

## SPICe Briefing

# Criminal Verdicts (Scotland) Bill

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Michael McMahon MSP introduced the Criminal Verdicts (Scotland) Bill in the Parliament on 27 November 2013. This member's bill seeks to:

- remove the 'not proven' verdict as an option in criminal trials, leaving two possible verdicts of 'guilty' and 'not guilty'
- change the rules relating to the number of jurors who must support a guilty verdict before the jury as a whole returns such a verdict, effectively requiring at least two-thirds in favour of a guilty verdict

This briefing considers the proposals in the bill along with work which the Scottish Government has carried out in this area.



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## EXECUTIVE SUMMARY

The Criminal Verdicts (Scotland) Bill seeks to:

- remove the 'not proven' verdict as an option in criminal trials, leaving two possible verdicts of 'guilty' and 'not guilty'
- change the rules relating to the number of jurors who must support a guilty verdict before the jury as a whole returns such a verdict, effectively requiring at least two-thirds in favour of a guilty verdict

The Criminal Justice (Scotland) Bill, introduced by the Scottish Government, includes provisions seeking to make the same change in relation to juror support required for a guilty verdict. There are, however, differences in the policy grounds underlying the proposals in the two bills. The Scottish Government has also indicated that it intends to ask the Scottish Law Commission to carry out a review of the not proven verdict.

In 2012-13, the percentage of people proceeded against who were acquitted on the basis of a not proven verdict was approximately 4% under solemn procedure and 0.5% under summary procedure. The picture for particular offences varied, with the not proven verdict representing a significantly higher proportion of outcomes in relation to some offences (eg rape).

Criticisms which have been levelled against the not proven verdict include:

- where the prosecution cannot prove its case beyond reasonable doubt, the presumption of innocence dictates that the accused should be found not guilty, without any scope for some sort of 'half-way house'
- the verdict is not always well understood and may cause confusion for jurors and the general public

The verdict has found support on various grounds, including that it may provide a safeguard against wrongful conviction. It has also been argued that any change in this area should be considered in the context of a wider review.

With regard to the level of juror support required for a guilty verdict, the current rules allow a jury to return a verdict of guilty based on a simple majority (ie eight out of fifteen jurors). This has been criticised as being inconsistent with the requirement on the prosecution to prove its case beyond reasonable doubt. On the other hand, it has been argued that any increased majority required for conviction should not be so high that it acts as a barrier to justice.

## INTRODUCTION

The [Criminal Verdicts \(Scotland\) Bill](#) was, together with [explanatory notes](#) (including financial memorandum) and a [policy memorandum](#), introduced in the Scottish Parliament in November 2013 by Michael McMahon MSP. It seeks to:

- remove the ‘not proven’ verdict as an option in criminal trials, leaving two possible verdicts of ‘guilty’ and ‘not guilty’
- change the rules relating to the number of jurors who must support a guilty verdict before the jury as a whole returns such a verdict, effectively requiring at least two-thirds in favour of a guilty verdict

In 2012, Michael McMahon [consulted](#) on his proposals for legislation in this area.<sup>1</sup> A [summary of consultation responses](#), produced by the Parliament’s Non-Government Bills Unit (NGBU), was published the following year.<sup>2</sup>

Also during 2012, the Scottish Government published a [consultation paper](#) seeking views on a number of legal reforms which might be considered desirable if, as the Government proposed, the general requirement for corroboration in criminal cases was abolished. The options in relation to which views were sought included removing the not proven verdict and changing the rules relating to the level of juror support required for a guilty verdict. Responses to this consultation are available [online](#) (Scottish Government 2013a).

The [Criminal Justice \(Scotland\) Bill](#) (as introduced by the Government in June 2013) includes provisions seeking to move to a system under which a guilty verdict requires the support of at least two-thirds of the jury. Further information on the Criminal Justice (Scotland) Bill is set out in an earlier [SPICe briefing](#) (McCallum 2013). Other reforms considered in the consultation paper, including removal of the not proven verdict, were not included. However, the Scottish Government has indicated that it intends to ask the Scottish Law Commission to carry out a review of the not proven verdict.

