OFFICIAL REPORT
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Criminal Justice Committee

Wednesday 13 December 2023

Session 6

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Pàrlamaid na h-Alba

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CRIMINAL JUSTICE COMMITTEE
34th Meeting 2023, Session 6

CONVENER

*Audrey Nicoll (Aberdeen South and North Kincardine) (SNP)

DEPUTY CONVENER

*Russell Findlay (West Scotland) (Con)

COMMITTEE MEMBERS

*Katy Clark (West Scotland) (Lab)
*Sharon Dowey (South Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Rona Mackay (Strathkelvin and Bearsden) (SNP)
*Pauline McNeill (Glasgow) (Lab)
*John Swinney (Perthshire North) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Laura Buchan (Crown Office and Procurator Fiscal Service)
Alisdair Macleod (Crown Office and Procurator Fiscal Service)
Stuart Munro (Law Society of Scotland)
Stuart Murray (Scottish Solicitors Bar Association)
Ronnie Renucci KC (Faculty of Advocates)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 13 December 2023

[The Convener opened the meeting at 10:01]

Victims, Witnesses, and Justice Reform (Scotland) Bill: Stage 1

The Convener (Audrey Nicoll): Good morning, and welcome to the 34th meeting in 2023 of the Criminal Justice Committee. We have received no apologies this morning.

Our main item of business today is to continue to take evidence on the Victims, Witnesses, and Justice Reform (Scotland) Bill. We will continue phase 2 of our scrutiny and focus specifically on part 4 of the bill, which covers the abolition of the not proven verdict and changes to jury sizes and majorities.

We are joined by Ronnie Renucci KC, who is vice-dean of the Faculty of Advocates; Mr Stuart Munro from the Law Society of Scotland; and Mr Stuart Murray, who is president of the Scottish Solicitors Bar Association. Welcome to you all.

I refer members to papers 1 and 2. I intend to allow up to 75 minutes for this session.

As ever, I will begin with a general question. I will work from my right to my left, and bring in Mr Munro first, then Mr Renucci, and then Mr Murray. Why do you believe that the not proven verdict should be retained as a third verdict?

Stuart Munro (Law Society of Scotland): Good morning. The Law Society's position, which is set out in its response to the call for evidence, is essentially that any criminal justice system is complex and is the sum of its parts. The object of any system should always be to convict the guilty and acquit the innocent, and to do so safely. We see periodic reminders, such as the Horizon scandal, of why it is so important to ensure that the balance is correctly calibrated.

Our view, in essence, is that the not proven verdict is one part of a greater whole that operates together to produce what we consider to be a broadly safe system. If one part of that whole, such as the not proven verdict, were to be taken away, the system would be put out of kilter, and other changes would have to be made in order to compensate, as it were, for that change.

Ronnie Renucci KC (Faculty of Advocates): Good morning. I broadly agree with Stuart Munro. The position of the Faculty of Advocates has always been that the not proven verdict cannot be removed in isolation without replacing it with some other form of safeguard.

We have a unique system in Scotland, given the size of our juries and the fact that we have three verdicts. I think that we have the only criminal jurisdiction in which someone can be convicted of a charge of murder, for example, by a majority of one. In some ways, the three verdicts have therefore provided a safeguard and, if a safeguard is going to be removed, it must be replaced with another. Our primary objection has always been that the not proven verdict could not be removed without replacing it with something else.

I recognise that there is no appetite any more for the not proven verdict. Obviously, that is a matter for Parliament, but we stress that, if the not proven verdict is going to be removed, some other safeguard has to be put in its place.

Stuart Murray (Scottish Solicitors Bar Association): Good morning, and thank you for inviting me to give evidence today on behalf of the SSBA.

Ultimately, the profession and the SSBA state that the not proven verdict is essentially a safety valve for jurors—for example, in a scenario in which a jury is not utterly convinced of an accused's innocence, but feels that the Crown has failed to prove guilt beyond a reasonable doubt. Of course, the principal test for the Crown is to prove guilt beyond a reasonable doubt. In cases that deal with rape, attempted rape, murder, other serious sexual offences and other matters of the most serious nature that call on the highest court in the country, that protection for accused persons is vital.

The Convener: Thank you very much for those opening responses. I will ask a follow-up question and put it to the three of you in the same order as before.

In the interests of having an accessible and transparent justice system in Scotland, how would you define "not proven"? That there is no definition of the not proven verdict has come up in previous evidence sessions. How would you define "not proven" if its meaning were to be set out in legislation, for example?

Stuart Munro: At the basic level, it is exactly the same as not guilty. It has exactly the same impact as not guilty. It is a verdict of acquittal. We used to talk about its being a matter of emphasis, with juries indicating their view of the evidence as a whole by selecting between not proven and not guilty. However, that is very difficult to pin down. It is difficult to know what might be in the minds of individual jurors and, obviously, we are prohibited by law from asking them. Ultimately, the not proven verdict is no more than that. It is a matter

of emphasis. It is perhaps an indication that is given by a jury that it is uncertain about a case.

Returning a not proven verdict as opposed to a not guilty one can be a positive in some limited cases for complainers, who can feel that a jury is not, as it were, branding them as a liar. Equally, in some respects, it is unsatisfactory. The truly innocent accused might feel that they did not get a fair verdict if the outcome is not proven rather than not guilty. However, fundamentally, from a legal point of view, not proven means exactly the same as not guilty.

The Convener: Okay. Thank you.

