

Reform of Criminal Verdicts (Scotland) Bill



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

by

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FOREWORD

For centuries, one of the distinctive features of Scots criminal law has been the availability of three verdicts: guilty, not guilty and not proven. The not proven verdict has been much criticised – Sir Walter Scott famously referred to it as “that bastard verdict” – but it also has its defenders. Arguments about it have rumbled on over the years among lawyers and academics, and there have been various reviews and debates. Before devolution, some attempts were made to legislate for reform, but there has not so far been any legislation introduced on this issue in the Scottish Parliament.

I have long been convinced that the three-verdict system is no longer defensible in a modern system of justice. I believe it causes confusion and uncertainty both for victims of crime and for accused persons, and that the principle that all accused persons are innocent until proved guilty entitles them to a straightforward acquittal in every case where the prosecution case against them cannot be established beyond reasonable doubt.

I consulted on a similar Member’s Bill proposal to abolish the not proven verdict at the end of the Parliament’s second session. Although that consultation yielded some useful responses, the level of responses was disappointing and there was in any case insufficient time to introduce a Bill. I felt that the consultation exposed that more information was required on this subject to allow for the fullest possible consideration of all of the issues involved. Having analysed the subject more fully I feel the time is right to return to this vital issue.

My bill would replace the current system of three verdicts with the same two-verdict system used in all other comparable jurisdictions. I propose these are labelled “guilty” and “not guilty”, but I will consider the case for other options.

I also believe that removing the “not proven” option makes it necessary to review the majority required for a conviction, currently eight out of 15 jurors. I believe a higher threshold, perhaps of two-thirds of jurors, would be more appropriate. However, I recognise that this is a complex issue, and I am particularly interested in hearing views on this issue, including on how any increased majority should be defined.

This is an important topic that lies at the heart of Scotland’s criminal justice system. It has the potential to affect every person in Scotland, and I believe this Bill could help to make justice simpler, clearer and fairer. I very much welcome your views as I develop these proposals in more detail.

Michael McMahon MSP

HOW THE CONSULTATION PROCESS WORKS

This consultation is being launched in connection with a draft proposal which I have lodged as the first stage in the process of introducing a Member's Bill. The process is governed by Chapter 9, Rule 9.14, of the Parliament's Standing Orders and can be found on the Parliament's website at:

<http://www.scottish.parliament.uk/parliamentarybusiness/17797.aspx>

A minimum 12 week consultation period is required, following which responses will be analysed. Thereafter, a final proposal is lodged in the Parliament along with a summary of the consultation responses. Subject to securing the required level of support for the proposal from other MSPs and political parties, and the Scottish Government not indicating that it intends to legislate in the area in question, I will then have the right to introduce a Bill which will follow the legislative process: generally, scrutiny at Stages 1 and 2 by a Parliamentary Committee and at Stage 3 by the whole Parliament.

At this stage, therefore, there is as yet not a Bill, only a draft proposal for the legislation.

The role of this consultation in the development of my Bill is to provide a range of views on the subject matter of the Bill, highlighting potential problems with the proposals, identifying equalities issues, suggesting improvements, raising any financial implications which may not previously been obvious and, in general, to assist in ensuring that the resulting legislation is fit for purpose.

The consultation process for my Bill is being supported by the Scottish Parliament's Non-Executive Bills Unit (NEBU) and will therefore comply with the Unit's good practice criteria. The Non-Executive Bill's Unit will also analyse and provide an impartial summary of the response received.

Details on how to respond to this consultation are provided at the end of the document.

Additional copies of the paper can be requested by contacting me at (MSP's Parliamentary address, telephone number and email address). Alternative formats may also be requested by contacting me and I will try to ensure that the format requested is provided. An on-line copy is available on the Scottish Parliament's website under Parliamentary Business/Bills/Proposals for Members' Bills/Session 4 Proposals

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/12419.aspx>

THE PROPOSAL

Background

The verdict in the context of criminal procedure

1. In Scots criminal law, there are two distinct procedures – solemn procedure and summary procedure.
2. Under solemn procedure, the trial proceeds on the basis of an indictment, listing the charges against the accused person, and is heard by a judge and jury. Solemn procedure is used for the more serious offences (including murder and rape), and trials are conducted either in the High Court of Justiciary or in the sheriff court.
3. Under summary procedure, the trial proceeds on the basis of a complaint, and is heard by a single sheriff or by one or more lay justices, in either case without a jury. Summary procedure is used for less serious offences, and trials are conducted in the sheriff court or the justice of the peace court.
4. A few of the most serious offences (murder and rape in particular) may only be prosecuted under solemn procedure. In relation to most other statutory and common law offences, however, the Crown Office and Procurator Fiscal Service can decide which procedure is best suited to the circumstances of the case. This decision may have implications for the sentencing options available to the court on conviction.
5. In cases prosecuted under solemn procedure, the judge decides questions of law, whereas the jury decides questions of fact. For each charge on the indictment, the jury has to consider whether or not the Crown has established, beyond reasonable doubt, that the offence charged was committed by the accused. The verdicts available to it are guilty, not guilty and not proven. Either of the latter verdicts leads to the acquittal of the accused, who (subject to limited exceptions¹) cannot be prosecuted again for the same offence. The accused has no right of appeal against a not proven verdict (despite it generally being regarded as a less satisfactory outcome from the accused's point of view than not guilty).
6. A verdict of guilty need not be unanimous; indeed, the minimum required is an absolute majority² of the 15 jurors – namely eight. If fewer than eight jurors vote for

¹ See [Double Jeopardy \(Scotland\) Act 2011](#).