The Justice Committee has been designated as the lead committee for the purposes of scrutinising both the Criminal Verdicts (Scotland) Bill and the Criminal Justice (Scotland) Bill. Given the overlap between the two in relation to jury majorities, committee scrutiny of the former is currently timetabled for some time after the latter has completed its passage through the Parliament. Originally, it was expected that stages 2 and 3 of the Criminal Justice (Scotland) Bill would be completed before the end of June 2014. However, in April 2014 the Scottish Government accepted a proposal from opposition party business managers to suspend stage 2 until a review headed by Lord Bonomy (considering potential further reforms in light of the proposed abolition of the requirement for corroboration) has reported in spring 2015.

The rest of this briefing looks at the proposals set out in the Criminal Verdicts (Scotland) Bill in more detail. In doing so, it includes consideration of relevant views expressed in response to the Scottish Government’s proposals. It should, however, be borne in mind that there are differences in the policy grounds underlying the two sets of proposals:

- Michael McMahon’s proposals for removing the not proven verdict were put forward on the basis of arguments relating to the undesirability of having three possible verdicts, whilst his proposals on the level of juror support required for a guilty verdict were

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<sup>1</sup> Paper copies of the consultation responses are available for reference, by MSPs and their staff, in SPICe.

<sup>2</sup> The summary includes a commentary section produced by Michael McMahon.

advanced as a way of ensuring that abolition of the not proven verdict does not heighten the risk of wrongful convictions

- the Government's proposals in this area were raised in the context of seeking to ensure that criminal proceedings are still subject to an adequate system of checks and balances following its proposed abolition of the requirement for corroboration

## **ABOLITION OF THE THIRD VERDICT**

### **Proposed Reform**

As things stand, three verdicts are available to a judge or jury in a criminal trial – guilty, not guilty and not proven. In legal terms, the implications of a not proven verdict are the same as a not guilty verdict in that the accused is acquitted.

Section 1 of the Criminal Verdicts (Scotland) Bill seeks to establish a two verdict system, effectively removing the option of the not proven verdict. The summary of consultation responses (NGBU 2013) noted that a majority of those responding were in favour of having just two verdicts. Those expressing doubts included the Law Society of Scotland, which questioned whether there is any requirement to reform the three verdict system in the absence of more detailed research.

As noted above, in 2012 the Scottish Government consulted on the possibility of abolishing the not proven verdict. An analysis of responses to the Government's consultation reported that there "was broad support for the removal of the not proven verdict" (Why Research 2013, para 1.12). Despite this, the Criminal Justice (Scotland) Bill as introduced does not seek to change the current three verdict system. The policy memorandum published along with the Scottish Government's bill states that:

"a significant minority of respondents were concerned that time should be given to allow the impact of implementing Lord Carloway's recommendations to be assessed before making changes to the three verdict system. The Scottish Government has therefore determined that the 'not proven' verdict should be retained for the time being and further consideration given to whether it remains appropriate in light of the implementation of the other changes proposed following the Carloway review." (para 181)

As noted above, the Scottish Government has indicated that it intends to ask the Scottish Law Commission to carry out a review of the not proven verdict.

### **Debate**

The existence of the not proven verdict has been criticised over the years on various grounds, with potential negative consequences being identified in relation to:

- the presumption of innocence – if the prosecution cannot prove its case beyond reasonable doubt, the accused should be found not guilty without any scope for some sort of 'half-way house'
- fairness for the accused – concern that use of the not proven verdict can leave a stigma of guilt following an acquittal
- fairness for the victim – concern that use of the not proven verdict can leave a victim with a feeling that a case has not reached a definite conclusion

- clarity for jurors and the general public – concern that the verdict is not always well understood and can cause confusion

Responses highlighting the above issues included ones to Michael McMahon’s consultation; for example:

