

SPICe Briefing

The Scottish Criminal Justice System: The Criminal Courts

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This briefing is one of six covering various aspects of the Scottish criminal justice system. It provides a brief description of the operation of the criminal courts in Scotland.

The other five briefings in this series are:

- The Scottish Criminal Justice System: Legal and Administrative Arrangements
- The Scottish Criminal Justice System: The Police
- The Scottish Criminal Justice System: The Public Prosecution System
- The Scottish Criminal Justice System: The Prison Service
- Children and the Scottish Criminal Justice System



INTRODUCTION

Trial and Appeal Courts

Criminal prosecutions take place in the following trial courts:

- the High Court of Justiciary (the High Court)
- sheriff courts
- justice of the peace courts

The most serious cases are prosecuted in the High Court and the least serious in justice of the peace courts.

Appeals are heard in:

- the High Court (sitting as an appeal court)
- the Sheriff Appeal Court

In addition, the UK's Supreme Court (located in London) may become involved in criminal cases as a result of its role as a court of appeal in relation to both compatibility and devolution issues.¹

More information on the courts is set out later in this briefing. In addition, the [Scottish Courts and Tribunals](#) website provides a wide range of information on the courts in Scotland.

Prosecution of Offences

Criminal procedure (ie the procedure for the investigation and prosecution of crime) is mainly regulated by the Criminal Procedure (Scotland) Act 1995 and is divided into solemn and summary procedures.

Solemn procedure involves the most serious of criminal cases and may ultimately lead to a trial on indictment, either before a judge in the High Court or before a sheriff in one of the sheriff courts. Trials under solemn procedure are conducted with a jury.

Summary procedure is used for less serious offences (with the charges set out in a complaint) and may ultimately lead to a trial before a sheriff or, in justice of the peace courts, before a bench of one or more lay justices. Trials under summary procedure are conducted without a jury.

Provisions in the Courts Reform (Scotland) Act 2014 created the judicial office of summary sheriff, with some of the powers of a sheriff.² In relation to criminal matters, summary sheriffs are able to deal with summary cases and certain procedural aspects of solemn cases. The policy intention behind the creation of summary sheriffs is that, as more are appointed over time, they will allow sheriffs to focus on more serious and/or complex matters.

Until recently, cases in Glasgow's justice of the peace court were also heard by a small number of legally qualified stipendiary magistrates, with the same sentencing powers as a sheriff dealing

¹ Discussed below under the heading of UK Supreme Court.

² Information on the first appointments to the office of summary sheriff is set out in the news release [Appointment of First Summary Sheriffs](#) (Scottish Government 2016a).

with a summary sheriff court case. The Courts Reform (Scotland) Act 2014 abolished the office of stipendiary magistrate, with existing stipendiary magistrates becoming summary sheriffs (from April 2016). Following the reforms made by the 2014 Act, summary sheriffs are also able to sit in justice of the peace courts, but only with the normal sentencing powers of a justice of the peace when doing so.

The choice of whether to prosecute a case under solemn or summary procedure is generally made by the prosecution service, known as the [Crown Office and Procurator Fiscal Service](#) (COPFS), and affects the sentences available to the court on conviction.³ The vast majority of criminal court cases are in practice dealt with under summary procedure – 94% of criminal court disposals during 2014-15 were in the summary courts (COPFS [Statistics on Case Processing Last 5 Years](#)).

It may also be noted that most court cases are concluded without evidence being led at a trial. For example, in 2014-15 only 10% of court cases were disposed of by a trial (where at least some evidence was led). There are, however, marked differences between the different levels of court. Thus, in 2014-15, the percentages of court cases disposed of by a trial were: 61% of High Court cases; 24% of sheriff court cases under solemn procedure; 11% of sheriff court cases under summary procedure; and 6% of justice of the peace court cases.⁴

Verdicts

Three verdicts are available to a judge or jury: 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.

In 2013, Michael McMahon MSP introduced the [Criminal Verdicts \(Scotland\) Bill](#) in the Scottish Parliament, including provisions seeking to remove the not proven verdict as an option in criminal trials (leaving two possible verdicts of guilty and not guilty). Although the bill was not passed, it seems likely that the Parliament will return to the issue in the future.

Juries

As noted above, juries are only used in the Scottish criminal justice system where a case is tried under solemn procedure. In such cases, the judge or sheriff decides questions of law, with the jury deciding questions of fact. In summary cases, both of these functions are performed by the sheriff, summary sheriff or lay justice(s).

