Justice Committee

Criminal Verdicts (Scotland) Bill

Written submission from the Law Society of Scotland

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

The Law Society of Scotland’s Criminal Law Committee (“the Committee”) has considered the Scottish Parliament’s Justice Committee’s call for written evidence upon the general principles of the Criminal Verdicts (Scotland) Bill which was introduced into the Scottish Parliament by the Michael McMahon MSP on 27 November 2013 and has the following comments to make.

General Comments

In October 2012, we responded to Michael McMahon MSP’s public consultation on a proposal for a bill to replace the current system of three verdicts in criminal trials with two, and to increase the majority required for conviction.


In this response, we stated that issues around weighted majority verdicts, unanimous verdicts and the current three verdict system should be taken into account in terms of a full scale review of Scottish criminal procedure.

We made further reference in that response to Michael McMahon MSP’s previous consultation issued in 2007 where we stated that, on the basis that the purpose of criminal trial is to establish whether the Crown has proved its case beyond reasonable doubt, then the most logical verdicts in a two verdict system would be “proven” and “not proven”.

We recognised at that time, however, that the verdicts of “guilty” and “not guilty” are well established and widely accepted in other jurisdictions.

This is what is proposed at Section 1 of the bill which inserts Section 292A into the Criminal Procedure (Scotland) Act 1995 whereby there will be only two verdicts available in criminal proceedings, guilty and not guilty.


We refer in particular to Chapter 10 of the report of the Academic Expert Group, which contains a discussion at pages 157-160 on the not proven verdict.

This part of the Report refers to a research paper by Lorraine Hope and others entitled “A third verdict option: exploring the impact of the not proven verdict on mock juror decision making” (2008) 32 Law and Human Behaviour 241-252.

The Academic Expert Group drew a number of tentative conclusions from this Report which are as follows:-

- Jurors do not use “not proven verdict in the manner which the structure of the three verdicts available to Scottish jurors suggest that they, in theory, should.
- The not proven verdict may help to prevent wrongful convictions, because it was in the case of “moderately strong” evidence – those where most caution would seem to be required - that it appeared to be particularly attractive to jurors.
- The extent to which jurors wrongly believe that a not proven verdict permits a subsequent retrial, despite having received direct instructions to the contrary, is particularly concerning.
- The not proven verdict may inhibit thorough deliberation by jurors: the authors noted in Study 2 how deliberations appear to “dry up” once the possibility of a not proven verdict was raised.

We also refer to Lord Bonomy’s Post Corroboration Safeguards Review Final Report published in April 2015, Chapter 12 entitled “Juries - Majority, Size, and the Three Verdict System.


In particular, we note Lord Bonomy’s comments at Paragraph 12.22.

12.22 The unique feature of Scottish juries discussed above form important parts of a balanced system which, until now, has included the corroboration requirement, a fifteen person jury, three verdicts and the possibility of conviction by simple majority. Insufficient is known at this stage about the relationship among them, and in particular about the use in practice of the not proven verdict, to enable any firm evidence based conclusion to be drawn about the likely impact of reducing the size of the jury, changing from a system with three verdicts to one with two, and requiring unanimous or near unanimous verdicts.

We also note that Lord Bonomy recommends at paragraph 12.24 of his final report that research should be undertaken into jury reasoning and decision making and that simultaneous changes to several unique aspects of the Scottish jury system should only be made on a fully informed basis.

Lord Bonomy suggests at paragraph 12.25 of his final report that such research would include asking jurors at least the following:-

- What jurors understand to be the difference between not guilty and not proven.
- Why they choose one over the other.
- Why, and to what extent, do jurors alter their position as regards not proven and not guilty as a result of deliberations.
- The extent to which the members of a jury of 15 (as compared with a jury of 12) actually participate in deliberations.
- The differences in outcome (assuming an identical factual matrix) as between a 12 person jury with only 2 possible verdicts and a 15 person jury with three verdicts, and the reasons for those differences; and
- Whether there are benefits requiring the jury to attempt to meet a unanimous verdict.

The Committee suggests that such research should be undertaken and that in very early course before the not proven verdict is removed in terms of Section 1 of the bill and jury verdicts are amended in terms of Section 2 of the bill.

Moreover, the Committee notes that Section 2 of the bill is in broad terms similar to Section 70 of the Criminal Justice (Scotland) Bill as introduced into the Scottish Parliament 21 June 2013.

We note that the bill (as now passed) was amended at Stage 2 by way of amendment number 68 in the name of the Cabinet Secretary for Justice, Michael Matheson MSP to leave out Section 70.

With particular reference to the Justice Committee’s Official Report of 8 September 2015, we note that the Cabinet Secretary for Justice’s amendment to the move Section 70 from the bill was agreed to.

The Committee also notes that the Scottish Government is considering Lord Bonomy’s recommendation that jury research should include research on the verdicts that are available to the jury, as well as research on jury majorities and size.

We also note that the Scottish Government considers it is preferable to retain the current jury system until this research has been completed when more detailed evidence on which to base any future reform can be considered.

We also note the very useful SPICe briefing on the bill

We note however, that the Executive Summary of the SPICe briefing states the following:-

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).

It is our understanding that these statistics cover all cases, including those which are resolved by guilty pleas before trial and also those where the Crown withdraws the charge and decides not to proceed either before or during the course of the trial.

This would represent the vast majority of both solemn and summary cases.
Accordingly, we believe that the proportion of cases where a not proven verdict is delivered at the conclusion of a contested trial, either summary or solemn, where the Crown has presented sufficient evidence of a case to answer, may be significantly higher than the 4% solemn and 0.5% summary referred to in the SPICe briefing.

We would appreciate some clarification regarding the proportion of such cases.

We trust that this information is of assistance.

Alan McCreadie
Deputy Director, Law Reform
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