“We support a two verdict system. There is, quite simply, no merit in having two different verdicts of acquittal, when each verdict has exactly the same practical consequence and the distinction between them is not well understood. We can see no defensible case for the current system. In particular, we support the argument that it is wrong for a verdict of acquittal to carry any implication of stigma.” (Chalmers and Leverick, p 1)

“In our experience, for many victims and witnesses, a not proven verdict can be confusing and disappointing. Finality and certainty are crucial elements of an effective criminal justice system. This includes finality and certainty not just on the part of accused persons, but also for victims and victims’ families. A clear and transparent verdict of guilt or innocence from the justice system is often vital for providing victims with a sense of closure.” (Victim Support Scotland, p 1)

And also responses to the Scottish Government’s consultation; for example:

“There is absolutely no doubt that the existence of a third verdict causes confusion for juries and it is not merely anecdotal to say that the existence of that verdict presents for juries a real problem which regularly requires to be dealt with. Those of us who conduct jury trials on a regular basis are very familiar with the situation where the jury return to ask the question – ‘what is the difference between the not guilty and the not proven verdict?’ The answer that has to be given to them is exactly the same as was carefully given to them a few minutes earlier during the judge’s charge, namely that there is no difference, and the continuing confusion is evident on their faces.” (Sheriff Maciver, p 14)

A number of responses sought to rebut some of the above arguments. For instance, in relation to the issue of clarity for jurors, a response to Michael McMahon’s consultation stated that:

“Juries are told in plain terms that both ‘not proven’ and ‘not guilty’ are verdicts of acquittal. It is patronising to jurors to assume that they cannot or do not understand what this means.” (Faculty of Advocates, p 2)

In addition, in relation to impact on victims, a response to the Scottish Government’s consultation suggested that use of the not proven verdict in sexual offence cases “conveys a message to the complainer that notwithstanding the lack of conviction, she was not necessarily disbelieved” (Campbell and Kennedy, p 3).

It has also been argued that any move away from a three verdict system should be considered in the context of a wider review. For example, the response from the Faculty of Advocates, to Michael McMahon’s consultation, stated that:

“The Faculty recognises that there may be a case for moving from a three verdict to a two verdict system. There are, however, strongly held views on both sides of the question. The question of whether the case for reform is made out is one which should be considered in the context of a review of the criminal justice system as a whole having regard to the other proposals which are currently on the table for reform.” (p 2)

Positive reasons advanced for retaining the not proven verdict, as a third option, include the argument that it can act as a safeguard against wrongful conviction. A response from the Judges of the High Court of Justiciary to the Scottish Government’s consultation noted:

“We recognise that, looked at in isolation, there are arguments for and against the retention of the not proven verdict. Within the judiciary there are different views. Some of our number consider that the verdict should be abolished while others wish to see it retained. It is, on any view, a very well established verdict in Scottish criminal procedure. Some judges consider that it provides a safeguard in cases where the jury are not satisfied beyond reasonable doubt that the accused is guilty but are uncomfortable in returning a verdict of not guilty. It provides a jury with an opportunity to return a nuanced verdict. Others take the view that it is an unnecessary and illogical verdict. In their view, in a case in which the Crown have failed to discharge the onus of proving guilt, the appropriate and logical verdict of acquittal is not guilty.” (p 7)

It may also be noted that use of the not proven verdict is not restricted to juries (see statistics below). A response to the Scottish Government’s consultation from Sheriff McFadyen suggested that:

“While the not proven verdict is often criticised and is somewhat anachronistic, the fact that it is used, albeit sparingly, in summary trials perhaps indicates that it is not wholly pointless.” (p 3)

As well as seeking views on whether there should be a move to a choice between two verdicts only, Michael McMahon’s consultation sought views on what those verdicts might be (eg guilty/not guilty or proven/not proven). The Scottish Government’s consultation also sought views on this point. As noted above, the Criminal Verdicts (Scotland) Bill provides for two verdicts of guilty and not guilty. The accompanying policy memorandum states that:

“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”. (para 36)

Arguments advanced in favour of a choice between guilty and not guilty include:

- they have greater public familiarity, are more readily understood and are widely used in other jurisdictions
- use of not guilty, as opposed to not proven, better reflects the presumption of innocence

Arguments advanced in favour of a choice between proven and not proven include:

- they better reflect the role of the jury (or judge in a summary case) at the conclusion of a trial

## Statistics

Table 1 below provides figures, for 2012-13, on people proceeded against in the criminal courts broken down by outcome – including those acquitted on the basis of a not proven verdict.

