Justice Committee

Stage 1 Report on the Criminal Verdicts (Scotland) Bill
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Introduction</strong></td>
<td>1</td>
</tr>
<tr>
<td>Policy objective of the Bill</td>
<td>1</td>
</tr>
<tr>
<td>The not proven verdict</td>
<td>1</td>
</tr>
<tr>
<td>Current use of the not proven verdict</td>
<td>2</td>
</tr>
<tr>
<td>Majority verdicts</td>
<td>2</td>
</tr>
<tr>
<td>Consultation and other relevant legislative scrutiny preceding consideration of the Bill</td>
<td>3</td>
</tr>
<tr>
<td>The Criminal Justice (Scotland) Bill</td>
<td>3</td>
</tr>
<tr>
<td>Post-corroboration Safeguards Review</td>
<td>4</td>
</tr>
<tr>
<td>Committee scrutiny of the Criminal Verdicts (Scotland) Bill</td>
<td>5</td>
</tr>
<tr>
<td><strong>Evidence on the not proven verdict</strong></td>
<td>6</td>
</tr>
<tr>
<td>Utility of not proven verdict?</td>
<td>6</td>
</tr>
<tr>
<td>Clarity of outcome</td>
<td>7</td>
</tr>
<tr>
<td>“Stigma” of not proven verdict</td>
<td>7</td>
</tr>
<tr>
<td>Fairness for the victim</td>
<td>8</td>
</tr>
<tr>
<td>Retaining “not proven” in a two verdict system</td>
<td>9</td>
</tr>
<tr>
<td>Effect of two verdict system on prosecution pre-trial preparation</td>
<td>10</td>
</tr>
<tr>
<td><strong>Majority required for guilty verdict</strong></td>
<td>10</td>
</tr>
<tr>
<td><strong>Research on jury behaviour</strong></td>
<td>12</td>
</tr>
<tr>
<td><strong>Recommendations</strong></td>
<td>15</td>
</tr>
</tbody>
</table>
Justice Committee

To consider and report on a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice and b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

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Introduction

Policy objective of the Bill

1. The Criminal Verdicts (Scotland) Bill was introduced in the Scottish Parliament on 27 November 2013 by Michael McMahon MSP. The accompanying Policy Memorandum explains that the 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.”

2. The Bill also increases the majority required in jury trials to secure a conviction from 8 to 10. As discussed further below, the Member in charge considers that there is a clear policy link between these two changes.

The not proven verdict

3. Under Scots law, three verdicts are currently available in a criminal trial, whether or not it involves a jury: guilty, not guilty and not proven. The legal implications of a not proven verdict are the same as with a not guilty verdict: the accused is acquitted. In particular, the fact that an accused was acquitted by a not proven rather than a not guilty verdict is of no relevance in terms of the law of double jeopardy: the general rule (to which there are exceptions) is that there can be no retrial. We note evidence from the Member in charge that judges cannot give directions to juries about the difference between the not guilty and not proven verdicts.

4. The Committee understands that there was a historical practice in Scots criminal law cases of leaving the jury to determine factual issues one-by-one as “proven” or “not proven”. It was then left to the judge to pronounce upon the facts found “proven” whether this was sufficient to establish guilty of the crime charged. In the 1700s, the practice arose of juries pronouncing the accused not guilty in cases where they were satisfied beyond reasonable doubt not only that the facts establishing guilt were not proven, but that the accused had not committed the crime. However, the option of returning a verdict of not proven was never withdrawn from the jury. Nowadays, it is the jury that decides whether, on the facts, the accused should be convicted or acquitted, by use of the three verdicts, following a direction on legal points from the judge.

5. It would also appear that very few other jurisdictions in the world have a three verdict system, or a finding at the outcome of a criminal trial equivalent to a not proven verdict.
Current use of the not proven verdict

6. During the course of scrutinising the Bill, the Committee asked the Government if it could provide data on the use of the not proven verdict, and in particular on its use in jury trials and in trials without juries. (Trials under solemn procedure, which may take place in either the High or Sheriff Court depending on the seriousness of the charge, are held before a judge and jury. Summary trials, which are for less serious offences, may take place in a Sheriff, Stipendiary Magistrate or Justice of the Peace Court, and are decided without a jury.)

7. The Government has since provided the Committee with statistical information. This is of somewhat limited value as, with the exception of one set of figures, discussed immediately below, the data provided does not enable a comparison between the frequency of use of the not proven verdict and the frequency of use of the other two verdicts in particular cases. However, further data obtained from the Scottish Government by the Scottish Parliament Information Centre shows that in 2013-14, in the case of acquittals following trials for rape or attempted rape, the not proven verdict was used in 35% of cases. This compares with a figure of 17% in the case of acquittals following trial generally (including trials without juries). Further information based on Government statistics is contained in Annexe A.