² In any group decision-making context, "majority" can be an ambiguous term. In a binary choice (i.e. where there are only two options to choose from), an *absolute majority* for either option is usually defined as requiring that more than half of the total number of available votes are cast for that option, whereas a *simple majority* for an option is usually defined as requiring only that more of those who vote (and who do not abstain) vote for that option than for the alternative. In contexts where more than two options are available, a "majority" for a particular option sometimes means only that more of those who vote choose that option than any other. For example, in electoral law (as it applies to the election of MPs and constituency MSPs), "the candidate to whom the majority of votes have been given shall be declared to have been elected", even though that candidate may have secured less than 50% of the votes cast. ([Representation of the People Act 1983, Schedule 1](#), rule 18.)

guilty, either not proven or not guilty may be returned, depending on which secures more votes (and if there is a tied vote between the two, the verdict must be not proven).³ Where a jury is split, it is open to individual jurors to abstain.

7. Jury trials may continue even if up to three of the original jurors are excused (for example, because of illness), but the majority required for a guilty verdict remains at eight.⁴ However, if the jury is reduced in number and fewer than eight vote for guilty, a tied vote between the other two verdicts results in a not guilty verdict being returned.⁵

8. Before the jury retires, the judge is required to give it certain directions. These must include informing the jury of the three verdicts available to it, but there is now an established rule that the judge should not attempt to explain the difference between the not proven and not guilty verdicts.⁶

9. When a jury returns to court after considering its verdict, the foreman (or spokesperson for the jury) is asked to pronounce the verdict and must state whether it was reached unanimously or by majority. If it is by majority, the size of the majority is neither asked for nor announced.

10. Where a case is prosecuted under summary procedure, it is for the judge (i.e. the sheriff, justice or justices) to decide both questions of law and fact. As in jury trials, all three verdicts are available, with not proven and not guilty both leading to acquittal. In a case tried by two or more justices who are equally divided on the question of guilt, a verdict of not guilty must be recorded.⁷

Origins of the three-verdict system

11. The origins of the three-verdict system are to some extent obscure and disputed. According to some, it is a matter of “pure historical accident”.⁸

12. Before the 17th century, there was a choice of only two verdicts, but the terminology used varied widely. Juries did use “guilty” and “not guilty”, but more often such terms as “convictus” and “convicit” for the former, and “made qwynt”, “deliuerit innocent” or “clene and sakles” for the latter. The Justice Court used similar terms, but also “fylit” (fouled) and “clangit” (cleansed) respectively.⁹

³ Lord Hope, in *Kerr v. HM Advocate* (1992) stated “The proper course also is for an acquittal verdict which is split equally to be recorded as one of not proven.”

⁴ [Criminal Procedure \(Scotland\) Act 1995, s.90\(1\)](#).

⁵ [Criminal Procedure \(Scotland\) Act 1995, s.90\(2\)](#).

⁶ *The Laws of Scotland (Stair Memorial Encyclopedia)*, vol 17 (procedure), para 763; note 25.

⁷ [Criminal Procedure \(Scotland\) Act 1995, s.162](#).

⁸ Ian Douglas Willock, *The Origins and Development of the Jury in Scotland*, 217 (Stair Society 1966).

⁹ Joseph M. Barbato, “Scotland's bastard verdict: intermediacy and the unique three-verdict system”, 15 *Indiana International and Comparative Law Review*, 543 (2004-2005). See also *The Laws of Scotland (Stair Memorial Encyclopedia)*, vol 17, para 559. Other sources attribute the origins of the guilty and not guilty verdicts to the period of Cromwell's occupation (1650-60).

13. During the 17th century, the practice developed of having longer indictments listing specific charges, with the jury invited to decide in relation to each whether it was “proven” or “not proven”. This approach was encouraged when, in the 1680s, there were a number of cases in which juries refused to convict those charged under statutes introduced for the suppression of the Covenanters, reflecting public support for their cause. This led the Lord Advocate to make it a rule that the jury’s role was to be limited solely to deciding whether the facts libeled in the indictment has been “proven” or “not proven”, leaving it to the judge to make the final decision on guilt. As a result, the “guilty” and “not guilty” verdicts fell into abeyance.

14. This continued until the trials of Samuel Hale in 1726 and Carnegie of Findhaven and 1728. In the former case, the jury was satisfied by Hale’s defence and returned a verdict of “not guilty” to the charge of homicide. In the latter case, the evidence left no doubt that the accused had indeed killed the Earl of Strathmore during a drunken brawl, but he plausibly denied any prior intention. As a verdict of “proven” on the facts alone could have led to the conviction (and hanging) of a man the jury regarded as innocent of murder, the jury was persuaded by Carnegie’s advocate to reassert its traditional right to judge the whole case and find the accused not guilty.¹⁰

15. The re-emergence of the not guilty verdict did not displace not proven, which continued to be used as an alternative verdict of acquittal, but with a different inference. According to David Hume,

“Not uncommonly, the phrase not proven has been employed to mark a deficiency only of lawful evidence to convict ... and that of not guilty, to convey the jury’s opinion of his innocence of the charge.”¹¹

16. In the 19th century, it also came to be used by juries unwilling to convict someone of a capital offence because of sympathy for their circumstances. For example, in the trial of Isabella Rae – who was accused of the murder of her two-year old son after she jumped into a canal clutching the child to her chest – the jury seems to have been convinced that she had been rendered suicidal by a life of abject poverty.¹²

17. By this time, commentators had already recognised that a not proven verdict carried a stigma as a form of “second-class” acquittal, although it had already been established that its effects in law are identical to that of not guilty. Sir Walter Scott (whose early career was as an advocate and sheriff-depute) famously described it as “that bastard verdict”, adding “Not proven. I hate that Caledonian *medium quid*. One who is not proven guilty is innocent in the eyes of the law.”

¹⁰ S A Bennett, *Not Proven: The Verdict* Scots Law Times, SLTA 2002, 12, page 97.

¹¹ Quoted in Barbato, citation above.

¹² S. Scott Robinson, “Nineteenth Century Criminal Justice - A Perilous Defence - The Trial of Isabella Rae”, 36 *Journal of the Law Society of Scotland*, 309 (1991).