**Table 1: People proceeded against in court by outcome, 2012-13**

| Outcome | PNGA* or deserted | Acquitted - not guilty | Acquitted - not proven | Charge proved | Total   |
|---------|-------------------|------------------------|------------------------|---------------|---------|
| Percent | 9%                | 4%                     | 1%                     | 87%           | 100%    |
| Number  | 9,979             | 4,710                  | 970                    | 100,964       | 116,623 |

Source: Scottish Government 2013b (tables 2a and 2b) \* Plea of not guilty accepted

The picture presented by the above table, in terms of use of the not proven verdict, is fairly typical of recent years. For example, 1% of all criminal court outcomes during each of the five years 2008-09 to 2012-13 involved the case against the accused being found not proven (see relevant Scottish Government statistical bulletins relating to [criminal proceedings](#)).

Of the 970 people acquitted on the basis of a not proven verdict in 2012-13:<sup>3</sup>

- 276 were prosecuted under solemn procedure (High Court and sheriff courts), and thus the not proven verdict was delivered by a jury
- 694 were prosecuted under summary procedure (sheriff and justice of the peace courts), and thus the not proven verdict was delivered by a sheriff, etc

Although there were more instances of the not proven verdict being used in the summary courts, this is a product of the large number of cases dealt with by those courts rather than the likelihood of the verdict being employed. For example, in 2012-13, the percentage of people proceeded against who were acquitted on the basis of a not proven verdict was approximately:

- 4% under solemn procedure
- 0.5% under summary procedure

The above proportions are similar to those for other recent years.

The picture for particular offences varies, with the not proven verdict representing a significantly higher proportion of outcomes in relation to some offences.<sup>4</sup> Table 2 sets out figures for the three offence categories with the highest proportions of not proven outcomes in 2012-13.

<sup>3</sup> Statistics provided by Scottish Government officials.

<sup>4</sup> Scottish Government statistical bulletins regularly group contraventions of the law into 'crimes' and 'offences' to provide some indication of the seriousness of the matter. The term 'offence' is used in this briefing to cover both.

**Table 2: People proceeded against in court by selected offence category and outcome, 2012-13**

| Outcome                 |     | PNGA* or deserted | Acquitted - not guilty | Acquitted - not proven | Charge proved | Total |
|-------------------------|-----|-------------------|------------------------|------------------------|---------------|-------|
| Rape and attempted rape | %   | 1%                | 28%                    | 15%                    | 56%           | 100%  |
|                         | No. | 2                 | 38                     | 21                     | 77            | 138   |
| Sexual assault          | %   | 6%                | 18%                    | 11%                    | 65%           | 100%  |
|                         | No. | 19                | 57                     | 34                     | 206           | 316   |
| Homicide                | %   | 4%                | 12%                    | 7%                     | 77%           | 100%  |
|                         | No. | 6                 | 17                     | 10                     | 113           | 146   |

Source: Scottish Government 2013b (tables 2a and 2b) \* Plea of not guilty accepted

Official figures for recent years have consistently disclosed relatively high use of not proven verdicts in relation to 'rape and attempted rape' (eg the highest proportion for any of the offence categories used in relevant Scottish Government statistical bulletins for each of the five years 2008-09 to 2012-13 – ranging between 14% and 21%).<sup>5</sup> However, it may be noted that the same figures also indicate relatively high proportions of such cases ending in not guilty acquittals (ranging between 21% and 38% during the same five years). Thus, the higher than average incidence of not proven verdicts may, at least to some extent, simply reflect the higher than average proportion of acquittals.