8. What the Government’s figures do demonstrate is that the not proven verdict is, by some margin, the least used of the three verdicts available in Scotland. They also show that its use tends to rise depending on the seriousness of the crime being charged: from a (rounded down) figure of 0% in Justice of the Peace and Magistrates courts to 5% in Sheriff Court solemn trials and 7% in High Court trials.

9. The figures in themselves do not explain the differences in use of the not proven verdict. Possible explanations might include: the nature of jury decision making as compared with that of a judge; the response of decision makers to more serious allegations; and the type of evidence which tends to be available in relation to different offences. However, without further relevant information, the Committee is not in a position to reach any conclusions on this point.

Majority verdicts

10. At present, a jury in Scotland 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 jurors or is reduced in numbers. Where a guilty verdict does not attract the support of at least eight jurors the accused is acquitted. Under these rules, a person may be convicted on the basis of a simple majority and there is no potential for a hung jury (i.e. the only possible outcomes are a finding of guilty or an acquittal)

11. The policy memorandum accompanying the Criminal Justice (Scotland) Bill notes that—
“Scotland is the only common law jurisdiction where an accused person can be convicted on a simple majority verdict. Other systems which are based on a simple majority verdict have additional protections. For example, Italy allows conviction on a simple majority, but the two judges sit alongside six lay jurors. In Belgium, jurors, can convict on a simple majority but a unanimous panel of judges can overturn an “erroneous” verdicts.”

Consultation and other relevant legislative scrutiny preceding consideration of the Bill

12. Following a preliminary consultation in 2007, Mr McMahon, undertook an additional consultation exercise between 28 June and 31 October 2012. A summary of consultation responses, produced by the Parliament’s Non-Government Bills Unit (NGBU), was published the following year. We note Mr McMahon’s evidence to us that it was responses to his consultation that had persuaded him to include provision on jury majorities alongside his original proposal to abolish the not proven verdict.

13. During roughly the same period that Mr McMahon was preparing for the introduction of his Bill, the Scottish Government published a consultation paper seeking views on a number of legal reforms associated with the proposed abolition of the general requirement for corroboration in criminal cases. The consultation sought views on the removal of the not proven verdict as well as on potential changes to the rules relating to the level of juror support required for a guilty verdict.

The Criminal Justice (Scotland) Bill

14. In June 2013, the Scottish Government introduced the Criminal Justice (Scotland) Bill, with the Justice Committee as lead Committee for Stage 1 scrutiny. We agreed to postpone Stage 1 consideration of the Criminal Verdicts (Scotland) Bill whilst the other Bill completed its passage through Parliament. The decision to delay scrutiny was based on an overlap between the two Bills: both proposed an increase in jury majorities to 10. There were, however different policy grounds underlying the two proposals:

- Michael McMahon’s proposals regarding the level of jury support required for a guilty verdict were advanced as a way of ensuring that the abolition of the not proven verdict did 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 would still be subject to an adequate system of checks and balances following the proposed abolition of the general requirement for corroboration.

15. The Committee considers that it was appropriate to postpone consideration of the Criminal Verdicts (Scotland) Bill, whilst the Criminal Justice (Scotland) Bill went through Parliament. However, we are aware that this placed Mr McMahon,
through no fault of his own, at a disadvantage, particular as the latter Bill took some time to be passed. We are grateful to him for his forbearance.

16. The passage of the latter Bill did, however, provide Mr McMahon with an additional opportunity to advance consideration of his proposals. He lodged a number of amendments to the Bill at Stage 2, which if agreed to, would have incorporated his proposed reforms into the Government’s Bill. During consideration of those amendments, the Cabinet Secretary for Justice indicated that he was “not unsympathetic to Mr McMahon’s position” on the need to reform the three verdict system but went on to state that his preference was to leave current arrangements in place until jury research in relation to corroboration and related reforms had been completed. In response, Michael McMahon warned against delaying reforms, but decided not to press his amendments, in order to allow the matter to be examined further.

17. The Criminal Justice (Scotland) Bill was passed in December 2015. Following amendments agreed to at Stage 2, the Bill as passed no longer made provision to abolish the general requirement for corroboration. The provision on jury majorities which, as noted above, the Scottish Government saw as incidental to removal of corroboration, were also removed by amendment.

Post-corroboration Safeguards Review

18. The Scottish Government’s decision to support the removal of the above provisions was taken in light of recommendations made in the Final Report (2015) of the Post-corroboration Safeguards Review (also referred to as the ‘Bonomy Review’).