A jury in a Scottish criminal case is made up of 15 people and 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 or is reduced in numbers (eg because one or more jurors have been excused). Where a guilty verdict does not attract the support of at least eight jurors the accused is acquitted. Under these rules, a person can be convicted on the basis of a simple majority (ie eight out of 15 jurors) and there is no potential for a hung jury (ie the only possible outcomes are a finding of guilt or an acquittal).

The above mentioned Criminal Verdicts (Scotland) Bill also sought to change the rules relating to the number of jurors who must support a guilty verdict before the jury as a whole returns such

³ Some offences may be prosecuted under only one of the procedures (either summary or solemn).

⁴ See COPFS Statistics on Case Processing Last 5 Years. Cases dealt with by stipendiary magistrates are included in the summary sheriff court rather than justice of the peace court figures.

a verdict, effectively requiring at least two-thirds in favour of a guilty verdict.⁵ The Scottish Government's [Criminal Justice \(Scotland\) Bill](#) (as introduced in 2013) also included provisions, although for different reasons, seeking to move to a system under which a guilty verdict would require the support of at least two-thirds of jurors.⁶ However, relevant provisions of the Government bill were removed prior to it being passed and, as noted above, the Criminal Verdicts (Scotland) Bill was not passed. Again, it is likely that the Parliament will return to these issues in the future.

Sentences Imposed

The most common sentences imposed by Scottish courts are fines. In 2014-15, for example, a fine was the main penalty imposed in relation to 53% of convictions. The other main sentences imposed were, in order of frequency, community sentence (17%), admonition (15%) and custodial sentence (13%) (Scottish Government 2016b, table 7). Of those given custodial sentences in 2014-15 (table 10(a)):

- 29% were of three months or less⁷
- 37% were over three months to six months
- 26% were over six months to two years
- 4% were over two years but less than four years
- 3% were of four years or more

Administration

In relation to the courts, the [Scottish Courts and Tribunals Service](#) (SCTS) is responsible for providing the staff, buildings and technology to support Scotland's courts – including the High Court, Sheriff Appeal Court, sheriff courts and justice of the peace courts (but not the UK's Supreme Court). It is governed by a corporate board chaired by the Lord President (the most senior judge in Scotland).⁸

The Scottish Court Service (SCS) was established as an independent body by the Judiciary and Courts (Scotland) Act 2008 (prior to which it was an executive agency of the Scottish Government). Reforms made by the Courts Reform (Scotland) Act 2014 included the renaming of the SCS as the SCTS, with its administrative functions extended to both courts and devolved tribunals.

⁵ The proposals in the Criminal Verdicts (Scotland) Bill, for changing the level of juror support required for a guilty verdict, were advanced as a way of ensuring that abolition of the not proven verdict did not heighten the risk of wrongful convictions.

⁶ The proposals in the Criminal Justice (Scotland) Bill (as introduced), for changing the level of juror support required for a guilty verdict, were included in the context of the proposed abolition of the general requirement for corroboration in criminal cases.

⁷ Section 17 of the Criminal Justice and Licensing (Scotland) Act 2010 (in force since February 2011) sets out a presumption against imposing custodial sentences of three months or less.

⁸ The Lord President is referred to as the Lord Justice General within a criminal court context (ie in relation to his role in the High Court).

The Scottish Criminal Cases Review Commission

The [Scottish Criminal Cases Review Commission](#) was set up in April 1999 to consider alleged miscarriages of justice and to refer appropriate cases to the High Court for review. Where a convicted person has already appealed against conviction and/or sentence, the Commission is able to look into the matter again. Normally, it will only look into a case after an appeal has already been heard by the High Court or Sheriff Appeal Court. Where the Commission does refer a case for review, it is up to the High Court to decide whether or not to overturn a conviction, change a sentence or give authority for a new prosecution.

Prior to its establishment, the power to refer cases back to the High Court for review was exercised by the Secretary of State for Scotland.

COURTS

High Court of Justiciary

The High Court is Scotland's highest criminal court (subject to the role of the UK's Supreme Court in relation to both compatibility and devolution issues).⁹ It sits as a trial court (ie a court of first instance dealing with the original case against an accused) and as a court of criminal appeal.