18. The three verdict system that resulted is unique to Scotland. Most other jurisdictions have a simple, binary system (with the available verdicts usually labeled guilty and not guilty).¹³

Current use of the not proven verdict

19. In 2010-11 (the latest year for which data is available), approximately 4% of those proceeded against in court (i.e. tried) were acquitted by a not guilty verdict and approximately 1% by a not proven verdict – the latter representing 16% of all acquittals.¹⁴ However, these proportions varied substantially according to the nature of the main offence. Strikingly, 14% of people charged with rape and attempted rape were acquitted on a not proven verdict – this being 26% of all acquittals for this category of case.¹⁵

20. More generally, the not proven verdict has been used more frequently by juries (in solemn proceedings, for the more serious sexual and violent offences), where it represents around a third of all acquittals, and less frequently by judges in summary trials (for less serious offences). However, as the overwhelming majority of trials are conducted under summary procedure, the overall figure is very close to that for summary prosecutions alone.¹⁶

The three-verdict system – previous reviews and proposals for change

21. The first major Government-sponsored review of the three-verdict system in modern times was undertaken by the Thompson Committee on Criminal Procedure, which reported in 1975.¹⁷ This concluded that the three-verdict system was illogical, but (by a majority) argued for its retention, mainly for fear that its abolition could lead to more guilty verdicts and hence a greater risk of wrongful conviction.

22. In 1994, the Scottish Office issued a consultation paper on juries and verdicts, which sought views on whether the three-verdict system should be retained or amended (without expressing a preference either way). The inclusion of this topic in the consultation is believed to have been prompted in part by reaction to the 1992 trial of Francis Auld for the murder of Amanda Duffy. Evidence led at the trial strongly

¹³ A few other systems provide for “differentiated acquittal” – for example, Italy, which in 1989 adopted a new code allowing for five different forms of acquittal, and California which allows acquitted defendants to petition for a “finding of factual innocence”. Bills have also been introduced in California to change “not guilty” to “not proven”. See Samuel Bray, “Not Proven: Introducing a third verdict”, *University of Chicago Law Review*, vol 75, no. 1299 (2005), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1339222.

¹⁴ This is slightly lower than in previous years – in 2009-10, it was 18%; and in 2008-09 and 2007-08, it was 20%.

¹⁵ [Statistical Bulletin: Crime and Justice Series: Criminal Proceedings in Scotland 2010-11, table 2b](#). Again, these figures represent a fall from previous years – in 2009-10, the proportions were 19% and 38%; in 2008-09, they were 21% and 36%; and in 2007-08, they were 24% and 45%, respectively.

¹⁶ In 2010-11, only 4% of all court disposals were in cases tried under solemn procedure (with a jury). See COPFS data on [Case processing: last 5 years](#).

¹⁷ Thomson Committee, *Criminal Procedure In Scotland, Second Report*, Cmnd. 6218 (1975).

suggested that the accused had indeed committed the crime (his teeth marks were found on her body), and the return of a not proven verdict was greeted with surprise and consternation. In particular, the victim's parents were instrumental in establishing a campaign against the not proven verdict.

23. The UK Government's conclusions from the consultation were set out in a White Paper which concluded:

"In the Government's view, a considerable weight of informed opinion against the three verdict system would be necessary to justify its abolition. Such weight of opinion does not appear to exist at present. **The Government therefore proposes that the three verdict system should remain.**"¹⁸

24. There have also been, prior to devolution, legislative attempts to abolish the three-verdict system. Private members' bills to that effect were introduced in 1969 by Donald Dewar and in 1993 by George Robertson, but neither became law.

25. In 1994, Lord Macaulay of Bragar tabled an amendment to the Criminal Justice (Scotland) Bill seeking the same outcome. He argued that, in the modern criminal justice system,

"it is for the Crown to prove its case beyond reasonable doubt and the not proven verdict makes no sense. If the juries are masters of the facts, as they are told they are, they must not be allowed to be the fudgers of the verdict. That is what happens in some circumstances. ... Perhaps in a domestic case where a person should have been found guilty beyond any shadow of doubt a sympathetic jury used not proven as a get-out. We should have no such get-outs in the law and we must therefore get rid of this antiquated verdict."

26. However, the amendment was resisted by the Government (partly on the basis of the results of the 1994 consultation), and was withdrawn at the end of the debate.¹⁹

27. As a result of devolution, responsibility for most aspects of the criminal justice system now lies with the Scottish Parliament. In 2007, towards the end of the Parliament's second session, I lodged a draft proposal and launched a consultation on replacing the three-verdict system with a simpler, binary system.²⁰ At the time, I suggested that the two verdicts should be labeled as "proven" and "not proven", rather than "guilty" and "not guilty". The consultation also considered the question of whether

¹⁸ *Firm and Fair: Improving the Delivery of Justice in Scotland* (Cm 2600), 1994, paragraph 3.19. Consultees who supported retention of the three-verdict system included most judges, sheriffs and JPs, all the lawyers who replied, civil liberties groups and victims' groups; those opposed included the Scottish Law Commission, two police associations and some individual sheriffs.

¹⁹ The debate is summarised in a 2009 House of Commons research note, "[The 'not proven' verdict in Scotland](#)".

²⁰ Available on the Scottish Parliament website:

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

a change was needed in the majority required for conviction. However, the number of responses was disappointing and the results therefore inconclusive; I was also not in a position in the following session to pursue the idea beyond the proposal stage.

28. I continue to believe that reform of criminal verdicts is important and overdue, which is why I have lodged a fresh draft proposal. Given the time that has elapsed since my earlier attempt, and the changed nature of the proposal itself, I feel it is right to consult again to test public and stakeholder opinion on this important issue.

29. I am encouraged that the current Justice Secretary appears to be open-minded about the case for change (based on his reported statements from 2011).²¹ However, recent criminal justice reforms have left the system unchanged, and the Scottish Government does not appear to have any plans to address the issue through its own legislation.