In terms of numbers, rather than proportions, various other offence categories (involving many more court cases) account for more not proven verdicts. Table 3 sets out figures for the three offence categories with the highest numbers of not proven outcomes in 2012-13.

**Table 3: People proceeded against in court by selected offence category and outcome, 2012-13**

| Outcome                              |     | PNGA* or deserted | Acquitted - not guilty | Acquitted - not proven | Charge proved | Total  |
|--------------------------------------|-----|-------------------|------------------------|------------------------|---------------|--------|
| Common assault                       | %   | 12%               | 9%                     | 2%                     | 78%           | 100%   |
|                                      | No. | 2,007             | 1,438                  | 254                    | 13,039        | 16,738 |
| Breach of the peace, etc             | %   | 9%                | 5%                     | 1%                     | 86%           | 100%   |
|                                      | No. | 1,298             | 678                    | 130                    | 12,935        | 15,041 |
| Serious assault and attempted murder | %   | 12%               | 18%                    | 6%                     | 63%           | 100%   |
|                                      | No. | 246               | 369                    | 124                    | 1,276         | 2,015  |

Source: Scottish Government 2013b (tables 2a and 2b) \* Plea of not guilty accepted

## JURY MAJORITY REQUIRED FOR A GUILTY VERDICT

### Proposed Reform

Under current rules, a jury returns a verdict of guilty where at least eight of its members support that verdict. This level of support is required whether the jury has a full complement of 15 jurors or is reduced in numbers (eg because one or more jurors have been excused).<sup>6</sup> Where a guilty verdict does not attract the support of at least eight jurors the accused is acquitted. Under these rules, a person may be convicted on the basis of a simple majority (ie eight out of 15) and there

<sup>5</sup> See Scottish Government statistical bulletins relating to criminal proceedings.

<sup>6</sup> A criminal jury must retain at least 12 jurors to be properly constituted.

is no potential for a hung jury (ie the only possible outcomes are a finding of guilt or an acquittal).

Section 2 of the Criminal Verdicts (Scotland) Bill seeks to introduce a system under which a guilty verdict requires the support of at least two-thirds of the jury (eg ten jurors where it has a full complement of 15 members).<sup>7</sup> Any other result would lead to an acquittal. Section 70 of the Criminal Justice (Scotland) Bill seeks to make the same change.

The policy memorandum published along with the Criminal Justice (Scotland) Bill notes that:

“Scotland is the only common law jurisdiction where an accused person can be convicted on a simple majority verdict. Other systems which are based on a simple majority verdict generally have additional protections. For example, Italy allows conviction on a simple majority, but the two judges sit alongside six lay jurors. In Belgium, jurors can convict on a simple majority but a unanimous panel of judges can overturn ‘erroneous’ verdicts.” (para 173)<sup>8</sup>

The reasons for the inclusion of this reform in the two bills differ. However, both bills are concerned with ensuring that some other reform (abolition of the not proven verdict or of the requirement for corroboration) does not lead to an increased risk of wrongful convictions. The policy memorandum published along with the Criminal Verdicts (Scotland) Bill states that:

“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.” (para 18)

Whilst the Scottish Government’s 2012 consultation noted that:

“the concern most often raised in connection with the removal of the requirement for corroboration is whether it would be safe to convict an accused person on the basis of a simple majority of the jury and on uncorroborated evidence”. (para 40)

Although the Justice Committee considered the Scottish Government’s proposal in this area during stage 1 scrutiny of the Criminal Justice (Scotland) Bill, its [stage 1 report](#) (2014) did not express a concluded view on its merits. Rather, it called for a wider review of additional reforms in light of the proposed abolition of the requirement for corroboration:

“The Committee is convinced that, if the general requirement for corroboration continues to be considered, this should only occur following an independent review of what other reforms may be needed to ensure that the criminal justice system as a whole contains appropriate checks and balances.” (para 414)

The terms of reference of the independent review, established by the Scottish Government to look at potential further reforms in light of the proposed abolition of the requirement for corroboration, include consideration of “jury majority and size” (Scottish Government 2014).