19. The report included a chapter on ‘Juries – Majority, Size and the Three Verdict System’. Although the review considered these issues in the context of proposals for abolishing the general requirement for corroboration in criminal cases, we note that the review continues to inform the Government’s approach to the proposals outlined in Mr McMahon’s Bill and makes a number of recommendations about how any reform should proceed. The report states that—

“The unique features of Scottish juries discussed above form important parts of a balanced system which, until now, has included the corroboration requirement, a 15 person jury, 3 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.

The time is right to undertake research into jury reasoning and decision making. Simultaneous changes to several unique aspects of the Scottish
jury system should only be made on a fully informed basis. That 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 3 verdicts, and the reasons for those differences; and
- Whether there are benefits in requiring the jury to attempt to reach a unanimous verdict.\textsuperscript{19}

20. Material helping to inform the work of the Post-corroboration Safeguards Review included a background report produced by an academic expert group (2014).\textsuperscript{20} That report also contains a chapter on ‘Jury Majority, Size and Verdicts’ with material relevant to consideration to the Criminal Verdicts (Scotland) Bill. Some of the submissions received in response to the Justice Committee’s call for written evidence on the Criminal Verdicts (Scotland) Bill refer to the work of the academic expert group.

Committee scrutiny of the Criminal Verdicts (Scotland) Bill

21. In anticipation of the Criminal Justice (Scotland) Bill soon being passed, the Committee issued a call for written evidence on the Bill on 24 November 2015. We received a total of only 14 written submissions from various stakeholders, including lawyers, academics, Police Scotland, victim support groups and several justices of the peace.\textsuperscript{21}

22. In summary, a clear majority of written evidence was supportive of the abolition of the three verdict system. There was slightly less clarity and certainty expressed as to whether it was important to expressly abolish the not proven verdict or whether the important thing was simply to have two verdicts: one to acquit and one to convict. Of those who expressed a clear view on jury majorities (mainly bodies representing victims of crimes), there was generally no support for increasing the majority required in order to convict.\textsuperscript{22}

23. The Committee took oral evidence on the Bill during a single evidence session on 19 January 2016,\textsuperscript{23} hearing from the Cabinet Secretary for Justice and then from Mr McMahon.
24. The Scottish Government’s position is, in summary, that it has an open mind as to the proposals in the Bill but would like recently announced jury research to be completed before any changes go ahead.

25. More detailed analysis of the evidence is set out below. Given that the Scottish Government has effectively reserved its position, there is little discussion of the Cabinet Secretary’s evidence, except in the discussion on jury research. The report concludes with the Committee’s recommendations on the Bill.

Evidence on the not proven verdict

Utility of not proven verdict?

26. There is no legal difference between a not guilty and not proven verdict. This raises questions as to the merits of retaining both verdicts.

27. Proponents of the three verdict system contend that the not proven verdict allows for a degree of nuance, which serves a purpose. The Scottish Justices Association Executive Committee stated that—

“The ‘Not Proven’ verdict may serve a purpose when a case may be easily proved within the balance of probabilities, but more evidence is needed to bring it to [the] higher evidential standard of proof beyond reasonable doubt.”

28. The Committee also notes views that the not proven verdict could function as a safeguard against wrongful conviction in cases where jurors are not satisfied beyond reasonable doubt that the accused is guilty, but may wish to put down a marker that they are uncomfortable with declaring the accused innocent (which, rightly or wrongly, is how a not guilty verdict may be interpreted). It could be argued that, if the not proven verdict were removed, there might be a greater propensity to convict.

29. In response to a question inviting him to comment on whether the existence of three verdicts provided juries with a degree of “nuance” that might be lost if his Bill were agreed to, Mr McMahon told us that—

“The clarity that we want is clarity about the outcome. If a sheriff or a justice of the peace decides that the likelihood is that the person is guilty but that the evidence that was presented was not particularly strong, which has led them to reach a not proven verdict, that does not give clarity; it suggests that there is an openness about the verdict that allows people to believe that the person who was acquitted could actually have been guilty. I do not believe that that is the kind of nuance that we want to see; we want there to be clarity.”
30. Victim Support Scotland stated that they considered it to be—

“unsettling that juries neither seem to understand the not proven verdict, nor use it in the way in which they should. For example, research cited by the Academic Expert Group of the Bonomy Review suggests that jurors wrongly believe that a not proven verdict permits a subsequent retrial, regardless of instructions received on this. We are further concerned by the findings that thorough debate is inhibited once the not proven verdict has been raised during deliberations; this suggests to us that we would see different outcomes for the same cases using a two verdict system in comparison to a three verdict system.”