The case for changing to a two-verdict system

30. Various criticisms have been made of the three-verdict system (and, in particular, of the not proven verdict) over the years. From my perspective, having considered the relevant literature, the principal arguments (some of which are connected) are as follows:

- that a three-verdict system is illogical and confusing – in particular, because the jury is not allowed to receive guidance on the difference between the two acquittal verdicts
- that by including what is widely regarded as a compromise or intermediate option, the three-verdict system makes juries less likely to convict – and hence that it skews the justice system in favour of the accused
- that a not proven verdict is inconsistent with the presumption of innocence, according to which accused persons should be entitled to an unqualified acquittal if the prosecution cannot convince the jury of their guilt
- that the person given a verdict of not proven, rather than not guilty, is unfairly stigmatised (particularly as they have no right to a retrial or appeal in order to “clear their name”).

31. I consider these arguments separately below.

Illogical and confusing

32. Almost every other jurisdiction has a simple, binary system, and this is widely accepted. As noted above, the three-verdict system appears to have arisen as a result of historical accident and developed in very different circumstances from those that exist

²¹ As reported, for example, by STV: <http://news.stv.tv/scotland/283328-justice-secretary-is-open-minded-about-future-of-not-proven-verdict/>

today. (For example, while it may be understandable that 19th century juries sometimes saw a rationale for not proven when guilty might have led the accused to hang, this does not have the same force now that capital punishment has been abolished.) Scotland is rightly proud of its distinctive legal system, but this should not be an excuse for holding onto practices that are no longer defensible in the modern age.

33. As the advocate Siggie Bennett put it,

“It is ... not asking too much that the verdict system be simple, straightforward and logical. Anything else risks injustice for one or more of the people involved and the potential exposure of the community to danger. ... If nothing is done, a legal challenge to a not proven verdict will surely come on human rights grounds, eventually, for it seems distinctly arguable that an illogical verdict system infringes an accused person’s convention right to a fair trial.”²²

34. The recent case of *Cadder v. HM Advocate* (in which the Supreme Court overturned the well-established rule allowing the police to detain and question suspects without first giving them access to a lawyer) has certainly demonstrated the potential vulnerability of Scots law to successful challenge on ECHR grounds.

35. There is some evidence that the existence of three verdicts can cause confusion, both to juries and to the public. For example, in the case of *Kerr v. HM Advocate* (1992), the jury was initially split – 7 for guilty, 4 for not proven, 4 for not guilty – but, after seeking a direction from the judge, it resumed its deliberations only to return a short time later with a verdict of guilty by majority. On appeal, it was held that a miscarriage of justice had occurred, partly on the grounds that the most likely explanation for the jury’s change of position was confusion caused by the judge’s direction.

36. This confusion can be heightened by the fact that judges have been instructed since the late 1980s (by the Court of Criminal Appeal) to inform juries about the three verdicts available but not to explain what the difference is between not proven and not guilty, on the grounds that any such explanation could amount to a misdirection. A striking example of this occurred in 1996, when Sheriff Graham Johnston in Glasgow told the jury in a fraud trial:

“there has been a lot of publicity recently about Not Proven as you will probably be aware. Technically speaking, we are not supposed to explain to you what it means but I don’t believe that that should be right. I think I should tell you what I think Not Proven means.”

He duly did, but the High Court told him he was wrong, and quashed the conviction.²³

²² Article in *The Scotsman*, 28 November 2011, [“Not proven ? A non-verdict that leaves me non-plussed”](#)

²³ As reported, for example by *The Scotsman*: [“Not Proven verdict stands accused of sending a mixed message”](#)

37. It is difficult to understand how juries are meant to make an informed choice among the verdicts open to them in these circumstances. Advocate Amber Galbraith puts it very succinctly:

“I can appreciate that it [not proven] is unsatisfactory for victims and the accused. A lot of people will be surprised that juries are never given any direction as to what not proven means, [but] simply told they can find a person guilty, not guilty or not proven. I don’t think there is a need for not proven; if it is part of the system, you have to tell people what it means.”²⁴

Reduced likelihood of conviction

38. It is of course impossible to be sure what difference removal of the third verdict would make to the likelihood of convictions, since jurors are strictly prohibited (under the Contempt of Court Act 1981) from revealing the nature of their deliberations. All the same, since the not proven verdict is widely seen as a compromise or intermediate option between the poles of guilty and not guilty, it seems almost certain that its existence reduces the likelihood of juries opting for guilty.

39. A research article published by the American Psychological Association in 2007 attempted to give some answers to this problem. It reported the results of two juror simulation studies involving groups of Scottish college students asked to give a verdict on the basis of written summaries of actual criminal trials (on charges of sexual assault in the first study and physical assault in the second). Some groups were asked to choose between only two verdict options, while other groups were given three options. In the second study, the groups were also differentiated according to whether the evidence against the accused was weak, moderate or strong. The results of the second study are shown below:²⁵

| Two-Verdict System | | | | Three-Verdict System | | | |
|--------------------|------------|----------------|----------------|----------------------|------------|----------------|----------------|
| Evidence Strength | Guilty (%) | Not Guilty (%) | Not Proven (%) | Evidence Strength | Guilty (%) | Not Guilty (%) | Not Proven (%) |
| Weak | 8 | 92 | - | Weak | 0 | 8 | 92 |
| Moderate | 33 | 67 | - | Moderate | 5 | 5 | 90 |
| Strong | 63 | 37 | - | Strong | 54 | 0 | 46 |

What is striking about these results is that the likelihood of a conviction was reduced when a not proven option was available – particularly when the evidence was only moderately strong. As the authors put it: “This finding demonstrates interesting decision-making inconsistency: Jurors are not adhering to a rational choice model that

²⁴ Article in *The Scotsman*, 29 March 2007, “[New campaign is launched to rid Scottish legal system of the 300-year-old 'bastard verdict'](#)”

²⁵ [A Third Verdict Option: Exploring the Impact of the Not Proven Verdict on Mock Juror Decision Making](#), *Law Hum Behav* (2008) 32:241–252.

would predict that if defendants could be considered guilty when one set of verdict choices is available they should also be considered guilty when an expanded set of verdict choices is available". The authors suggest this may be an example of the "compromise effect" or a tendency to avoid the extremes when there is seen to be an intermediate option. The article also acknowledges, however, the limitations of the exercise, noting in particular that the not proven option was chosen far more often in the study than it is in actual criminal trials. Although this study was conducted under simulated courtroom conditions, we can never fully recreate the decision-making process that jurors participate in during a real trial. However, this evidence is as close as we have to understanding the implications of having a three-verdict system on a jury's decision-making process.

