



## Briefing for the Public Petitions Committee

**Petition Number:** [PE1562](#)

**Main Petitioner:** Alan McLean

**Subject:** Perverse Acquittal

Calling on the Scottish Parliament to urge the Scottish Government to consider the need for a trial judge to have the power to refer a jury verdict to the High Court of Justiciary in the event that the judge believes the verdict to be perverse (eg irrational, unsupported or unbelievable)

### Proposed Reform

The information provided as part of the petition indicates that the petitioner is seeking new powers for a trial judge who believes that a jury's decision to acquit an accused (not guilty or not proven) is perverse. In such cases, the petitioner would like the judge to have the ability to refer the verdict to the court of appeal for reconsideration.

A possible alternative would be for the prosecution to be given a new right to appeal the decision of a jury to acquit an accused. It may be noted that the defence (but not the prosecution) currently has the possibility of appealing on the basis that the jury returned a verdict which no reasonable jury, properly directed, could have returned.

### Current Legal Provisions

Criminal court cases are dealt with under either solemn or summary procedure. The former is used for the most serious of cases and may lead to a trial in the High Court or a sheriff court. Trials under solemn procedure involve both a judge and jury.<sup>1</sup> The judge decides questions of law and the jury questions of fact.

After a jury's verdict has been recorded, it cannot be altered or explained. However, if it is self-contradictory or contrary to the judge's directions on a point of law, the judge may require the jury to reconsider it.

Sheriff courts, along with justice of the peace courts, also deal with less serious cases under summary procedure. A jury is not used in a summary trial, with the verdict being determined by the judge.

---

<sup>1</sup> The term 'judge' is used in this briefing to cover High Court judges, sheriffs and, in relation to justice of the peace courts, stipendiary magistrates and justices.

As well as being a trial court, the High Court also acts as the court of appeal. The defence and prosecution have different rights of appeal, with the prosecution's ability to appeal against a verdict being more limited. In relation to solemn procedure cases:

- the defence may seek to appeal against conviction on the ground that there has been a miscarriage of justice. The bases upon which the defence may seek to establish such a miscarriage include "the jury's having returned a verdict which no reasonable jury, properly directed, could have returned"<sup>2</sup>
- the prosecution cannot appeal against the decision of a jury to acquit, although it can appeal against the decision of a judge to acquit without the matter being considered by the jury (eg where the judge accepts a defence submission of 'no case to answer' following the close of the prosecution evidence)<sup>3</sup>

In relation to summary procedure cases:

- the defence may seek to appeal against conviction on the ground that there has been a miscarriage of justice<sup>4</sup>
- the prosecution can appeal against an acquittal on a point of law<sup>5</sup>

### **Scottish Law Commission**

A Scottish Law Commission [Report on Crown Appeals](#) (2008) focuses on appeals against judicial rulings rather than jury verdicts:

"At the outset we should make clear that the present project is concerned only with judicial rulings and rights of appeal against judicial rulings; it does not involve consideration of rights of appeal following a jury verdict that acquits the accused. At present the accused has a right of appeal following a verdict of guilty but the Crown has no such right in the event of a verdict of not guilty or not proven. We are not asked to consider any change in this position." (p 1-2)

It does, however, include some information on the existing ability of the defence to appeal a jury's guilty verdict:

"In general (...) the Appeal Court has been reluctant to interfere with verdicts on this ground, on the basis that questions of credibility and reliability of evidence are matters for the jury and the court should be slow to substitute its own views." (p 74)

---

<sup>2</sup> Section 106 of the Criminal Procedure (Scotland) Act 1995.

<sup>3</sup> A submission of no case to answer (under section 97 of the Criminal Procedure (Scotland) Act 1995) seeks to establish that there is insufficient evidence in law to justify the accused being convicted. The prosecution's right of appeal in this area is set out in section 107A of the Criminal Procedure (Scotland) Act 1995 (as inserted by the Criminal Justice and Licensing (Scotland) Act 2010).

<sup>4</sup> Section 175 of the Criminal Procedure (Scotland) Act 1995.

<sup>5</sup> Section 175 of the Criminal Procedure (Scotland) Act 1995.

“Overall, the cases seem to establish that the test that must be satisfied for such an appeal to succeed is demanding. The justification for a strict test is the general rule that credibility and reliability are matters for the decision of the jury, and unless the jury’s verdict is shown to be unreasonable or perverse the court will not interfere with it. Finally, it should perhaps be emphasised that the question of whether a verdict is one that no reasonable jury properly directed in the law could have returned is itself a question of law; that is the theory that underlies section 106(3)(b), and provides the basis on which the Appeal Court can interfere with such verdicts’.” (p 75-76)

It also provides some relevant comparative information. For example, it states that:

“Canada is unusual in giving the prosecution a general right of appeal against acquittals on a question of law. This right, which has been available since 1892, extends to all acquittals, including acquittals by a jury on the merits of the case.” (p 88)

“In order to overturn a jury verdict of acquittal where the Crown has established an error of law at the trial, the onus is upon the Crown to satisfy the appeal court ‘that the verdict would not necessarily have been the same if the trial judge had properly directed the jury’, which has been held to be equivalent to showing that the jury’s verdict ‘might have been different’ had the error of law not occurred.” (p 89)

### **Level of Perverse Acquittals**

Various issues make it difficult to assess whether and to what extent perverse acquittals might be a problem – in particular, legal restrictions on questioning jurors about their deliberations.

In addition, it might be argued that there can sometimes be a role for juries in tempering the strict application of the law with mercy.<sup>6</sup>

### **Other Reforms**

One possible reason for a jury reaching a verdict which an external observer might consider unreasonable could involve jurors being improperly influenced. In this context, it may be noted that provisions of the Double Jeopardy (Scotland) Act 2011 on tainted acquittals allow for the possibility of an accused person being retried for the same crime where the original acquittal may have been influenced by an offence against the course of justice (eg involving interference with a juror). The original acquittal must be set aside and a new trial permitted by the High Court, on the application of the Lord Advocate.

The fact that a Scottish jury can (at present) convict an accused on the basis of a simple majority is, at least when compared with any rule requiring

---

<sup>6</sup> For example, see Professor Duff’s discussion of the use of the not proven verdict in [The Scottish Criminal Jury: A Very Peculiar Institution](#) (1999, p 195).

unanimity amongst jurors, sometimes said to lessen the chances of perverse acquittals – on the basis that one biased juror has less power to affect the outcome. The size of jury majority required for a conviction is currently under consideration within the context of section 70 of the Criminal Justice (Scotland) Bill.

**Frazer McCallum**

Senior Researcher

31 March 2015

SPICe researchers are not able to discuss the content of petition briefings with petitioners or other members of the public. However if you have any comments on any petition briefing you can email us at [spice@scottish.parliament.uk](mailto:spice@scottish.parliament.uk).

Every effort is made to ensure that the information contained in petition briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.