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<sup>7</sup> This may be described as a requirement for a ‘weighted’ or ‘qualified’ majority.

<sup>8</sup> Appendix B of the Scottish Government’s 2012 consultation provides further information on jury systems in a number of countries.

## Debate

Responses to the two consultations,<sup>9</sup> and evidence received by the Justice Committee during stage 1 scrutiny of the Criminal Justice (Scotland) Bill, included views on:

- whether reform is desirable in light of other proposed changes (abolition of the not proven verdict or of the requirement for corroboration) and/or in its own right
- the nature of any reform (eg the proportion of jurors needed for a guilty verdict)

This briefing does not deal with evidence which is linked specifically to the proposed abolition of the requirement for corroboration. Apart from this, the main issues raised are illustrated below.

The Justice Committee's stage 1 report (2014) on the Criminal Justice (Scotland) Bill noted that:

“there was a general view that changing the jury majority requirement in returning a guilty verdict was a positive step in improving confidence in the criminal justice system, even irrespective of the corroboration debate”. (para 371)

Similar expressions of opinion in response to Michael McMahon's consultation included:

“Even if we do not move to a two verdict system, the majority required for conviction ought in any event to be increased” (Ferguson, p 1)

Whilst the Faculty of Advocates stated that:

“There is a case for increasing the majority required for a conviction whether or not there is a move to a two verdict system. Although the Crown must prove the case beyond reasonable doubt, an accused may, under the present law, be convicted even though seven out of fifteen jurors are not convinced by the Crown case – indeed, even if seven out of fifteen jurors find the exculpatory evidence credible and reliable.” (p 3)

However, the response from Victim Support Scotland to Michael McMahon's consultation indicated that it was not convinced that the case for change had been made:

“We do not perceive that there is a rationale for changing the majority based on the number of verdicts available to the jury. Changing from the three verdict system to a two verdict system does not alter the fact that there are only two outcomes to a case; that is, a person is either convicted or acquitted.” (p 3)

In relation to the size of any increased majority required for a guilty verdict, the above response said that “we do not want to create a system whereby the number of votes required to convict is so high that it acts as an impediment to justice” (p 3). The analysis of responses to the Scottish Government's consultation noted that:

“Opinions differed over the size of a majority; most of those who specified favoured a majority of 10 or more out of 15 jurors. The main themes to emerge on this issue were: the need to ensure that there is justification for the number that is chosen; and that the majority should be in line with other countries.” (Why Research 2013, paras 1.8)

It may be noted that the Scottish Government's 2012 consultation had proposed that both convictions and acquittals should require the support of a majority of jurors, with a minimum of

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<sup>9</sup> Michael McMahon's 2012 consultation on his proposals for legislation and the 2012 Scottish Government consultation on possible additional safeguards (in light of the proposed abolition of the general requirement for corroboration).

nine or ten jurors being suggested. This would have introduced the possibility of hung juries (eg where eight support acquittal and seven support conviction, or vice versa). This approach is not adopted in either the Criminal Verdicts (Scotland) Bill or the Criminal Justice (Scotland) Bill. The analysis of responses to the Scottish Government's consultation reported that:

“In relation to the need for a majority for acquittal, many respondents felt that failure to convict should automatically result in acquittal.” (Why Research 2013, para 1.9)

Submissions arguing against the possibility of having hung juries included one from the Judges of the High Court of Justiciary:

“We find it difficult to identify any justification for it. We consider this proposal to be illogical and contrary to the presumption of innocence. An accused person is presumed to be innocent and remains innocent unless and until the jury are satisfied beyond reasonable doubt of his guilt. In our view, once an appropriate qualified majority is identified, failure to reach that majority should result in acquittal. The Crown would have failed to displace the presumption of innocence by satisfying the jury beyond reasonable doubt of the guilt of the accused. In these circumstances we consider that an acquittal should follow.” (p 4-5)

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