The two senior judges in the High Court are known as the Lord Justice General and the Lord Justice Clerk. More information on High Court judges is provided on the Judiciary of Scotland website under the heading of [Senators of the College of Justice](#).¹⁰

As a trial court, its jurisdiction extends over the whole of Scotland (and sometimes beyond) in respect of all crimes unless excluded by statute. It has exclusive jurisdiction to try the most serious crimes such as treason, murder and rape and, in practice, deals with other serious crimes such as armed robbery, drug trafficking and sexual offences involving children (even where it is competent for these to be tried by a sheriff sitting with a jury). It sits regularly, in its role as a trial court, at various locations throughout Scotland and can impose sentences of up to life imprisonment. Cases are tried by a judge and jury under solemn procedure.

Prosecutions in the High Court are brought in the public interest in the name of the Lord Advocate (head of the COPFS) and are generally prosecuted by advocate deputes. Information on prosecutors is set out on the COPFS website ([Who We Are](#)). Private prosecutions are possible in Scotland but are extremely rare. An advocate or solicitor advocate will usually conduct the defence, although accused persons are normally also permitted to conduct their own defence in person.¹¹

In its role as a court of appeal, it sits only in Edinburgh and deals with appeals from the High Court (acting as a trial court) and in relation to sheriff court cases prosecuted under solemn procedure. It may also hear appeals, on points of law only, from the Sheriff Appeal Court (discussed below).

⁹ This role is discussed below under the heading of UK Supreme Court.

¹⁰ The same judges sit in both the High Court and the Court of Session (the highest civil court within Scotland). The two courts are sometimes referred to as the Supreme Courts – not to be confused with the UK's Supreme Court.

¹¹ Solicitors, as well as advocates and solicitor advocates, can represent accused persons in the other criminal courts (sheriff and justice of the peace courts).

At least three judges will hear the case where there is an appeal against conviction, and at least two where the appeal is against sentence alone.

Sheriff Courts and the Sheriff Appeal Court

There are currently 39 sheriff courts spread across the country together with the Sheriff Appeal Court located in Edinburgh. The Scottish Courts and Tribunals website provides a [map](#) showing the locations of all sheriff and justice of the peace courts.

The country is split into six sheriffdoms:

- Glasgow and Strathkelvin
- Grampian, Highland and Islands
- Lothian and Borders
- North Strathclyde
- South Strathclyde, Dumfries and Galloway
- Tayside, Central and Fife

Each sheriffdom has a sheriff principal, whose duties include securing the efficient disposal of court business in the sheriffdom.

The sheriff courts deal with criminal and civil business. In relation to criminal cases, they are trial courts dealing with both:

- solemn cases – presided over by sheriffs (including sheriffs principal)¹²
- summary cases – presided over by sheriffs and summary sheriffs

Prosecutions in sheriff courts are conducted by the local procurator fiscal or one of the procurator fiscal deputies.¹³

The sheriff courts can try any crime not reserved to the High Court, including those which can be tried in justice of the peace courts.¹⁴ The sheriff courts deal with more prosecutions than any of the other courts. Of approximately 99,000 criminal court disposals in 2014-15:¹⁵

- 37% were in justice of the peace courts presided over by lay justices
- 56% were in summary sheriff courts (or dealt with by stipendiary magistrates)
- 6% were in solemn sheriff courts
- 1% were in the High Court

In relation to sentencing, a sheriff court sitting as a court of summary jurisdiction is generally limited by the following maximum sentences: (a) a custodial sentence of 12 months; and (b) a

¹² Summary sheriffs can deal with certain procedural aspects of solemn cases.

¹³ In particularly difficult cases an advocate depute may appear for the prosecution.

¹⁴ Section 3(6) of the Criminal Procedure (Scotland) Act 1995 provides that, subject to any express statutory exclusion, "it shall be lawful to indict in the sheriff court all crimes except murder, treason, rape (...), rape of a young child (...) and breach of duty by magistrates". The territorial jurisdiction of the court is regulated by section 4 of the 1995 Act.

¹⁵ See COPFS Statistics on Case Processing Last 5 Years.

fine of £10,000.¹⁶ The general limits may, where a statute has been contravened, be subject to a higher or lower maximum provided for in the statute.