40. As noted above, the Thomson Committee saw a real danger that abolishing not proven would increase the number of wrongful convictions. However, I see no reason to equate increased convictions with injustice in this way. As Professor Peter Duff put it when commenting on the Committee's line of argument:

"In response, it might be observed that, first, their concern is based purely on speculation, and, second, there is always a danger of wrongful conviction, yet no other country in the world feels that giving the jury a choice of three verdicts is a solution to this problem."²⁶

41. Professor Duff goes on to say that there is anecdotal evidence which suggests that the not proven verdict is used in situations where the jury knows well that an accused person is guilty but feels that the law needs to be "tempered with mercy". The 'classic example being the wife who has been battered by her alcoholic husband for years and who eventually stabs him to death. A verdict of not proven is likely to be delivered in this case as the jury may feel that the accused has suffered enough at the hands of her deceased husband. However, I would argue that jurors should base their decision solely on a dispassionate assessment of the evidence presented and that it is not their place to use the verdict to express their sympathies for the individual.

42. Furthermore, there is some evidence that the likelihood of a miscarriage of justice occurring is lower when a two-verdict as opposed to three-verdict system is used as illustrated by the table below:

1997-2008

| | Scotland | England & Wales |
|-------------------------|-----------|-----------------|
| Convictions | 1,422,207 | 15,807,700 |
| Miscarriages of Justice | 969 | 2,184 |
| Percentage Value (%) | 0.068 | 0.014 |

²⁶ Peter Duff, "The Scottish Jury – a very peculiar institution", *Law and Contemporary Problems*, Vol 62, No. 2 (1999).

Although the proportion of miscarriages of justice in Scotland may seem miniscule, it is still nearly five times greater than the proportion in England & Wales during the same period.

Presumption of innocence

43. It is a fundamental principle of justice that an accused person is regarded as innocent until proved guilty, beyond reasonable doubt, by due process of law. It is for this reason that our criminal justice system puts the onus firmly on the prosecution to prove its case, while the role of the defence is to rebut that case rather than prove a contrary case (and the accused need not even give evidence).²⁷

44. Seen in that light, the ability of the court to reach a verdict of not proven seems anomalous. Since it is a verdict of acquittal, it can only be arrived at because the prosecution has failed to convince the court to the standard required – in which case, the accused is surely entitled to a straightforward and unqualified acquittal. As Dr Hugh McLachlan argues:

“As a matter of logic – given one is presumed to be innocent unless and until one is proved beyond all reasonable doubt to be guilty – there can only be two possible verdicts and, for the sake of clarity and simplicity, it would be best to use only two terms. There is no room for a begrudged verdict somewhere between established guilt and unestablished guilt. "Not guilty" and "not proven" might have different connotations, but they cannot have different meanings.”²⁸

45. In two-verdict systems, acquittal is not understood to mean that the court was fully convinced of the defence case; instead it is recognised that sometimes an accused is acquitted only because the case made for conviction fell short of the standard of proof required. I see no reason why this would not also become the case in Scotland, if a two-verdict approach was adopted. Arguably, it is only the existence of the not proven alternative that makes a not guilty verdict look like a vindication of the accused, on the grounds that it must have been chosen for a reason; but if not guilty was the only acquittal option, it would be much more difficult to draw any such inference.

Unfair stigmatisation

46. Where the not proven verdict is used, the accused is left in an unsatisfactory position of limbo – formally acquitted, but with their reputation tainted as a result of not being found not guilty. Victims and relatives sometimes also find this outcome unsatisfactory, as it denies them a sense of closure.

47. The stigma arises because the not proven verdict is often regarded as the jury’s way of saying “we know you are guilty, but we cannot prove it” (or, as the old joke goes, “not guilty – but don’t do it again”).

²⁷ The Laws of Scotland (Stair Memorial Encyclopedia), vol 17, para 565.

²⁸ Article in the Scotsman, 3 April 2007: <http://www.scotsman.com/news/scottish-news/top-stories/individuals-are-presumed-innocent-until-proven-guilty-third-verdict-is-illogical-1-741145>

48. This, to me, is unfair on the accused, particularly as he or she has no mechanism available to clear his or her name through further proceedings. I have heard it said that three verdicts give the jury a better ability to express its concluded view – distinguishing, in particular, between the bad person who only escaped conviction because of inadequacies in the prosecution case, or as a blameless person who was wrongly accused. But I don't believe that it is properly part of the jury's role to attempt such a differentiation. In any case, acquitted persons don't fall into two clear categories any more than they can be put into one – juries may have a whole range of reasons for not convicting, but the verdict for doing so should, in my view, always be the same (just as the verdict should be the same whether the jury is unanimous, or reaches its decision by majority).

49. It is, perhaps, unavoidable that some of those tried for serious offences – particularly where the evidence is widely reported – should remain tainted by the process even after a formal acquittal. There is not much that the law can do about that, so long as trials take place (as they should) in public, but what it can do is remove the formal mechanism by which such a taint is given official sanction by the verdict itself.

Q1: Do you support the general case set out above for moving to a two-verdict system? Please give reasons for your choice.

Which two verdicts?

50. In my 2007 consultation, I advocated a two-verdict system that retained “not proven” and changed “guilty” to “proven”. My preference now is to abolish “not proven”, leaving “guilty” and “not guilty” as the available verdicts. However, I am interested in views on the relative merits of these two options, and also on whether there could be another option that would avoid both sets of terminology.

