



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

3rd Meeting, 2016 (Session 4)

Tuesday 19 January 2016

The Committee will meet at 9.45 am in the David Livingstone Room (CR6).

1. **Decisions on taking business in private:** The Committee will decide whether to take items 4 and 5 in private.
2. **Criminal Verdicts (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Michael Matheson, Cabinet Secretary for Justice, Orla Davey, Criminal Justice Division, and Kevin Gibson, Directorate for Legal Services, Scottish Government;

and then from—

Michael McMahon, Member in Charge of the Bill, Clare O'Neill, Senior Assistant Clerk, Non-Government Bills Unit, and Neil Ross, Solicitor, Committee and Chamber Team, Scottish Parliament.

3. **Community Justice (Scotland) Bill:** The Committee will consider the Bill at Stage 2 (Day 1).
4. **Abusive Behaviour and Sexual Harm (Scotland) Bill:** The Committee will consider a draft Stage 1 report.
5. **Work programme:** The Committee will consider its work programme.

Peter McGrath
Clerk to the Justice Committee
Room T2.60
The Scottish Parliament
Edinburgh
Tel: 0131 348 5195
Email: peter.mcgrath@scottish.parliament.uk

The papers for this meeting are as follows—

Agenda item 2

Paper by clerk

J/S4/16/3/1

Private paper

J/S4/16/3/2 (P)

[Criminal Verdicts \(Scotland\) Bill and accompanying documents](#)

[Written submissions received on the Bill](#)

Agenda item 3

[Community Justice \(Scotland\) Bill and all associated documents](#)

Agenda item 4

Private paper

J/S4/16/3/3 (P)

[Abusive Behaviour and Sexual Harm \(Scotland\) Bill, accompanying documents and SPICe briefing](#)

[Written submissions received on the Bill](#)

Letter from the Cabinet Secretary for Justice to the Convener

J/S4/16/3/4

Agenda item 5

Private paper

J/S4/16/3/5 (P)

Private paper

J/S4/16/3/6 (P)

Private paper

J/S4/16/3/7 (P)

Justice Committee

3rd Meeting, 2016 (Session 4), Tuesday 19 January 2016

Criminal Verdicts (Scotland) Bill

Note by the Clerk

Purpose

1. This paper provides background information in advance of the Committee's evidence session on the Criminal Verdicts (Scotland) Bill.

Background

2. 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", and
 - 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 Not Proven Verdict

3. At present, 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. The policy memorandum accompanying the Bill provides the following justification for the removal of the not proven verdict: "it is a widely held view 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

4. Michael McMahon's consultation sought views on the verdicts to be used following the proposed abolition of the three verdict system. The Bill opts to retain the guilty and not guilty verdicts rather than proposing an alternative form of wording (proven, not proven). The accompanying policy memorandum states that: "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."²

Jury Majority Required For a Guilty Verdict

5. Under current rules, a jury returns a verdict of guilty where at least eight of its members support the verdict. Where a guilty verdict does not attract the support of at least eight jurors the accused is acquitted. Section 2 of the Criminal Verdicts Bill seeks to introduce a system under which a guilty verdict requires support of at least two-thirds of the jury. Any other result would lead to an acquittal.

The Criminal Justice (Scotland) Bill

6. The Justice Committee's stage 1 scrutiny of the Criminal Verdicts (Scotland) Bill was postponed whilst the Criminal Justice (Scotland) Bill completed its passage through the Parliament, due to overlap between the two bills (as introduced) in

¹ http://www.scottish.parliament.uk/S4_Bills/Criminal%20Verdicts%20Bill/b42s4-introd-pm.pdf

² http://www.scottish.parliament.uk/S4_Bills/Criminal%20Verdicts%20Bill/b42s4-introd-pm.pdf

relation to reform of jury majorities. The Criminal Justice (Scotland) Bill, as introduced by the Scottish Government in June 2013, also included provisions seeking to move to a system under which a guilty verdict would require the support of at least two-thirds of jurors. There were, however, 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. His proposals on the level of juror support required for a guilty verdict were advanced as a way of ensuring that abolition of the not proven verdict does not heighten the risk of wrongful convictions
- the Scottish Government's proposals on jury majorities were included 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 general requirement for corroboration in criminal cases

7. The Justice Committee took evidence from Michael McMahon during stage 1 scrutiny of the Criminal Justice (Scotland) Bill. In addition, Michael McMahon lodged a number of stage 2 amendments which, if agreed, would have incorporated into the Criminal Justice (Scotland) Bill the reforms provided for in his own bill. During consideration of those amendments, the Cabinet Secretary indicated that he was "not unsympathetic to Mr McMahon's position" on the need to reform the three verdict system.³ However, he went on to state that his preference was to leave current arrangements in place until jury research in relation to corroboration and related reforms has been completed. In response, Michael McMahon warned against postponing reforms, but was persuaded to withdraw his amendments to allow the matter to be examined further.