Clarity of outcome

31. The Committee considered whether the existence of the not proven verdict could serve a purpose as a limited form of sanction in cases where guilt beyond reasonable doubt had not been established but a judge or jury wanted to “send a message”. Mr McMahon said—

“That is possible, but I do not think that it is right that that should be the case. If someone walks out of a court having been acquitted, they should have the right to say that they have been tried and acquitted and that they are not guilty of the crime. Some people who corresponded with me said that they had been acquitted on a not proven verdict and had to move because they believed that the local community thought that they were guilty and had got off with it.”

32. It could be argued that, given the presumption of innocence and the need for criminal proceedings to have as clear an outcome as possible, the not proven verdict should be abolished. If the prosecution cannot prove its case beyond reasonable doubt, then the accused should be found not guilty without any scope for some sort of half-way house. The Committee notes that this evidence is, in some respects, the mirror image of the evidence outlined above that the not proven verdict might provide a safeguard against unsafe convictions and that abolishing it might lead to more unsafe convictions.

“Stigma” of not proven verdict

33. Although the implications of a not proven verdict are the same as a not guilty verdict, the Committee acknowledges that the verdict is not always well understood and can cause confusion for both jurors and the public. We note views that this confusion can lead to the effective defamation of the accused where the public believes the not proven verdict implies a degree of culpability; that the accused, in colloquial terms, “got away with it”. The Committee acknowledges that a not proven verdict may have social and indeed employment consequences that a not guilty verdict does not.
34. The joint written submission of Professors Chalmers and Leverick of Glasgow University Law School states that—

“There is, quite simply, no merit in having two different verdicts of acquittal, when each verdict has exactly the same practical consequence and the distinction between them is not well understood. We can see no defensible case for the current system. In particular, we support the argument that it is wrong for a verdict of acquittal to carry any implication of stigma.”

35. This perceived lack of clarity surrounding the three verdict system and the potential for unnecessary stigmatisation was further acknowledged by Mr McMahon in his evidence to the Committee—

“a not proven verdict suggests that there may have been some evidence that the person had done it—just not enough to convict them. That is not what a trial is there to achieve; it is there to look at the evidence and arrive at a conclusion as to guilt.”

Fairness for the victim

36. For victims the perception that a verdict carries with it a certain degree of finality is important and allows them to move on with their lives. Whilst the Committee did not receive a large amount of evidence from groups working with victims of crime, the evidence that we did receive indicated that the not proven verdict failed to provide that degree of closure. Victim Support Scotland, stated that in their experience—

“many victims and witnesses find the third verdict to be confusing and disappointing. Finality and certainty are crucial elements of an effective criminal justice system. With the added option of the not proven verdict, and how it is understood in the context of standing alongside ‘guilty’ and ‘not guilty’ options, many victims are left without the conclusive answer they were looking for from the justice system. (...) It can also be argued that giving the jury two acquittal verdicts but only one conviction verdict to choose from favours the accused.”

37. Rape Crisis Scotland also argued that the three verdict system may in some cases help the accused—

“Jury members can be notoriously reluctant to convict in rape cases, even in cases where there is significant evidence, and we are concerned that the not proven verdict contributes to wrongful acquittals.”

38. There appears to be some validation of those views in statistical data obtained by the Committee (see paragraph 7).

39. Some who support the retention of the three verdict system have suggested that it can allow a judge or jury to indicate that, whilst the prosecution has not proven its
case to the required standard for a guilty verdict, the complainer was not necessarily disbelieved. While the Committee understand that this view might afford some victims a degree of comfort, this is not an argument that victims’ organisations put forward in their evidence on this Bill.

Retaining “not proven” in a two verdict system

40. There was some discussion in evidence as to whether, if a two verdict criminal justice system were to be adopted, it should be the not proven guilty that is abolished rather than the not proven verdict. It could be argued, for example, that proven and not proven better reflects the role of the judge or jury at the conclusion of a trial as their deliberations are based on proof of evidence rather than on taking a view on whether or not the accused is innocent. Victim Support Scotland said—

“Following the removal of the third verdict, there are several options for the names of the remaining verdicts. Victim Support Scotland acknowledges that there are benefits to retaining the verdicts of ‘guilty’ and ‘not guilty’, but believes that the fairest option both for victims and accused persons is to return to a two-verdict system of ‘proven’ and ‘not proven’. These labels most clearly reflect the purpose of a criminal trial, that being to establish whether the Crown has proved its case ‘beyond reasonable doubt’. From a victim’s perspective a ‘not proven’ verdict (within the context of a two-verdict system) can also signal an important message to the victim that the acquittal verdict was reached due to insufficient evidence to convict. By contrast, a verdict of ‘not guilty’ may send a message to the victim that they were not believed, or that they were perceived by the court to have been lying or to having made false accusations.”