Proven and not proven

51. As noted above, the question the jury is expected to answer is whether the prosecution has established (beyond reasonable doubt) proof of the offence charged. Adopting “proven” and “not proven” as the two available verdicts would reinforce this point, and should help to avoid any inference that acquittal is or should be fully exculpatory (i.e. demonstrates the accused person's innocence). This option can also seem attractive because of the link with the past, and the maintenance of something distinctively Scottish.

Guilty and not guilty

52. The main argument for “guilty” and “not guilty” is that these verdicts are well established and widely accepted in other jurisdictions. Also, since part of the rationale for abolishing the “not proven” verdict is that it leaves victims unsatisfied and the acquitted person with a permanent sense of stigma, these disadvantages could be carried over in the public mind if the label was retained for the only acquittal verdict.

53. I still believe that “proven” and “not proven” fit better with the legal principle at stake, and would be the more logical choice if we were starting from a blank sheet of paper. But I also recognise that the realities of our actual starting point make it unrealistic to expect these two verdicts to be accepted and interpreted free of the “baggage” that has built up over centuries.

Yes and no

54. There may be another option. Lord McCluskey has argued that the jury should be asked, in relation to each charge, “Has the prosecutor proved beyond reasonable doubt that the accused is guilty?” – and instructed to answer either “Yes” or “No”. These answers would be translated by the judge into conviction or acquittal respectively.²⁹ This would avoid the need for either pair of verdict-labels to be used, while still respecting the distinction between the role of the jury (to reach a conclusion on the evidence) and the judge (to convict or acquit). However, it is not clear how this would work in practice, as a bare “Yes” or “No” answer cannot easily be reported as a verdict, making it likely that those describing the outcome would soon revert to the familiar labels (not necessarily consistently).

Rape trials

55. In considering these options, I am aware, in particular, of the need to find a solution that is seen to be appropriate in rape (and other sexual assault) trials. Take a case where there is no dispute that the man accused of rape had sex with the woman in question, and the only question is whether it was consensual. Such cases often result in acquittal, because of a lack of corroborating evidence. Women’s groups have sometimes defended the not proven verdict on the grounds that it allows a jury to acquit in a way that doesn’t imply they believed the man’s evidence over the woman’s – and that simply abolishing not proven could further inhibit rape victims from coming forward.

56. I am sympathetic to these concerns, but I don’t see them as just providing a defence of the existing three-verdict system. Moving to either a binary proven/not proven system, or to the Yes/No system outlined above, could avoid the difficulties associated with a “not guilty” acquittal in a case like the one described.

Q2: If there is to be a two-verdict system, should these be (a) “proven” and “not proven”, (b) “guilty” and “not guilty”, or (c) some alternative system (such as the Yes/No approach outlined)? Please give reasons for your choice.

²⁹ He has advanced this argument in various articles, including this from the Scotsman in 2006: <http://www.scotsman.com/news/unloved-verdict-stands-test-of-word-and-law-1-1116964>.

Majority required for conviction

Background

57. As noted above, a normal jury of 15 may convict only if eight or more jurors reach that view. Even if the number of jurors is reduced by excusal (the quorum being 12), the majority required for a guilty verdict remains at eight.

58. The fact that the majority required is so low (compared, in particular, with England and Wales, where unanimity is normally required) has itself been controversial, with some commentators arguing that it is hard to say that the “beyond reasonable doubt” threshold has been crossed if nearly half the jurors continue to doubt the guilt of the accused, since such a significant level of doubt cannot easily be dismissed as unreasonable.

59. Notably, Professor Peter Duff raises his doubts:

“The adequacy of a bare majority of eight to seven is obviously open to question. This emerges very starkly when one considers that until the abolition of capital punishment in the early 1960s, it was theoretically possible for someone to be executed on the basis of this majority. In essence, is it really safe to convict someone if seven out of fifteen jurors think that the case has not been satisfactorily proven? If almost half of the jurors are not convinced of the accused’s guilt, is this not evidence in itself that the case has not been proved beyond reasonable doubt?”³⁰

60. It is also not clear why the current majority is defined by a fixed number of jurors, rather than by a proportion – in other words, why the minimum required for a conviction does not fall to 7 if the total number of jurors is reduced to 13 or 12. I can see that some provision for excusal of jurors is needed (to minimise the need for lengthy delays or even a re-trial just because one or two jurors fall ill or otherwise cannot continue). Presumably, once it is accepted that 15 is the appropriate number to start with, and hence that eight need to be convinced of guilt to justify conviction, the argument must be that the height of that hurdle (for the prosecution) should not be reduced just because of jurors being excused. After all, if the accused was convicted by 7 out of 13 remaining jurors, say, there could be a suspicion that (had it not been for the illness of two jurors) there could have been a majority in favour of acquittal.

61. It is not my intention to change the law in relation to the size of the majority (either in the case of a full or a reduced jury) for its own sake. Nor do I intend to make changes to the overall size of the jury or the quorum (i.e. the minimum size to which it may be reduced by excusal). However, I do think it important to consider whether moving to a two-verdict system would require a change to the size of the majority as a consequence. And in order to reach a view on what larger majority might be appropriate, these other aspects must also be considered.

³⁰ Peter Duff, “The Scottish Jury – a very peculiar institution”, *Law and Contemporary Problems*, Vol 62, No. 2 (1999), 173 - 201

Previous consideration of the majority rule

62. The Thomson Committee considered the case for a two-thirds majority but, noting that most of the evidence it received opposed this, concluded that no change was necessary, in view of other safeguards to protect the innocent. Similarly, the Scottish Office concluded in its 1994 White Paper that no change was needed to the size of the majority required for conviction.