When sitting as a court of solemn jurisdiction, a sheriff court may impose a maximum custodial sentence of five years and can impose an unlimited fine.¹⁷ Where the sheriff considers that these sentencing powers are insufficient, the case can be remitted to the High Court for sentencing.¹⁸

The creation of the Sheriff Appeal Court was another reform made by the Courts Reform (Scotland) Act 2014. It deals with both criminal appeals (since September 2015) and civil appeals (since January 2016). In its role as a court of criminal appeal, it hears appeals in summary cases from both sheriff and justice of the peace courts. In relation to bail appeals only, its jurisdiction extends to decisions of sheriffs under solemn procedure.¹⁹

A decision of the Sheriff Appeal Court may be appealed to the High Court, with the permission of the High Court, on a point of law only.²⁰

The Sheriff Appeal Court is presided over by appeal sheriffs – generally two or three in criminal cases depending on the type of appeal. Bail appeals involve a single appeal sheriff. All sheriffs principal are also appeal sheriffs. In addition, sheriffs of at least five years may be appointed as appeal sheriffs. Appeal sheriffs retain their role as sheriffs.

The decisions of the Sheriff Appeal Court on the interpretation of the law are not binding on the High Court

Justice of the Peace Courts

Justice of the peace courts were created by the Criminal Proceedings etc (Reform) (Scotland) Act 2007, replacing the former district courts (administered by local authorities) on a sheriffdom by sheriffdom basis between 2008 and 2010.

They are courts of summary criminal jurisdiction only, with cases being dealt with by a bench of one or more lay justices. Summary sheriffs may also sit in justice of the peace courts (with the same sentencing powers as a lay justice). The prosecution is conducted by the local procurator fiscal or one of the procurator fiscal deputies.

Justice of the peace courts generally deal with less serious cases, with jurisdiction over many cases dealt with by sheriff courts being excluded (eg robbery or theft by housebreaking). As the lowest level of criminal court, justice of the peace courts have the most limited sentencing powers. They can impose custodial sentences of up to 60 days and can impose fines of up to £2,500 (unless a lower or higher statutory maximum is specified for a particular offence).²¹

¹⁶ Sections 5 and 225(8) of the Criminal Procedure (Scotland) Act 1995.

¹⁷ Section 3(3) of the Criminal Procedure (Scotland) Act 1995.

¹⁸ Section 195 of the Criminal Procedure (Scotland) Act 1995.

¹⁹ Section 32(11) of the Criminal Procedure (Scotland) Act 1995.

²⁰ Section 194ZB(1) of the Criminal Procedure (Scotland) Act 1995.

²¹ Section 7 of the Criminal Procedure (Scotland) Act 1995. Section 46 of the Criminal Proceedings etc (Reform) (Scotland) Act 2007 (not yet in force) sets out powers allowing the Scottish Ministers to amend, by statutory instrument, the maximum sentencing powers of justice of the peace courts (up to a maximum custodial sentence of six months and a fine of £5,000).

UK Supreme Court

The UK's [Supreme Court](#) (established by the Constitutional Reform Act 2005) is the highest court in the UK. It took over the functions of the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council in October 2009. Whilst it is the final court of appeal for Scottish civil cases, the High Court (in Edinburgh) is generally the final court of appeal for Scottish criminal cases. However, the Supreme Court can become involved in Scottish criminal cases. This possibility arises from its role as a court of appeal in relation to both compatibility and devolution issues.

In relation to Scottish criminal cases, reforms made by the Scotland Act 2012 created a specific right of appeal to the UK's Supreme Court where there are compatibility issues. This happens where a question arises in relation to either of the following:²²

- whether a public authority has acted (or proposes to act) in a way that is incompatible with any Convention right or EU law
- whether an Act of the Scottish Parliament (or a provision of such an Act) is incompatible with any of the Convention rights or EU law

Convention rights are those rights and freedoms, derived from the European Convention on Human Rights (ECHR), listed in section 1 of the Human Rights Act 1998.

Of particular practical importance in considering the above is the fact that the Lord Advocate (head of the COPFS) is treated as a public authority. Thus, a question of whether a criminal prosecution has been conducted in a way which is compatible with Convention rights, including the right to a fair trial under Article 6(1) of the ECHR, may give rise to an appeal to the UK's Supreme Court.

