

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

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