8. Provisions abolishing the current general requirement for corroboration in criminal cases were removed, by way of amendment, from the Criminal Justice (Scotland) Bill, which the Scottish Parliament passed in December 2015. Provisions to change the rules on jury majorities, which (for reasons set out above) were seen as consequential on the abolition of corroboration, were also removed, pending the completion of jury research.

Stage 1 Scrutiny

9. The Justice Committee issued a call for written evidence on 24 November 2015. Submissions received are available online: <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/95168.aspx>

10. The Committee will take evidence from both the Scottish Government and Michael McMahon on 19 January 2016. Following consideration of oral and written evidence the Committee will publish its Stage 1 report in February.

³ Scottish Parliament Justice Committee, 8 September 2015 (col 30).

Justice Committee

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Abusive Behaviour and Sexual Harm (Scotland) Bill

Letter from the Scottish Government to the Convener

During evidence to the Justice Committee on the Abusive Behaviour and Sexual Harm (Scotland) Bill (“the Bill”) on Tuesday 5 January 2016, Christian Allard MSP asked if the Scottish Government was aware of any jurisdiction which has introduced jury directions in sexual offence cases and then gone on to introduce other types of jury directions more generally. We agreed to reply in writing.

Three examples of statutory jury directions cited in the policy memorandum for the Bill concerning how juries should consider the question of delay in reporting a sexual offence are those in place in the Australian States of New South Wales and the Northern Territory, and New Zealand.

New South Wales/Northern Territory

In respect of non-sexual offence trials, we are aware that section 116 of the Evidence Act 1995 (New South Wales) provides that where identification evidence has been admitted, the judge is to inform the jury that there is a special need for caution before accepting identification evidence, and of the reasons for that need for caution, both generally and in the circumstances of the case. This jury direction applies to offences generally and is not restricted to sexual offence cases.

While we are not aware of other legislation which makes provision for jury directions in New South Wales (or indeed any other statutory directions at all in the Northern Territory other than those relating specifically to sexual offence trials), we would caution that given the complexities of researching criminal laws in different jurisdictions, there may be other statutory jury directions in New South Wales and the Northern Territory that we have not identified.

The Committee may wish to note that in 2012, the New South Wales Law Reform Commission published a report on “Jury Directions in Criminal Trials” (see www.lawreform.justice.nsw.gov.au/Documents/r136.pdf) which considered, amongst other things, whether the content of jury directions should be codified. It concluded that “*the best course is to retain the existing approach that encourages the use of suggested directions contained in the Bench Book, as developed by the Bench Book Committee. This approach will preserve for judges the discretion to tailor their directions to the real issues in the individual case without the shackles of a codified or mandatory set of statutory directions.*” (see paragraph 2.39).

New Zealand

We note that statutory jury directions concerning “delayed complaint or failure to complain in sexual cases” in New Zealand law are contained at section 127 of the Evidence Act 2006 (see

<http://www.legislation.govt.nz/act/public/2006/0069/latest/whole.html#DLM393959>).

Sub-part 6 of that Act makes provision for statutory jury directions on a number of matters, including evidence which may be unreliable, certain ways of offering evidence, children's evidence and identification evidence. These statutory jury directions cover both sexual offences and non-sexual offences.

Victoria

Although not cited in the policy memorandum, we note that the Australian state of Victoria legislated in 2015 to introduce a range of statutory jury directions covering both sexual offence cases and non-sexual offence cases. We understand they are intended to enable judges to provide clearer and simpler directions to juries and reduce the possibility of judicial errors.

These directions are contained in the Judicial Directions Act 2015 (see http://www5.austlii.edu.au/au/legis/vic/num_act/jda201514o2015243/).

I hope this information is helpful to the Committee in its consideration of the Bill.

Michael Matheson
Cabinet Secretary for Justice
12 January 2016