Ronnie Renucci: Ultimately, it is perhaps a matter of emphasis. It has to be remembered that we do not operate in an inquisitorial system. The purpose of the jury is not to find the truth; the question for the jury is whether the Crown has proved the case beyond a reasonable doubt. It is not a matter of "with a degree of certainty"; it is a matter of "beyond a reasonable doubt".

We should also remember that, day in and day out, juries are given directions by judges and sheriffs that it is not a matter for the defence or the accused to prove his innocence; it is a matter of whether the Crown can prove his guilt. It may be found in many cases that members of the jury are not convinced of the accused's innocence, but the Crown has failed to meet the standard of proof beyond a reasonable doubt. Therefore, the not proven verdict allows the jury perhaps to give a more detailed verdict in a sense, and to say, "The Crown has failed in that, and it is not proven."

That is perhaps where the verdict comes into sexual offences cases. We must remember that rape cases are fairly unique in that the jury is asked to determine whether a crime has been committed. In the normal course of events, sexual intercourse between two parties is not a crime; it becomes a crime when it is done without consent. That is different from when there is a body with a stab wound, because we then know already that a crime has been committed and it then becomes an issue of whether the person committed the crime. In many cases, a jury in a rape case has to decide whether the crime has actually been committed. A verdict of not proven may be a better way of expressing its view that the Crown has failed to establish even that.

It is very difficult to define "not proven" in any statutory form, if that is what one is thinking. If it had to be defined, it would be a matter of emphasis.

The verdict also has a place in our system at present. If we are going to maintain a jury of 15, with a majority of eight to seven, and remain with the system that we have, it could not possibly be taken away. It is an integral part of the 15-person jury with three verdicts system. It is for the Crown to prove beyond a reasonable doubt, and it must have a majority of at least eight to seven. One can imagine a situation in which a number of those 15 people think that the person is guilty, a number think that the person is not guilty, and others think, "I don't think the Crown has proved its case. I'm not quite sure either way, and the Crown hasn't met the standard that is required." Their verdict would therefore be not proven. That is why the verdict fits very neatly within our criminal justice system at the moment.

The Convener: Thank you very much. Would Stuart Murray like to add anything?

Stuart Murray: Both of my colleagues have given fairly concise answers that I cannot go beyond. Their reasons are well founded. However, I will say that I would be reluctant to attempt to give a definition of the not proven verdict. To do so might well be a dangerous game; in fact, the jury manual that judges use to give direction includes commentary on that. It says that it may not be advisable to give direction as to an exact definition of "not proven". I stand to be corrected, but I think that I am right in saying that Professor Fiona Leverick gave evidence to that effect to this committee.

I have described the not proven verdict as a safety valve; it is part of a system of safeguarding accused persons. Other countries have in place safeguards that go beyond that, I think—for example, where a unanimous decision is required in order to prove guilt.

The Convener: I will now bring in other members. Fulton MacGregor is first.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Good morning to the panel.

I want to go back to something that Stuart Munro said in his previous answer. It is something that we have certainly heard before in taking evidence over the past number of weeks. He said that there is no difference in outcome between the not guilty and not proven verdicts. For the benefit of laypeople MSPs, if there is no difference, why do we need the extra verdict, considering that no other system has it?

Stuart Munro: That is a fair question. I think that the committee heard from Eamon Keane on a previous occasion that the not proven verdict has a very interesting historical back story. It could legitimately be said that we do not need a not proven verdict but that we need a verdict of conviction and a verdict of acquittal, as is the case in pretty much every comparable jurisdiction. However, we have it. We probably have it because of a historical accident as much as anything else, but it has become an embedded part of our system, and it is seen as one of the critical

features that give us proper balance and, we hope, allow the original aim—convict the guilty, acquit the innocent—to be best achieved. You can make a perfectly cogent argument to say that we do not need it, but the point that I tried to get across in my previous answer—I think that the others have said much the same—is that, if you take off that one bit of the system, there will be consequences that have to be addressed.

10:15

Fulton MacGregor: That brings me on to my second question. All three of you have talked about balance. Do you have a fear that, if the Parliament gets rid of the not proven verdict, either the number of wrongful convictions will increase or the opposite will occur and more people will walk free when they are actually guilty? You have talked a lot about the not proven verdict being needed for balance, but what would happen if the balance, as you are calling it, was taken away?

Stuart Munro: That is the logical concern. If the starting point is that we think that our system pretty much gets it right and allows the balance to be struck correctly, disturbing it will have ramifications. It is very hard to predict how many wrongful convictions abolishing the not proven verdict might result in, but that has to be the logical implication of doing so.

There are other elements of our system about which we have concerns. The simple majority verdict, for instance, is not used in any comparable jurisdiction, but we allow a conviction on the basis of eight out of 15. That would be unconstitutional in the United States, for example, and convictions would simply be overturned if a jury tried to do that in many other jurisdictions.

Fundamentally, we regard the not proven verdict as something that weighs in the balance, set against the other considerations, and if you take away something that is regarded as a safeguard and do not address some of the other areas of concern, then, yes—there would have to be a risk of an increase in the number of wrongful convictions.

Ronnie Renucci: I would not say that there is no difference between not proven and not guilty. There is no difference in the outcome, which is acquittal, but there is a subtle difference between not proven and not guilty. When I explained our system to colleagues in America, they were aghast. However, they did not ask, “How do you get convictions?”; their question was, “How on earth do you get any acquittals in that system?”. Remember, the jury does not say that a matter is for certain. There will always be an unknown.