41. Arguments advanced in favour of a choice between guilty and not guilty sometimes highlight the greater public familiarity of such verdicts, as well as the fact that the key question to be resolved in any criminal trial is whether the accused is guilty beyond all reasonable doubt. Mr McMahon said that—

“given that the not proven verdict is the controversial one, to go back to having proven and not proven might cause more confusion in the minds of juries than would be caused by their being told to look at the evidence and determine whether it suggests beyond all reasonable doubt that a person is guilty or not, which is what juries are there to do. I was persuaded to move away from proven and not proven on the basis that juries understand that they are being asked to find someone guilty or not guilty”.

42. The written submission of Professors Chalmers and Leverick invited the Committee to reflect on the centrality of the presumption of innocence in the criminal justice system—
“When this debate has arisen in the past, it has sometimes been suggested that – if Scotland were to move to a two-verdict system – it would be appropriate for ‘not guilty’ to be the verdict which disappears, on the basis that all a jury ever does is to decide whether a charge is proven or not. This is an unhelpful distraction which proceeds on a failure to appreciate the consequences of the presumption of innocence. It is correct to say that all a jury can ever do is ask whether a charge is ‘proven’ or ‘not proven’. But that is true of any jury in any system. Because all persons are innocent until proven guilty, any person against whom a charge is not proven is entitled to be declared innocent in law. The presumption of innocence means that a not guilty verdict is the logical consequence of a charge not being proven.”

Effect of two verdict system on prosecution pre-trial preparation

43. The Committee also raised the issue of sufficiency of evidence and how, in a two verdict system, the Crown Office and Procurator Fiscal Service might approach a case should they believe they are less likely to secure a particular outcome. Mr McMahon conceded that a two verdict system might impact upon the number cases taken to court, but considered that overall the issue was somewhat speculative. He suggested that if there was any merit to this point, it would raise wider questions about performance of our judicial system—

“I would not want to spend a lot of time trying to suggest that, in our trial system, either the prosecution or the defence were not doing their utmost to present the case. If that were so, it would raise substantial questions about whether we thought that the performance of our courts was at the level that it should be at. I do not want to make that suggestion.”

Majority required for guilty verdict

44. Section 2 of the Bill seeks to introduce a system under which a guilty verdict requires the support of at least two-thirds of the jury. Any other result would lead to an acquittal.

45. Michael McMahon’s proposals 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 does not heighten the risk of wrongful convictions. In other words he saw these two sections of the bill as linked and effectively forming a package. The Committee understands Mr McMahon’s position, but also notes views (articulated both in the evidence on this Bill and in the context of a wider debate on the future of Scottish criminal procedure and evidence) that—

- support for removing the not proven verdict does not necessarily imply support for changing the current rules on jury majorities
support for changing the current rules on jury majorities may be contingent on wider reforms to the criminal justice system (in which connection, we note, for instance, the ongoing debate on whether the general requirement for corroboration should be abolished), and

conversely, a case may be made for increasing the minimum level of juror support required for a guilty verdict irrespective of any other proposed changes to the criminal justice system (including removal of the not proven verdict or any change to the law on corroboration).

46. In relation to the first two points, some submissions on the Bill expressed support for removal of a third verdict but retention of the current rules on jury majorities (at least until wider reforms are also considered). 41

47. In line with its position on possible reform of the not proven verdict, the Scottish Government has indicated a preference for carrying out research into jury decision-making prior to taking forward any reforms to the level of juror support required for a guilty verdict. 42 Submissions in support of this approach include one from the Law Society of Scotland.

48. The majority of written submissions on the Bill focused on the proposal for the removal of the not proven verdict. Those respondents who did address the proposed reform to jury majorities raised specific concerns about the impact these reforms might have on conviction rates in certain cases.

49. The Highland Violence Against Women Partnership raised concerns about the role preconceived notions already play in jury decision making and contended that any increase in jury majority might also increase the likelihood that these views could influence a jury’s decision in certain cases—

“As juries are representative of the population, there is already a concern that some will hold particular beliefs about violence against women, including the perception that women are sometimes responsible for the crimes perpetrated against them. This reduces the likelihood of a jury finding someone guilty.” 43

50. Victim Support Scotland raised similar concerns, proposing that increased jury majorities would further obstruct justice for victims and would favour the accused in some cases—

“VSS does not accept that it would be necessary to increase the jury majority if the not proven verdict were to be removed. In a system that requires corroboration of the essential facts of each case, we believe that rather than address a ‘possible bias against the accused’, increasing the majority required to convict would in fact create an additional barrier to justice for victims of crime, and lead to a bias in favour of the accused. The number of jurors required to reach a guilty verdict should not be so high as to act as an impediment to justice, recognising that miscarriages of justice
do not only occur when an innocent person is wrongly convicted, they also occur when the guilty are acquitted.”

