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PE1562/C

Ned Sharratt
Assistant Clerk,
Public Petitions Committee
The Scottish Parliament
EDINBURGH
EH99 1SP

Our Ref:LS74/10 AM/LA
Date:21st May 2015
petitions@scottish.parliament.uk

Dear Mr Sharratt,

CONSIDERATION OF PETITION 1562 – (PERVERSE ACQUITTAL)

I thank you for your letter dated 29 April 2015 addressed to my colleague Matthew Thomson, the Society's Legal Aid Policy Officer which has been passed to me for my attention.

I respond to you in my capacity as Secretary to the Society's Criminal Law Committee, having also passed a copy of your letter to members and received their comments upon its terms.

I should therefore like to respond to you as follows.

We note the terms of the letter dated 20th May 2015 from the Cabinet Secretary for Justice Michael Matheson MSP to the Public Petitions Committee Convener John Pentland MSP.

In particular, we contributed to Lord Bonomy's review by way of our written response in November 2014, the link to which is attached for information:

<http://www.lawscot.org.uk/media/401505/CRIM-The-Post-corroboration-Safeguards-Review-November-.pdf>

At that time, we reiterated our position as stated in our written evidence to the Scottish Parliament's Justice Committee in August 2013 upon the general principles of the Criminal Justice (Scotland) Bill which remains before that Committee.

We stated that proper research should be commissioned in order to determine the number of persons who sit on a jury and the majority required for any verdict and that

Scottish Government should commission such research.

We also note paragraph 12.29 of Lord Bonomy's Final Report of his Post-corroboration Safeguards Review published on 21st April 2015 which states the following:

"12.29 It is strongly recommended that research should be undertaken in early course to ensure that decisions about what, if any, appropriate changes to jury size, majority and verdicts maybe appropriate are made on an informed basis. The Chair and members of the Reference Group are willing to re-convene to consider the research findings, and to make such further recommendations as are appropriate in light of those findings."

We also note from the terms of the Cabinet Secretary for Justice's letter dated 20 May 2015 that it is Scottish Government's intention to work with stakeholders during the remainder of the current Parliamentary session to develop and seek consensus on a package of proposals for criminal justice reform and jury research is to be considered in that context

We welcome the opportunity to work with Scottish Government and other stakeholders in this regard.

With particular reference to the Petition PE1562, we have the following comments:

While it may be observed that there is at present a right for the defence to appeal a conviction with no equivalent right for the prosecution to appeal against the decision of a jury to acquit an accused, the prosecution can of course appeal against the decision of a judge to acquit without the matter being considered by the jury such as where he or she has accepted a defence submission of "no case to answer" following the close of the prosecution case all in terms of section 97 of the Criminal Procedure (Scotland) Act 1995.

This prosecution right of appeal is set out in section 107A of the Criminal Procedure (Scotland) Act 1995 which was inserted by section 74 of the Criminal Justice and Licensing (Scotland) Act 2010 and brought into force on 28 March 2011.

We highlight, however, the different positions of the prosecution and the defence in a criminal trial. The role of the prosecution is to present evidence in the public interest, and where that evidence is sufficient in law to justify it and it is appropriate to do so, to seek a conviction on the basis that the prosecution has proved guilt beyond reasonable doubt.

The defence need only persuade a majority of jurors that there is a reasonable doubt and, if such doubt exists, the benefit of the doubt must be afforded to the accused and the jury should therefore acquit.

It is not for the defence to be required to lead evidence or prove its case, but it need only cast a reasonable doubt on the prosecution case.

With particular reference to the very useful SPICe briefing for the Public Petitions Committee on this Petition, we note that the Scottish Law Commission Report on Crown Appeals from July 2008 concentrated on Crown appeals against judicial rullings as opposed to jury verdicts and that the Scottish Law Commission at that time were not being asked to consider any change to the Crown having no right of appeal in the event of a verdict of not guilty or not proven.

We also note from the SPICe briefing that legal restrictions on the questioning of jurors about their deliberations may make it difficult to assess whether and to what extent perverse acquittals maybe problematic. On the basis that the prosecution seeks a conviction and the defence an acquital, we envisage that it may be difficult for the Appeal Court, on a prosecution appeal against an acquittal by a jury being able to determine whether the acquittal was perverse. The jury must be presumed to have complied with their oath to give a true verdict according to the evidence and, given the jury's deliberations are confidential, it would be difficult to envisage a situation where a judge would be confident of upholding such an appeal.

We further refer to the SPICe briefing and note that the provisions at section 2 of the Double Jeopardy (Scotland) Act 2011 now provide for a new prosecution in respect of an acquitted accused where either the acquitted accused or some other person has subsequently been convicted of an offence against the course of justice, or the court concludes on the balance of probabilities that either the acquitted accused or some other person has committed an offence against the course of justice in connection with the proceedings on the original indictment or complaint. (tainted acquittal).

With further reference to the Scottish Law Commission Report as referred to in the SPICe Briefing, we note at paragraph 2.30 of Appendix D at Page 88 of the Report that Canada has among the most extensive rights of prosecution appeal of any common law jurisdiction.

We note, however, that the Canadians Supreme Court has made it clear that it is not possible to appeal a jury verdict of acquittal simply on the ground that it is unreasonable and refer to
R v Biniaris [2000] 1 SCR 381 at paragraphs 30-33 in this regard.

<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1777/index.do>).

For the avoidance of any doubt, Canadian law would not permit an appeal in the circumstances envisaged by this Petition although it would permit an appeal based on e.g. the judge misdirecting the jury or making an erroneous ruling on the admissibility of the evidence.



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We trust that this information is of some assistance to the Scottish Parliament's Public Petitions Committee in consideration of this Petition.

Should you, however, require further information, please do not hesitate to contact me.

Yours sincerely,

Alan McCreadie
Deputy Director, Law Reform