Perhaps a way of looking at the not proven verdict in our system with a jury of 15 is that you may have one group whose view is that the person is guilty, another group who says that he is not guilty and an undecided group in the middle. Within that group, there may be some who are not prepared to say that the person is guilty and some who are not prepared to say that he is not guilty. Therefore, when you only have a need for a majority of one in the system as we do at present, that allows the jury to come to a decision. The not proven verdict operates as a safeguard and allows juries to come to verdicts.

I would not say that there is no difference between the not proven and not guilty verdicts. It is a matter of emphasis. It allows juries to come to a decision even when they are not convinced that the person is guilty and they are not convinced that he is innocent.

Fulton MacGregor: You said that some of your American colleagues were shocked about our system and wondered how it achieves acquittals. I want to make a point about the Scottish jury research—I am trying to find the information so that I get the figures right—which I know that other colleagues want to ask about. According to the study, undertaken in 2019, when juries had two verdicts available to them, they returned three out of 32 convictions, and when they had three verdicts available to them, they returned four out of 32. Acquittal is very high, it would seem.

Ronnie Renucci: Our view on the Scottish jury research is fairly well known.

Fulton MacGregor: Okay. Thank you for that. So that I do not feel the wrath of the convener, I will just give Stuart Murray an opportunity to answer my earlier question.

Stuart Murray: Is there a fear of wrongful conviction? Yes, of course there is, but not only for the reasons that both of my colleagues have laid out. I think that a concern from the profession is that the matter is being considered at a time when other considerations, which could completely alter the landscape of the criminal justice system, are being looked at. Those include the development, in section 275 of the Criminal Procedure (Scotland) Act 1995, of the ability or lack of ability to criticise someone’s character, such as that of a complainer, in court; possible changes on the horizon to the law relating to distress and identification; and, of course—I think that this issue is being dealt with at the next evidence session in January or February—the proposals to put in place a pilot scheme for non-jury rape trials and attempted rape trials in the High Court. Doing so, at the same time as all the other proposals, seems to put the criminal justice system in Scotland at risk of being adulterated, and puts access to justice and the rights of the accused—innocent until proven guilty—at substantial risk.

Sharon Dowey (South Scotland) (Con): I want to ask about jury majorities. You said that, at the moment, we have 15 jurors and the decision to send somebody to jail may be based on the decision of one person if there is an eight to seven majority verdict. Would you like there to be a change to unanimity, or, if the jury size reduces to 12, for eight out of 12 to be needed to reach a verdict? What are your opinions on unanimity?

Stuart Munro: The Law Society's position has long been that the current simple majority arrangement is not satisfactory and not tenable. No other comparable jurisdiction allows it. The broad approach that seems to be taken in all other English-speaking jurisdictions is that juries tend to have 12 people and unanimity tends to be required, at least initially. Some jurisdictions will then allow something short of unanimity—effectively, near unanimity. I think that that is to do with taking away a couple of outliers but still requiring unanimity from those who are left, rather than regarding it as a majority-type system.

As I said earlier, in the US, the sixth amendment effectively provides, or has been interpreted by the Supreme Court as providing, a requirement for unanimity. Even a 10 to two verdict in the US would not be regarded as sufficient to justify a conviction. In practical terms, that changes the dynamic of our juries so that the jury is regarded as a single entity. It is the jury as a whole that requires to be satisfied beyond reasonable doubt of an accused person's guilt rather than individual jurors who then come to vote.

It may well be that there is something significant in that process: the instruction given to the jury that they have to try to reach a unanimous verdict. What is interesting in the statistics that come from elsewhere is that, in so many cases, juries manage to do that. It is pretty rare for juries to be unable to come to a verdict. Less than 1 per cent of cases seems to be the number that is thrown about.

Our position has long been that the notion that an accused person should be convicted only where the case against him or her has been proved beyond reasonable doubt is inconsistent with the idea that barely more than half of a jury can support conviction for that to be regarded as a conviction. We are of the view that unanimity or close to it, perhaps something akin to the English model, is what Scotland should be looking at.

Ronnie Renucci: In a case of a jury going eight to seven, it is difficult to see how there cannot be a reasonable doubt in that entity, when you have seven people who are unconvinced.

If we are going to change the numbers, we should be striving for unanimity. In all jurisdictions that operate a jury system of 12, either unanimity or a majority of 10 to two is required. No system falls below 10 to two. There have been discussions about eight to four, but I am not sure where that has come from because, certainly, no other system falls below 10. I find it difficult to see where the justification for that would be. If we are going to change our system wholesale and go to 12, it is difficult to see what the justification is or where the research is for eight, for example, as opposed to the tried and tested formula, which is 12 or 10.

As Stuart Munro said, in America, it has to be 12. In England, it has to be 12, unless, I think, two hours have elapsed, after which a judge can then direct the jury that he is prepared to accept a majority, but that majority must be at least 10.

I am not sure where eight has come from. Even nine would be better than eight but, again, it is difficult to see where the justification for that comes from without any research having being done. I do not mean to be flippant, but it is difficult to see how someone can just pluck the figure of eight out of the air and say, "Well, let's just go for eight". I suspect that that has happened because it fits in neatly as two thirds of a jury of 12, but what is the justification or basis for that?

Stuart Murray: I would go slightly further. I agree with what both Stuart Munro and Ronnie Renucci have said. The problem with coming third in a line-up where the majority or all of us are speaking from the same hymn sheet is that I repeat what my colleagues said. However, I will add that I do not believe that the current system of a majority of eight out of 15 is appropriate. The system should be stronger than that, with more built-in protections.