51. Mr McMahon was invited to address these views. He acknowledged—

“some validity in the argument, but it is outweighed by what a majority decision can mean. In very serious cases, the outcome can be entirely different if one juror changes their position and takes the majority in one direction or another, which hardly suggests to me that the jury has arrived at a conclusion that is beyond reasonable doubt. If, having presented all its evidence, a legal team can convince only seven out of 15 jurors that the evidence does not suggest that the accused is guilty or it can find only eight people who believe that the evidence suggests that the accused is guilty, that far outweighs any concerns that people could have about moving to 10 or 12 jurors making the decision. If 10 or 12 jurors made the decision, we could genuinely believe that, whether the verdict was guilty or not guilty, the strength of the evidence had convinced a sizeable majority of the jury”.

Research on jury behaviour

52. The Committee has noted in this report perceptions that the not proven verdict may impact upon certain cases and disproportionately affect victims of certain crimes. We also noted the perception that abolishing the verdict may lead to more unsafe convictions or, conversely, to significantly more not guilty verdicts. The Committee notes that these issues are all, to a greater or lesser degree, matters of conjecture, which raise wider questions about the behaviour and decision-making processes of courts. In this connection, we note the data referred to earlier appearing to indicate that juries show a greater propensity to use the not proven verdict than judges.

53. Throughout the scrutiny of the Bill, one of the main areas of debate has been the issue of jury research. The Scottish Government’s written submission on the Bill stated that—

“The Scottish Government fully agrees with Lord Bonomy’s rationale and, in terms of building a consensus for future reforms, considers it important to take forward the recommendation that jury research be carried out. As such, on 8 September 2015, the Cabinet Secretary for Justice announced that preliminary work in relation to conducting jury research would be undertaken. This work is under way. While the Scottish Government is open to the possibility of the Not Proven verdict being removed, it considers it necessary to take a holistic and evidence-based approach to reform and believes Lord Bonomy’s recommendation that jury research should be taken forward to understand better how juries operate is an important part of considering justice reform in the round as it will provide an evidence
54. When the Cabinet Secretary subsequently gave evidence to the Committee, he made clear that the Scottish Government was open-minded as to the case for abolishing the not proven verdict or changing jury majorities but considered that additional research on juries was needed before any reform should be proposed. In response to a question on why the Scottish Government took this approach in relation to Mr McMahon’s Bill but not the current Abusive Behaviour and Sexual Harm (Scotland) Bill, which sets out jury directions to be given in certain sexual offences trials, the Cabinet Secretary explained that he believed there was already a strong evidence base for the introduction of statutory provisions on jury directions whereas this was not the case in relation to the proposals in Mr McMahon’s Bill.

55. Some of the respondents to the Committee’s call for evidence supported the Government’s approach, for example the Law Society of Scotland. Other evidence argued that the value of such research, particularly in relation to abolition of the not proven verdict, might be limited. Professors Chalmers and Leverick said that—

“Research might, for example, show that mock juries asked to view simulated trials are either more or less likely to convict when presented with two possible verdicts rather than three. There would, however, be no means of establishing for the purposes of such a study what the correct conviction rate was, and so the research would not establish which of a three or two verdict system was ‘better’. Ultimately, the not proven verdict raises questions of principle which must be confronted directly and cannot be evaded by calls for further empirical research.”

56. When asked about the concerns raised by Professor Chalmers and Leverick, the Cabinet Secretary argued that it was not purely a matter of principle but also “a matter of outcome”. In relation to decision-making by juries, he said that—

“This issue is absolutely fundamental to how our justice system operates, so it is important that we take the necessary time to undertake the research that will give us an evidence base and some understanding of the impact that any changes might have on how the system operates.”

57. Mr McMahon told the Committee that he saw the argument for waiting for the research to conclude as being more to do with continuing the discussing other aspects of the judicial system, such as corroboration. He said that he did not think additional research with regards to the not proven verdict would add anything—

“I see no value in waiting, because I do not think that the research findings will be very different from what we already know. We know that there is a stigma attached to the not proven verdict and that there is confusion about what it means. We know that it results in acquittal, as does the not guilty
verdict. We know that judges cannot articulate to juries the difference between a not proven and a not guilty verdict. We know all those things, and I do not see what further evidence will be found that will clarify all that.”

