

CRIMINAL VERDICTS (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

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

POLICY OBJECTIVES OF THE BILL

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

DETAIL OF THE BILL

Number of verdicts

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

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

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

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

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

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

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

Which verdicts?

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

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

Former acquittals

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

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

Majority required for conviction

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

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

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

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

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

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

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

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

Legislative context

Criminal Procedure (Scotland) Act 1995

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

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

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

Scottish Government's position

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

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

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

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

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

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

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

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

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

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

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

CONSULTATION

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

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

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

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

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

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

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

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

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

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

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

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

ALTERNATIVE APPROACHES

Removal of third verdict

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

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

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

Majority required for conviction

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

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

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

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

Is legislation necessary?

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

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

Equal opportunities

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

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

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

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

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

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

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

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

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

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

Human rights

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

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

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

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

Island communities

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

Local government

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

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

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

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

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

Sustainable development

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

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

CRIMINAL VERDICTS (SCOTLAND) BILL

POLICY MEMORANDUM

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website -
www.scottish.parliament.uk

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by APS
Group Scotland.

ISBN 978-1-78392-244-4