As Stuart Munro said, in most states in America—I think, 48 out of 50—it is unconstitutional to have anything less than unanimity. I suggest that the figures required for a verdict in Scotland should be raised from eight to perhaps 10, if the decision is taken that it will remain with 15 jurors, but even a reduction in the number of jurors should retain a majority of perhaps 10.

The problem, which Ronnie Renucci touched on, is that the research is not in place to come to any real conclusion. That is a theme in the way that the Scottish Government has made a number of proposals to change the landscape of the criminal justice system. There is a lack of research, and that has to change. We must be provided with real research and not just the limited research that has been provided so far. That is no criticism of those who carried out the research for the Scottish Government. To some extent, their hands were tied in the way that they could carry out the research. The situation needs to change.

Sharon Dowey: What research would you like there to be?

Stuart Murray: Some research, frankly. There has been very little Scottish Government research. This is perhaps for a different day, but we can look at the jury system and the pilot scheme for removing juries from cases under section 1 of the Sexual Offences (Scotland) Act 2009 and attempted rape cases in the High Court. We can get into that if you want, but the amount of research that was carried out and the research that was able to be carried out was almost non-existent.

Ronnie Renucci: Research has been done down south with real juries and jurors over many years. Professor Cheryl Thomas interviewed thousands of jurors and published research on that. Data and research with real jurors is available, but there is none in Scotland. I, too, appreciate that those who carried out the research had their hands tied behind their backs. They could not speak to real jurors. That is why we have research on mock juries. Even then, if we are to apply research involving mock juries, our criticism is that it was not substantial enough.

10:30

My view is that we should not change our whole legal system based on research with mock juries, which, in no way, mirrored what happens in courts. The mock trial lasted for an hour. I have conducted between 250 and 300 rape trials in my career. I have never had a rape trial that has lasted for only a day. When someone says, “This is good research. We have had a trial, it only lasted for an hour and we are asking you to change your criminal justice system on that basis”, I think that we should really hesitate before making major decisions based on that type of information. Again, that is not a criticism of those who carried it out. There is research out there, and I invite members to read the research that was conducted by Professor Cheryl Thomas. Her research came to starkly different views from our research on a number of important matters, particularly in relation to sexual offences.

Stuart Murray: Could I just perhaps—

The Convener: I need to move things on. I am conscious of time. I encourage members to direct their questions to specific witnesses, unless it is absolutely necessary to ask all witnesses because you would like a response from each of them. We will get through more questions that way.

Sharon Dowey: I have one further question. I absolutely agree that the accused is innocent until proven guilty, but you mentioned a difficulty in relation to rape cases. If you have a murder case, there might be a knife in somebody, so you know that a crime has been committed. At the moment, a complainer in a rape or sexual crime case does not get individual legal representation unless section 275 of the 1995 act is applied. Is there a case for them to get individual legal representation earlier? I put that to Ronnie Renucci.

Ronnie Renucci: As you will know from our response, we are in favour of independent legal representation. I am certainly in favour of it going further than it does at the moment in relation to section 275, but I am not in favour of such representatives taking part in the trial; that is what the Crown is there for. The Crown is there to prosecute the case, and then you have someone for the defence. If you were bringing in another party on behalf of the complainer, it would become untenable. It is impractical as well. For example, I have a trial coming up in which there are 20 complainers. If you had 20 complainers who each had separate representation, with each trying to take part in the trial, our whole system would come to a halt.

We have said that we think that independent legal representation could be expanded. One of the ways in which that could happen is helping complainers by providing a degree of expectation of what is likely to happen in a rape trial and to help them along the way, but that would certainly not extend to actually taking part in a trial.

The Convener: We have strayed a little from part 4. I do not like to be too precious, but I point that out in the interests of getting as much evidence as possible on part 4.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning, panel. I would like to go back to something that Ronnie Renucci said that, I think, will be very offensive to rape victims. You said that we were talking about sexual intercourse: in fact, it is sexual violence. I am sure that you did not mean it in that sense, but I just wanted to clarify that with you and give you the opportunity to retract it.

Ronnie Renucci: I was referring to when there is an allegation and what the jury has to decide. The facts involve sexual intercourse. Another way of putting it is that the crime is the sexual penetration of the vagina, anus or mouth without consent. Normally, between two people, sexual penetration, when it is consensual, is not a crime. The jury is being asked to decide whether there was consent in relation to that physical act. I was not suggesting for a minute that it is not a form of sexual violence. Of course, rape is sexual violence; that goes without saying.

Rona Mackay: Thank you.

Ronnie Renucci: I was not suggesting otherwise.

Rona Mackay: Okay. It was just the term that you used. I wanted to give you the chance to explain what you have just explained.

Ronnie Renucci: It is simply because the act that is involved is not normally a crime, and the jury has to decide whether it is a crime. I was not intending anything other than that.

Rona Mackay: Thank you.

You also said that the jury is not there to find the truth, that it is for the legal system to prove the offence and that, if it does not, it is a failing of the Crown. Do you understand why victims feel crushed and let down by a not proven verdict? They feel that the system is weighted against them and in favour of the accused, for the reasons that you have outlined. Many witnesses have said to us that they would much rather have had a not guilty verdict than a not proven verdict, because they are left in limbo.

Ronnie Renucci: I absolutely understand that. Again, that is why, touching on something separate, I support independent legal representation. If the position were perhaps explained better to complainers or victims, it might assist them. For example, a verdict of not proven does not mean that the jury is saying that the complainer is not telling the truth or is lying. It may well be that a verdict of not proven can be returned where the jury is not saying that the complainer was making up the accusation and telling lies. Rather, the jury has not been convinced that the Crown has proved the case that it was rape—that it was sexual intercourse without consent. In some ways, a not proven verdict could be a comfort to complainers, but I do not think that it has been explained to them.