63. The Scottish Government consulted in 2008 on various aspects of the jury system. While the consultation specifically excluded consideration of changes to the three-verdict system, it did consider the case for reducing the size of the jury. In that context, it noted that the larger the jury (and the 15-member Scottish jury is unusually large), the more difficult a unanimity requirement would be, thus increasing the need to allow conviction by majority. Conversely, it argued, smaller juries carry an increased risk of allowing individual jurors undue influence, and so increase the case for higher (or “weighted”) majorities.³¹

64. In a different way, the recent Carloway review (prompted by the Cadder verdict) also made the link between the majority issue and the three-verdict system, saying that “if the issue of majority verdicts were to be examined, a review of the three verdict system (i.e. ‘not proven’) would have to follow”.³²

65. A number of people who have commented on the merits of the three-verdict system have made a direct connection with the size of the majority. For example, the criminal defence lawyer George More has argued that any change to a two-verdict system “would have to be accompanied by a change in the majority” – suggesting a majority of 13 out of 15, or 10 out of a jury reduced to the quorum of 12.³³

Q3: Do you agree that moving to a two-verdict system makes it necessary to increase the majority required for a conviction? If so, please explain your reasons.

How large a majority?

66. If it is accepted that there is at least an argument for increasing the majority (in connection with moving to a two-verdict system), the question arises of what the higher majority should be, and how it should be expressed (i.e. by number or by proportion).

67. The obvious proportions to choose (above a half) are two-thirds and three-quarters, and there is a further choice as to whether that is the minimum proportion required, or whether the minimum must exceed that proportion. Each proportional option has different implications for the actual numbers that would be required if the number of jurors was reduced. Similarly, if a fixed minimum number (above 8) is chosen, this has

³¹ [The Modern Scottish Jury in Criminal Trials](#), paragraph 7.12.

³² *The Carloway Review – Report and Recommendations*, paragraph 1.0.20. Available at: <http://www.scotland.gov.uk/About/CarlowayReview>

³³ <http://www.scotsman.com/news/no-doubt-in-defence-of-verdict-1-1006802>

different implications for the effective proportion of the jury this number represents if the number of jurors was reduced. The main options are summarised in the table below.

| Majority required for conviction | Size of jury (at end of trial) | | | |
|----------------------------------|--------------------------------|----------------|-----------------|-----------------|
| | 15 (full jury) | 14 (1 excusal) | 13 (2 excusals) | 12 (3 excusals) |
| More than half | 8 (53%) | 8 (57%) | 7 (54%) | 7 (58%) |
| 8 (current) | 8 (53%) | 8 (57%) | 8 (62%) | 8 (67%) |
| 9 | 9 (60%) | 9 (64%) | 9 (69%) | 9 (75%) |
| At least two-thirds | 10 (67%) | 10 (71%) | 9 (69%) | 8 (67%) |
| 10 | 10 (67%) | 10 (71%) | 10 (77%) | 10 (83%) |
| More than two-thirds | 11 (73%) | 10 (71%) | 9 (69%) | 9 (75%) |
| 11 | 11 (73%) | 11 (79%) | 11 (85%) | 11 (92%) |
| At least three-quarters | 12 (80%) | 11 (79%) | 10 (77%) | 9 (75%) |
| More than three-quarters | 12 (80%) | 11 (79%) | 10 (77%) | 10 (83%) |
| 12 | 12 (80%) | 12 (86%) | 12 (92%) | 12 (100%) |

68. Clearly, it would not be viable to set a higher fixed majority than 12 without calling into question the jury quorum of 12. However, other options would be possible, such as George More's suggestion (paragraph 60), or a move to unanimity (perhaps qualified along the lines of the English model).

69. At this stage, while I am generally convinced that some increased majority would be appropriate if a two-verdict system were adopted, I have no firm views on what that majority should be (other than that I would be unlikely to favour a move to unanimity). However, as a starting point, I would suggest that a majority of at least two-thirds could be appropriate. Accordingly, I would welcome views on the following questions in particular.

Q4: If there is to be an increased majority, how should it be defined?

Q5: Would an increased majority also require changes to (a) the size of the jury; (b) the quorum; (c) any other related factor (such as the right of jurors to abstain in any vote)?

Other issues

Financial implications

70. While the changes outlined above would mark a significant change in criminal procedure, I see no reason to consider that they would be either difficult or expensive to

implement. I would not expect there to be any significant overall impact on the rate of conviction or on the average duration of criminal trials. No doubt there would be a need for some lead-in period to ensure that any necessary administrative adjustments had been made, and that judges were aware of the need to instruct juries appropriately on the new arrangements, but it should be possible to absorb any associated costs within existing budgets.

Q6: What is your assessment of the likely financial implications (if any) of the proposed Bill?

Q7: How quickly could the proposed changes be brought into effect?

Equalities implications

71. I am not currently aware of any likely adverse impact of the proposed changes on equalities grounds. Should the proposal be developed further, I would expect a full equalities impact assessment to be carried out. At this stage, however, I would be grateful for an advance indication of any equalities concerns that may arise.

Q8. Is the proposed Bill likely to have any substantial positive or negative implications for equality? If it is likely to have a substantial negative implication, how might this be minimised or avoided?

Other considerations

72. Finally, it would be useful to know of any other relevant considerations, not covered in the previous questions, that you think I ought to consider in developing this proposal.

Q9. Do you have any other comments on or suggestions relevant to the proposal?

SUMMARY AND LIST OF QUESTIONS

The three-verdict system

At present, three verdicts are available in a criminal trial – guilty, not guilty and not proven. This three-verdict system dates back nearly 300 years, and appears to be the result of accident more than of design. It has long been controversial. In my view, the main arguments against it are:

- that it is illogical and confusing
- that it skews the justice system in favour of the accused
- that a not proven verdict is inconsistent with the presumption of innocence
- that the person given a verdict of not proven is unfairly stigmatised.

Q1: Do you support the general case set out above for moving to a two-verdict system? Please give reasons for your choice.

I advocate moving to a simple, two-verdict system. This raises the question of what these verdicts should be. The main options appear to be:

- “proven” and “not proven” – to reflect the role of the jury in deciding whether the prosecution has proved the charge against the accused
- “guilty” and “not guilty” – which is the established system in most other jurisdictions, and the option I currently prefer
- a system in which the jury simply answers Yes or No to the question whether the charge against the accused has been proved to the standard required.