58. Lord Bonomy’s review estimated that the jury research it envisaged might take around two years, but that the timescale would ultimately depend on a range of factors. When the Committee inquired further as to timescales from the Cabinet Secretary, he noted Lord Bonomy’s estimate and indicated that the research could take years. The Cabinet Secretary also highlighted other issues to be resolved in relation to this work, such as whether to use mock or real jurors. It should be noted that if real jurors were to be used, amendments would need to be made to the Contempt of Court Act 1981.

59. The Committee notes that, as of February 2016, some five months after the initial announcement that the Scottish Government would proceed with the research, the parameters of the research are still being scoped.

60. Mr McMahon told the Committee that the linkages that the Scottish Government saw as existing between various aspects of criminal law and procedure did not adequately justify postponing the measures outlined in his Bill—

“One of the reasons why I have not been able to introduce this reform is because it was never part of the discussion on or consideration of any of the criminal justice bills that have been introduced. Given that it has never been felt that the not proven verdict had to be looked at in relation to double jeopardy or any of the other changes that have taken place, I cannot see why there is now an inextricable link between the not proven verdict and corroboration. That link was never made before, but now, all of a sudden, because the corroboration aspect of the criminal justice system has got into some difficulty, the argument is being made that we have to link corroboration to the not proven verdict and the jury majority issue.”

61. The issue of jury research also arose in the context of proposed reforms to the size of jury majorities. Mr McMahon was asked if the concerns about this reform raised in written evidence by some groups (as outlined earlier) underlined the value of carrying out jury research before any change in the size of the required majority was agreed to. He said that it was his view, based on the evidence he had collected in preparing the Bill that people tend to have more confidence in a verdict if they know that a majority of 10 out of 15 was required.
Recommendations

The Committee commends Michael McMahon for bringing this Bill before the Parliament and helping provoke more debate about the not proven verdict. We note that most of the evidence we have received has been critical of Scotland’s three verdict system, querying whether it serves any useful purpose and, in some cases, suggesting that it may even be to the detriment of justice. We note that some of the evidence we have received as to the effect of removing the not proven verdict is necessarily rather speculative in nature.

A clear majority of the Committee supports the intention of the Bill to abolish the not proven verdict but not the proposal in relation to jury majorities. The Committee considers that the latter proposal should be considered alongside the other reforms proposed by Lord Bonomy.

In the Committee’s view, Mr McMahon has effectively acknowledged that removal of the not proven verdict requires consideration of wider issues relating to decision-making by juries by proposing in the Bill parallel reforms in relation to jury majorities. The Committee understands the reasons for Mr McMahon including this measure in the Bill but notes the opposition to this proposal that arose in written evidence. In our view, this underlines the benefit of further research on decision-making by juries before proceeding with the reforms set out in the Bill.

The Committee hopes that the research on juries announced by the Scottish Government will proceed soon.

A majority of the Committee is therefore unable to support the general principles of the Bill.

1 Criminal Verdicts (Scotland) Bill, Policy Memorandum, paragraph 2
2 Double Jeopardy (Scotland) Act 2011, section 1
5 Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration, Appendix B
6 Letter from the Cabinet Secretary for Justice to the Convener, 28 January 2016
7 Criminal Procedure (Scotland) Act 1995, Section 90
8 Criminal Justice (Scotland) Bill, Policy Memorandum, paragraph 173
9 Criminal Procedure (Reform of Verdicts) (Scotland) Bill, Consultation responses
10 Members Bill Summary of Responses
12 Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration Scottish Government Consultation Paper
13 Scottish Parliament Justice Committee, 8 September 2015 col 30
14 Scottish Parliament Justice Committee, 8 September 2015 col 31
15 Scottish Parliament Justice Committee, 8 September 2015 col 30
Annexe A

Criminal Verdicts (S) Bill
Stage 1 Committee Report
Annexe: Statistics on Use of the Not Proven Verdict

As mentioned in the main body of the report, the Government provided the Committee with some additional statistical information on the use of the not proven verdict. Analysis of this, along with published figures in the Government’s statistical bulletins for Criminal Proceedings in Scotland, highlights the following points.

The picture presented by the following table, in terms of use of the not proven verdict, is fairly typical of recent years. For example, 1% of all criminal court outcomes during each of the five years 2008-09 to 2012-13 involved the case against the accused being found not proven.