Rona Mackay: We have rarely heard that in evidence sessions.

Ronnie Renucci: I absolutely understand that, but, for example, I have been involved in cases in which it is clear that the complainer is genuinely of the position that she has been raped, the accused genuinely thinks that he has not raped her and the jury is obviously undecided on the question. Of course, there are two aspects to rape. It is rape if it was done without consent or if the accused had no reasonable belief that the complainant was consenting. You can therefore have a rape case in which, as a matter of fact, a complainer was not consenting but, nonetheless, a verdict of acquittal could be returned if the jury were to find that, although that was factually the position, the accused had reasonable belief that she was consenting. That is our law at present.

Rona Mackay: We have heard in previous sessions about the lack of transparency with the not proven verdict, in that the complainer does not know how many people on the jury thought that and how many did not. That is another aspect of the complainer feeling let down.

Ronnie Renucci: The accused is in the exact same position. No one knows what the split is. We are not allowed to know.

Rona Mackay: Why would that be? I know that that must be laid down somewhere, but do you think that it is fair that nobody knows?

Ronnie Renucci: I do not have a view on whether it is fair or not. It is the system that we operate at present. I think that it helps the jury to know that its decision is not going to be questioned, analysed or torn apart to see how many decided this or who the people were who decided that.

Rona Mackay: Obviously, it is not to identify people, but even having the numbers would be at least some information.

Ronnie Renucci: Sometimes we do know. For example, when a jury has gone down to 14, there have been occasions when there has been a seven to seven split. That has to result in a verdict of acquittal, because there is not the eight that is required. The only reason why other systems have transparency is that they have either unanimity or 10 to two.

Stuart Munro: Clearly, the Parliament could provide that jury majorities should be ascertained and made public. That is in the Parliament's gift. However, I wonder whether there is a public confidence issue there. If someone were convicted on the basis of eight to seven, the media might query whether that is truly a safe conviction. Indeed, if it were to go the other way, and seven people were in support of guilty but not the necessary eight, that might undermine confidence in the acquittal verdict from the jury. What might that mean for the relationship between the public on the one hand and the system on the other? That is a matter for the Parliament to consider, however.

Rona Mackay: Finally, is everyone in favour of legal representation for victims?

Stuart Murray: Yes.

Ronnie Renucci: Yes.

Stuart Munro: Yes, absolutely. The Law Society has been very supportive of the concept of independent legal representation. As Ronnie Renucci said, the exact parameters of that and what it means in practice absolutely have to be identified. It is important to say that there is a resource issue. For instance, in a case like the one that Ronnie Renucci described, with 20 complainers, will there seriously be 20 individual lawyers to whom those complainers can go in order to get the right sort of proper advice to which they should be entitled? That has to be considered as well, but in principle, yes, absolutely.

Stuart Murray: We are absolutely in favour of that. I do not think that any reasonable proponent of law and the legal system would argue against it. Again, the line has to be drawn, and it is a dangerous line to find, because the Crown, of course, prosecutes in the public interest. That is its role in court. We have to be careful that, by allowing a representative for a complainer to come into the process, we are not allowing them to go too far and effectively be minuted in as another party to the process. That has significant risk and has to be avoided at all costs.

Rona Mackay: Thank you.

The Convener: Again, I remind members to confine questions to part 4. I know that I am being precious, and I said that I was not going to be.

Russell Findlay (West Scotland) (Con): The faculty's written submission says that the "system ... ostensibly works", yet, last week, the head of Rape Crisis Scotland told us that it is

"obvious to anyone—guilty men are regularly walking free".—[*Official Report*, *Criminal Justice Committee*, 6 December 2023; c 9.]

Do you think that rapists are walking free, or is she wrong? That is for Ronnie Renucci.

Ronnie Renucci: Undoubtedly, there will be cases where people are convicted when they should not be and cases where people are acquitted when they should be convicted. I do not know the number or percentage of cases where that occurs but, undoubtedly, it will happen. However, that will happen in any criminal justice system.

Russell Findlay: Potentially, there are almost as many being wrongly convicted as there are being wrongly acquitted. Is that your assessment?

Ronnie Renucci: No. I simply said that there will be cases where people are wrongly convicted and cases where people are wrongly acquitted.

Russell Findlay: One of the problems that we have had is the lack of data and, indeed, the flaws with research that have been identified by the panel. You told us that you have represented up to 300 men who have been accused of rape. Can you tell us the rough breakdown of verdicts in your cases between guilty, not guilty and not proven?

Ronnie Renucci: I honestly could not. What I can say is that it is significantly different now. I would be surprised if the data now were not changing more towards conviction. That is partly because of changes in the way in which the law has evolved. Of course, one must trust the courts. The courts have evolved the law, certainly in recent years. The court of appeal made it clear that the courts have to move with the times, as it were. There is a modernisation of the law and a modernisation of approach taking place. For example, the law on Moorov has been expanded and, for applications made under section 275, there is a much narrower interpretation of section 275. All those factors have affected the way in which rape trials are conducted. I have no doubt that it is in a way that will be fairer to the complainers.

Russell Findlay: I guess that Smith v Lees coming into play will alter things again.

Ronnie Renucci: Precisely.

10:45

Russell Findlay: In its submission, the Crown Office points to the Scottish jury manual, which Mr Murray referred to earlier. It provides guidance to judges on directing juries. It says that, if a juror is satisfied beyond reasonable doubt,

"your duty is to convict".