The reforms relating to compatibility issues have been in force since April 2013. Prior to this, such matters were dealt with as devolution issues under the provisions of the Scotland Act 1998. The approach to dealing with devolution issues, particularly in relation to the role of the UK's Supreme Court in determining the legality of criminal prosecutions, led to calls for reform on the basis that the proper role of the High Court was being usurped:

“Prior to its being amended by the 2012 Act, the 1998 Act provided that the Lord Advocate had no power to do any act that was incompatible with Convention rights, including in the course of a criminal prosecution. An act of the Lord Advocate in breach of a Convention right, including Article 6(1), was a nullity and a court had no discretion as to the appropriate judicial remedy. It is this aspect of the system provided for by the 1998 Act that had given rise to difficulty. The 2012 Act altered this position, effective from 22 April 2013.” (Supreme Court 2013, p 3-4)

Following the reforms made by the 2012 Act, an act of the Lord Advocate which breaches Convention rights of EU law is no longer a nullity. In addition, under the provisions relating to compatibility issues, the roles of the High Court and UK's Supreme Court are altered with the aim of ensuring that the High Court retains the ultimate power to resolve cases once the Supreme Court has ruled on a compatibility issue.

Although the reforms relating to compatibility issues have narrowed the scope for devolution issues in criminal cases, devolution issues under the Scotland Act 1998 can still arise where the question relates to whether a provision of an Act of the Scottish Parliament, or an act of the Scottish Government, relates to a reserved matter.

²² Section 288ZA of the Criminal Procedure (Scotland) Act 1995.

More information in the above areas is set out in a [briefing](#) produced by the UK's Supreme Court (2013).

SOURCES

Criminal Justice (Scotland) Bill [as introduced] Session 4 (2013). SP Bill 35. Edinburgh: Scottish Parliament. Available at:

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

Criminal Verdicts (Scotland) Bill [as introduced] Session 4 (2013). SP Bill 42. Edinburgh: Scottish Parliament. Available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/70453.aspx>

Crown Office and Procurator Fiscal Service. Available at: <http://www.crownoffice.gov.uk> [Accessed 1 May 2016]

Crown Office and Procurator Fiscal Service. *Statistics on Case Processing Last 5 Years*. Available at:

<http://www.crownoffice.gov.uk/images/Documents/Statistics/Statistics%20on%20Case%20Processing%20Last%205%20Years%202010-15.pdf> [Accessed 1 May 2016]

Crown Office and Procurator Fiscal Service. *Who We Are*. Available at:

<http://www.crownoffice.gov.uk/about-us/who-we-are> [Accessed 1 May 2016]

Judiciary of Scotland. *Senators of the College of Justice*. Available at: <http://www.scotland-judiciary.org.uk/34/0/Senators-of-the-College-of-Justice> [Accessed 1 May 2016]

Scottish Courts and Tribunals Service. *About the Scottish Courts and Tribunals Service*.

Available at: <http://www.scotcourts.gov.uk/about-the-scottish-court-service> [Accessed 1 May 2016]

Scottish Courts and Tribunals Service. *Scottish Courts and Tribunals*. Available at:

<http://www.scotcourts.gov.uk/> [Accessed 1 May 2016]

Scottish Courts and Tribunals Service. *Scottish Courts and Tribunals Service Locations*.

Available at: <http://www.scotcourts.gov.uk/docs/default-source/default-document-library/locations-map.pdf?sfvrsn=0> [Accessed 1 May 2016]

Scottish Criminal Cases Review Commission. Available at: <http://www.sccrc.org.uk/> [Accessed 1 May 2016]

Scottish Government. (2016a) *Appointment of First Summary Sheriffs*. News release 5

February 2016. Available at: <http://news.scotland.gov.uk/News/Appointment-of-first-summary-sheriffs-2247.aspx> [Accessed 1 May 2016]

Scottish Government. (2016b) *Criminal Proceedings in Scotland 2014-15*. Statistical Bulletin:

Crime and Justice Series. Edinburgh: Scottish Government. Available at:

<http://www.gov.scot/Publications/2016/02/6001> [Accessed 1 May 2016]

Supreme Court. Available at: <https://www.supremecourt.uk/> [Accessed 1 May 2016]

Supreme Court. (2013) *The Jurisdiction of the Supreme Court of the United Kingdom in*

Scottish Appeals: Human Rights, the Scotland Act 2012 and the Courts Reform (Scotland) Act

2014. Available at: <https://www.supremecourt.uk/docs/jurisdiction-of-the-supreme-court-in-scottish-appeals-human-rights-the-scotland-act-2012-and-the-courts-reform-scotland-act-2014.pdf> [Accessed 1 May 2016]

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