### People proceeded against in court broken down by outcome, 2013-14

<table>
<thead>
<tr>
<th>Outcome</th>
<th>PNGA* or deserted</th>
<th>Acquitted - not guilty</th>
<th>Acquitted - not proven</th>
<th>Charge proved</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percent</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>100%</td>
</tr>
<tr>
<td>Number</td>
<td>9,685</td>
<td>5,318</td>
<td>1,116</td>
<td>105,549</td>
<td>121,668</td>
</tr>
</tbody>
</table>

* plea of not guilty accepted

Turning to figures provided by the Government broken down by court (reproduced in the next table), it is clear that whilst there are more instances of the not proven verdict being used in the summary courts, this is a product of the large number of cases dealt with by those courts rather than the likelihood of the verdict being employed. In 2013-14, the percentage of people proceeded against who were acquitted on the basis of a not proven verdict was 5.2% under solemn procedure and 0.7% under summary procedure. These proportions are fairly similar to those for other recent years.

### People proceeded against in court broken down by outcome and court, 2013-14

<table>
<thead>
<tr>
<th>Outcome</th>
<th>PNGA* or deserted</th>
<th>Acquitted - not guilty</th>
<th>Acquitted - not proven</th>
<th>Charge proved</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>percent</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>High Court</td>
<td>9%</td>
<td>21%</td>
<td>7%</td>
<td>63%</td>
<td>100%</td>
</tr>
<tr>
<td>Sheriff Solemn</td>
<td>6%</td>
<td>10%</td>
<td>5%</td>
<td>79%</td>
<td>100%</td>
</tr>
<tr>
<td>Sheriff Summary</td>
<td>10%</td>
<td>5%</td>
<td>1%</td>
<td>83%</td>
<td>100%</td>
</tr>
<tr>
<td>JP Court**</td>
<td>5%</td>
<td>2%</td>
<td>-</td>
<td>93%</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td>number</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>High Court</td>
<td>92</td>
<td>223</td>
<td>73</td>
<td>661</td>
<td>1,049</td>
</tr>
<tr>
<td>Sheriff Solemn</td>
<td>338</td>
<td>543</td>
<td>261</td>
<td>4,228</td>
<td>5,370</td>
</tr>
<tr>
<td>Sheriff Summary</td>
<td>6,846</td>
<td>3,418</td>
<td>679</td>
<td>55,347</td>
<td>66,290</td>
</tr>
<tr>
<td>JP Court**</td>
<td>2,331</td>
<td>1,132</td>
<td>103</td>
<td>45,313</td>
<td>48,879</td>
</tr>
</tbody>
</table>

* plea of not guilty accepted ** justices of the peace and stipendiary magistrates
To obtain a clearer picture of the significance of the not proven verdict, it is helpful to take the above figures and focus on just those cases where an accused has been acquitted as the result of a verdict based on the evidence in a trial. The following table displays the figures in this way. As can be seen, the not proven verdict accounts for a sizeable proportion of acquittal verdicts (especially in jury cases).

### People acquitted following trial broken down by court, 2013-14

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Acquitted - not guilty</th>
<th>Acquitted - not proven</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>percent</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>High Court</td>
<td>75%</td>
<td>25%</td>
<td>100%</td>
</tr>
<tr>
<td>Sheriff Solemn</td>
<td>68%</td>
<td>32%</td>
<td>100%</td>
</tr>
<tr>
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<td>83%</td>
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</tr>
<tr>
<td>JP Court*</td>
<td>92%</td>
<td>8%</td>
<td>100%</td>
</tr>
<tr>
<td><strong>number</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>High Court</td>
<td>223</td>
<td>73</td>
<td>296</td>
</tr>
<tr>
<td>Sheriff Solemn</td>
<td>543</td>
<td>261</td>
<td>804</td>
</tr>
<tr>
<td>Sheriff Summary</td>
<td>3,418</td>
<td>679</td>
<td>4,097</td>
</tr>
<tr>
<td>JP Court*</td>
<td>1,132</td>
<td>103</td>
<td>1,235</td>
</tr>
</tbody>
</table>

* justices of the peace and stipendiary magistrates

Figures in the Government’s statistical bulletins for Criminal Proceedings in Scotland can be used to provide a similar analysis for particular offences. For example, the next table provides figures for the category of rape and attempted rape. As indicated, use of the not proven verdict (in terms of the proportion of acquittals) is relatively high for some offences.

### People acquitted following trial – rape and attempted rape, 2013-14

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Acquitted - not guilty</th>
<th>Acquitted - not proven</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>percent</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percent</td>
<td>65%</td>
<td>35%</td>
<td>100%</td>
</tr>
<tr>
<td><strong>Number</strong></td>
<td></td>
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</tr>
<tr>
<td>Number</td>
<td>80</td>
<td>43</td>
<td>123</td>
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