Otherwise, they would need to deliver a verdict of not guilty or not proven. The Crown is saying that, if the not proven verdict is scrapped, it is not clear why a juror who was not convinced of guilt would be considered more likely to return a guilty verdict. That appears to be at odds with your collective position: that jurors might be forced to return a verdict that they are not comfortable with or of which they are not convinced. Can you, perhaps, explain that anomaly or reasoning? That question is for Mr Renucci or anyone who might care to take it.

Ronnie Renucci: Again, that may be the Crown Office's view. I do not know what the answer is to that. I do not know what would make jurors go from one verdict to another, because there is certainly not the proper research there to determine that.

Russell Findlay: If the instruction from a judge is to convict only when sufficiently persuaded beyond reasonable doubt—

Ronnie Renucci: Absolutely.

Russell Findlay: —and they are not, they will reach for a not guilty verdict if not proven is unavailable.

Ronnie Renucci: Well, one would think that that would be the natural way of it, but our jury research and the information that we have been given says something different. As I understand it, Fiona Leverick suggested that her research showed, without giving figures, that, if you took away the not proven verdict, there would be a swing towards conviction.

Russell Findlay: The Crown seemed to be suggesting that the result will potentially be more acquittals.

I will move on to a question that is perhaps for all three of you about the potential for retrial. The Crown appeared to be arguing that that should be an option in Scotland anyway but certainly if these changes are made. Do you have any views on that?

Stuart Murray: The law in England, as I understand it, is that it is possible to have a retrial. The difference between the English system, as I understand it—I am not qualified in that system—and the Scottish system is that, in England, it is allowed, essentially, for a jury not to reach a verdict. That is simply not possible in Scotland, where a verdict is required. In England, there can be a retrial because a jury has been unable to reach an appropriate verdict. That is an added layer that, frankly, I am unsure of. To revert to my previous comment, there is an absolute lack of appropriate research on such matters. Most of what we speak about and most of the commentary that is made is based, essentially, on anecdotal evidence. If any broad, sweeping change to the system is to be made—this is where I revert to my comment—proper investigation and research has to be carried out.

Russell Findlay: If we are pushing ahead and it is likely that the Government intends to change jury sizes and the majority needed for a guilty verdict, and to remove the not proven verdict, should it also use the bill to bring in the opportunity to have a retrial? That might be for Mr Munro.

Stuart Munro: There are different ways of looking at it. I may have misunderstood the Crown submission—forgive me, please, if I have—but I think that it suggests that, if we had a qualified majority system as provided for in the bill, there might be some scope for the court to be allowed to order a retrial where a particular majority had been reached. There would be concern about that. In the English model, as Stuart Murray said—it can be hard for lawyers in Scotland to get their heads around it—there is a requirement that there be unanimity or near unanimity for any verdict. It is not that, if you cannot find enough for a guilty verdict, there is automatically an acquittal, as there is here: you require unanimity for a not guilty verdict as well as a guilty verdict.

What is remarkable about the English system is how rarely juries fail to reach a conclusion one way or the other. The figure of about 1 per cent is often bandied about but, back in 2014, when the expert group on corroboration reported, it dug into those figures. It turned out that the hung jury rate in England included cases in which juries failed to reach verdicts on individual charges. There might be 10 charges in an indictment, and the jury convicts on eight but cannot reach a verdict on two, for instance. It might or might not be that those two charges are significant, but the expert group concluded, based on earlier research by the Scottish Office, that if we adopted the English model, the rate of retrial in Scotland would be in single figures.

On the question of whether that is a bad thing—I appreciate that there are resource implications—there is an argument that that is exactly what juries should be doing. Again, in the case from America in which the whole question of majority verdicts came up, the judge said:

> "who can say whether any particular hung jury is a waste, rather than an example of a jury doing exactly what the plurality said it should—deliberating carefully and safeguarding against overzealous prosecutions?"

The point is that there might be cases in which a retrial in that context is absolutely right and proper, but we should not regard that as being inherently likely to happen very often.

Russell Findlay: Two weeks ago, Professor Fiona Leverick and Eamon Keane told us, to my surprise, that they opposed the eight out of 12 proposition. They believed we should have what is typical of international jurisdictions: either unanimity or 10 or 11 out of 12. I was surprised by their position. Given that their position is consistent with that of the legal profession, do you think that the Scottish Government should perhaps rethink the eight out of 12?

Stuart Munro: Yes.

Ronnie Renucci: Absolutely.

Stuart Murray: Yes.

Russell Findlay: So, unanimity or, perhaps, something like 10 or 11 out of 12.

Ronnie Renucci: Strive for unanimity but, if that cannot be achieved, then 10 or 11.

Russell Findlay: Thank you.

Ronnie Renucci: That is, if we go down to 12.

Katy Clark (West Scotland) (Lab): My first question is for Ronnie Renucci, who focused on the fact that, in Scotland, we lack evidence or, indeed, any research to draw any conclusions, and referred to some work that has been done in England, which we will look at. Mr Renucci, could you summarise your understanding of any conclusions or, indeed, lack of conclusions that there might have been in the work on jurors in England that might be relevant to the legislation that we are looking at now? What is your understanding of that research? I appreciate that you did not do the work yourself.

Ronnie Renucci: Obviously, that work is not relevant to the question of the not proven verdict, for example, or changing jury sizes. It is more relevant with regard to other aspects, such as what juries think and believe about issues such as

rape myths. It was quite specific and, to a great degree, dealt with sexual offence cases. It is perhaps not exactly on point in relation to what we are discussing today, but it would be in relation to other matters. I was simply pointing out that there is real research out there, involving real juries, that gives an indication of how juries think and what juries do once they get into that jury room. That is obviously something that we know absolutely nothing about.