Q2: If there is to be a two-verdict system, should these be (a) “proven” and “not proven”, (b) “guilty” and “not guilty”, or (c) some alternative system (such as the Yes/No approach outlined)? Please give reasons for your choice.

The majority required for conviction

At present, a jury can only convict if at least eight of the 15 jurors opt for a guilty verdict. This is a fixed minimum – that is, it remains eight even if the number of jurors is reduced during the trial (the minimum, or quorum, being 12). I believe that moving to a two-verdict system would make it appropriate to require, instead, a higher (or “weighted”) majority for a conviction. There are various options for how such an increased majority could be defined – including a higher minimum number of jurors, or a proportion of jurors above a half (e.g. two-thirds or three-quarters). My current preference is for a majority of at least two-thirds.

Q3: Do you agree that moving to a two-verdict system makes it necessary to increase the majority required for a conviction? If so, please explain your reasons.

Q4: If there is to be an increased majority, how should it be defined?

Q5: Would an increased majority also require changes to (a) the size of the jury; (b) the quorum; (c) any other related factor (such as the right of jurors to abstain in any vote)?

Other issues

Q6: What is your assessment of the likely financial implications (if any) of the proposed Bill?

Q7: How quickly could the proposed changes be brought into effect?

Q8. Is the proposed Bill likely to have any substantial positive or negative implications for equality? If it is likely to have a substantial negative implication, how might this be minimised or avoided?

Q9. Do you have any other comments on or suggestions relevant to the proposal?

HOW TO RESPOND TO THIS CONSULTATION

You are invited to respond to this consultation by answering the questions in the consultation and by adding any other comments that you consider appropriate.

Responses should be submitted by **5 October 2012** and sent to:

Michael McMahon MSP
Room M1.09
Scottish Parliament
Edinburgh EH99 1SP

Tel: 0131 348 8582
Fax: 0131 348 6941

E-mail: michael.mcmahon.msp@scottish.parliament.uk

Please indicate whether you are a private individual or an organisation

Respondents are also encouraged to begin their submission with short paragraph outlining briefly who they are, and who they represent (which may include, for example, an explanation of how the view expressed was consulted on with their members).

Important Note

Under section 8 of the Contempt of Court Act 1981, "it is a contempt of court to ... disclose ... any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings". If your response to this consultation is informed by previous experience serving as a member of a jury, you should therefore ensure that your submission does not disclose any such particulars.

To help inform debate on the matters covered by this consultation and in the interests of openness, please be aware that the normal practice is to make responses public – by posting them on my website <http://michaelmcmahonmsp.snappages.com/> and in hard copy in the Scottish Parliament's Information Centre (SPICe).

Therefore, if you wish your response, or any part of it, to be treated as **anonymous**, please state this clearly along with the reasons for this. If I accept the reasons, I will publish it as "anonymous response". If I do not accept the reasons, I will let you know and give you the option of withdrawing it or submitting it on the normal attributable basis. If your response is accepted as anonymous, it is your responsibility to ensure that the content of does not allow you to be identified.

If you wish your response, or any part of it, to be treated as **confidential**, please state this clearly and give reasons. If I accept the reasons, I will not publish it (or publish only

the non-confidential parts). However, I am obliged to provide a (full) copy of the response to the Parliament's Non-Executive Bills Unit when lodging my final proposal. As the Parliament is subject to the Freedom of Information (Scotland) Act (FOISA), it is possible that requests may be made to see your response (or the confidential parts of it) and the Parliament may be legally obliged to release that information. Further details of the FOISA are provided below.

NEBU may be responsible for summarising and analysing the results of this consultation and will normally aim to reflect the general content of any confidential response in that summary, but in such a way as to preserve the confidentiality involved. You should also note that members of the committee which considers the proposal and subsequent Bill may have access to the full text of your response even if it has not been published in full.

There are a few situations where not all responses will be published. This may be for practical reasons: for example, where the number of submissions we receive does not make this possible or where a large number of submissions are in very similar terms. In the latter case, only a list of the names of people and one response who have submitted such responses would normally be published.

In addition, there may be a few situations where I may not choose to publish your evidence or have to edit it before publication for legal reasons. This will include any submission which contains defamatory statements or material. If I think your response potentially contains such material, usually, this will be returned to you with an invitation to substantiate the comments or remove them. In these circumstances, if the response is returned to me and it still contains material which I consider may be defamatory, it may not be considered and it may have to be destroyed.

Data Protection Act 1998

As an MSP, I must comply with the requirements of the Data Protection Act 1998 which places certain obligations on me when I process personal data. Normally I will publish all the information you provide (including your name) in line with Parliamentary practice unless you indicate otherwise. However, I will not publish your signature or personal contact information (including, for example, your home telephone number and home address details, or any other information which could identify you and be defined as personal data).

I may also edit any information which I think could identify any third parties unless that person has provided consent for me to publish it. If you specifically wish me to publish information involving third parties you must obtain their consent first and this should be included in writing with your submission.

If you consider that your response may raise any other issues concerning the Data Protection Act and wish to discuss this further, please contact me before you submit your response.

Further information about the Data Protection Act can be found at: www.ico.gov.uk.

Freedom of Information (Scotland) Act 2002

As indicated above, once your response is received by NEBU or is placed in the Scottish Parliament Information Centre (SPICe) or is made available to committees, it is considered to be held by the Parliament and is subject to the requirements of the Freedom of Information (Scotland) Act 2002 (FOI(S)A). So if the information you send me is requested by third parties the Parliament is obliged to consider the request and provide the information unless the information falls within one of the exemptions set out in the Act, even if I have agreed to treat all or part of the information in confidence and to publish it anonymously. I cannot therefore guarantee that any other information you send me will not be made public should it be requested under FOI.

Further information about Freedom of Information can be found at: www.itspublicknowledge.info.