Katy Clark: What you have said is helpful, but it also points out that it is possible to do such research. That has not happened in the lead up—

Ronnie Renucci: At present, in Scotland, it is not possible because of the law. You cannot ask a juror anything about their deliberation.

Katy Clark: Right, so that is one of the reasons why—

Stuart Munro: There has been some debate about the extent to which it is or is not possible, and I think that Cheryl Thomas subscribes to the view that we, collectively, have been a bit restrictive in our interpretation of the Contempt of Court Act 1981. She thinks that it is possible to go further than some other people think that we can, but that has to be resolved.

I will make a point about the research that Cheryl Thomas has undertaken. Ronnie Renucci is absolutely right: her research, by definition, has not considered whether we should have 15-person juries or whether we should have simple majorities. However, she has looked at other elements of the system down south, such as routes to verdict and written directions, and she produced some pretty startling results that identified that they were regarded by juries as tremendously helpful in allowing them to navigate the process of coming to decisions in criminal trials. The research might suggest other things that do not currently exist in the bill that may be worth looking at.

Katy Clark: Is it the case that the legislative framework is slightly different in Scotland from that in England in relation to what academics can do?

Stuart Murray: Substantially different.

Katy Clark: And that has been a real barrier in Scotland. We have a lot of academics—

Stuart Murray: To be clear, the research that Cheryl Thomas carried out at University College London was long-awaited and groundbreaking. It should not be ignored in this jurisdiction.

Katy Clark: Obviously, a lot of issues do not translate easily into the Scottish system, but are you aware of much work in England on jury majority? Are you aware of how common it is—in England or in other jurisdictions, as I note that Stuart Munro spoke about other jurisdictions and referred to statistics elsewhere—to get a unanimous decision when a unanimous decision is not required or to get a majority? Stuart Munro, would you like to come in?

Stuart Munro: I do not know what the statistics are, but I would be amazed if they were not available.

Katy Clark: So, you think that there will be statistics.

Stuart Munro: I think that the Ministry of Justice would be able to produce that material without too much difficulty.

Stuart Murray: It may well be that looking further than jurisdictions in the United Kingdom is required. Certainly, my understanding is that there has been a fairly significant amount of research carried out in America, particularly in the Chicago courts. Stanford University has carried out a survey and research in relation to unanimity, or there-or-thereabouts unanimity, and anything that falls short of that. Similar research could be undertaken here.

Katy Clark: Are you sure that the Scottish Government has not looked at that kind of evidence? It may well be that it has carried out that work, and that is how it has come to the proposal of eight out of 12. That figure might have been plucked out of the air, or it might be based on evidence. Have you any knowledge of that? Ronnie Renucci, you suggested that it had been plucked out of the air. Are you sure that it was, or do you think that the decision to settle on that figure might be evidence based?

Ronnie Renucci: I am unaware of any evidence.

Katy Clark: I am not aware of any either, so thank you.

Ronnie Renucci: That is why I said that. No evidence has been presented to us.

Stuart Murray: We trust juries in this country with decision-making responsibility in relation to really quite complex issues: for example, issues of a medical or forensic nature and forensic accounting matters. If, as seems to be the case, people doubt the reliability of juries and the system, what I would say is this: it has long been said that—

Katy Clark: We are not dealing with that at the moment. We may deal with it after Christmas.

Stuart Murray: I want to make this point generally. It is often said that there is merit in a Scottish education. Most of the issues that the committee is dealing with today—those that it has dealt with prior to and will deal with subsequent to this hearing—could be dealt with in the forum of

jury trials by educating juries and the general public. It does not necessarily mean that we have to dismantle piecemeal the criminal justice system of Scotland to get what we want.

Katy Clark: In this session, we are trying to focus on whether a change in the numbers would make a substantial difference. If we put in place a requirement for unanimity, for example, would that make much difference to conviction rates? We do not really have any evidence from this jurisdiction, as far as I understand.

Stuart Murray: No, we do not.

Katy Clark: Thank you.

Pauline McNeill (Glasgow) (Lab): Good morning. I put my first question to Stuart Munro. The question of the three-verdict system has long been debated in Scotland. You might remember that Michael McMahon, a Labour Party member, introduced a bill on the issue many years ago. If the Parliament decides to retain the not proven verdict, do you think that we will always be discussing the three-verdict system, given that it is unusual? Secondly, do you think that the Government's rationale for changing it is clear?

11:00

Stuart Munro: The answers to those questions are probably: yes, we will continue to debate it; and, yes, the rationale is clear. That is not to say that the idea of getting rid of the not proven verdict is necessarily correct, but a clear and cogent argument is presented as to why it does not fit with what others might regard to be a sensible criminal justice system model. That does not mean that we should necessarily get rid of it. It is part of our system—a unique feature of our system—and, broadly speaking, our system, as a whole, works with that feature in it. You can make perfectly rational and reasonable arguments against it, and you can make arguments in favour of its retention. It is a perfectly fair discussion to have.

Pauline McNeill: Thank you. Stuart Murray, you had an exchange with Katy Clark about the research that the Government is relying on. The policy memorandum is quite clear that the evidence used for removing the verdict is the research involving 900 mock jurors. Do you think that the Government would be taken more seriously on that research if we addressed the question of the Contempt of Court Act 1981 and, perhaps, as a part of this bill, legislated to allow research to be done on juries and trends in juries and how they come to their decisions?

Stuart Murray: Undoubtedly. It goes back to the point that I rather cack-handedly attempted to make a few moments ago about education. Having the research is all part of educating people, including lawyers. If we want to be able to view the jury system and the justice system on a par with our colleagues south of the border, we need to consider how we do that.

Pauline McNeill: Do you think that it would be a good use of the Parliament's time to take through the necessary legislation to allow for research such as that done by Cheryl Thomas?

Stuart Murray: I am very familiar with Cheryl Thomas's research and familiar with her commentary about how, perhaps, we have been too reserved in Scotland in looking at the issue and how we address it. I am all in favour of exploring that. How that is done, I am not sure, but it would be churlish to suggest that it would be a waste of time for the Parliament to look into that issue.

Pauline McNeill: Thank you. My final set of questions is for Ronnie Renucci. You have probably seen some of the exchanges in the *Official Report* of this committee in relation to the three verdicts, including last week's evidence from Joe Duffy and Rape Crisis Scotland. In your opening remarks, you talked about what the Crown had to prove. Do you think that there has been enough discussion about how the judge charges the jury, if you like? Rather than debating the cold, clinical aspects of removing a verdict, would it be more useful to discuss what the jury is actually asked to do when it is deciding on a conviction?

Ronnie Renucci: Changes have already been made. Again, that is something that Scotland has come to slightly later. One of the things that Cheryl Thomas addressed in her recommendations was the impact of written directions to the jury before a trial starts. We now have written directions, which are given to the jury. The jury has them and retains them when it goes into the jury room, but they are read out by the judge at the start of the trial. We now have a situation where juries are better informed before they even hear a bit of evidence.

In England, there are opening speeches, but it is often said that, in Scotland, we just go straight into the evidence. Up until recently, the jury has been ignorant about what was going to happen. It has certainly been more effective to tell the jury or at least to give it an understanding or an idea about what is going to come. I am certainly in favour of educating the jury and giving it as much information as is required to enable it to carry out the task that it has been given, which is to arrive at a true and just verdict. I am in favour of anything that assists the jury in coming to that decision.

Stuart Murray: I am sorry to interrupt, but that issue was raised by Lady Dorrian in her recent review paper in relation to the Victims, Witnesses, and Justice Reform (Scotland) Bill. More can be

done to educate the jury in relation to specific matters.

Pauline McNeill: Yes, thank you. None of us, apart from Katy Clark, has practised criminal law in the courts, so we are learning as we go. What I am really driving at is this: is it fair to say that the instructions that the jury will be given will be primarily around the Crown proving its case beyond reasonable doubt? In other words, the first question is not about what verdict you are going to choose. Is it fair to say that the jury will be directed to decide guilt or innocence, and then have to decide which verdict is appropriate?

Ronnie Renucci: Funnily enough, with the three verdicts that are available, those directions are given to the jury at the very end, just before it is sent out. The directions at the start are to do with whether there is burden of proof and the standard of proof. They are also given in relation to Moorov, for example. That can be explained to the jury as well. There are also directions in relation to witnesses' statements or what witnesses will say, et cetera. The actual verdict forms a very small part of the overall charge. A judge's charge to the jury might take two hours, but there might be only two minutes of that, right at the end, in which the jury is directed on what its verdicts can be.

Pauline McNeill: My final question is about the numbers on the jury if the not proven verdict were to be removed. The profession would prefer a unanimous jury but would accept, as in England, a majority of 10 to two. I understand that your fundamental position is to retain the not proven verdict. Ronnie Renucci, can you talk the committee through what, you think, the Crown would have to show in order to get a conviction? To a layperson, you are saying that the jury is required to have a unanimous verdict before you could convict, and that sounds like it would be really difficult to get a conviction, whereas a majority of 10 to two seems to allow for it. However, of course, we do not understand how juries operate or the proceedings of a court.

Ronnie Renucci: Sorry, I was not suggesting that that should be the case. That would be unrealistic. I was saying that we should strive for unanimity. England looks for unanimity, and, if a jury cannot get unanimity, after a certain period, the judge can advise that a majority verdict will be accepted. I am not suggesting that we have that system in Scotland. It is simply about striving for unanimity, but, obviously, a fixed majority will be accepted. That allows for a majority of 10, 11 or 12, but I am not suggesting that we start by saying that it has to be 12 and then work down from that.

Pauline McNeill: That is helpful. Finally, given the hundreds of cases that you have—

The Convener: Sorry, may I interrupt? Stuart Munro wants to come in on that.

Stuart Munro: I will, if I may, make a point in response to that. It is superficially attractive to think that, if we require unanimity or a majority of 10 to two, that will make it harder to secure convictions than requiring a majority of eight to seven. That does not explain why conviction rates in rape cases are higher in England than in Scotland. The English figures—I do not have them in front of me—demonstrate a fallacy in that argument. Ultimately, it is possible to secure convictions and, indeed, a relatively high rate of convictions under a model that requires unanimity or a majority of 10 to two.

Pauline McNeill: I have one final question for Ronnie Renucci. We have been hearing that the not proven verdict is used a lot in rape cases. Have you any comment on whether, in your experience—I realise that this is just your evidence—there is a tendency for not proven verdicts in rape cases?

Ronnie Renucci: I am not sure where that information comes from. I am aware that a freedom of information question was asked of the Scottish Government that covered 2015 to 2020. The reality was that, of the three verdicts of not proven, not guilty and guilty in rape and attempted rape cases, the verdict that was returned the least was not proven. The verdict that was returned the most was guilty. It is when you combine the not guilty verdicts with the not proven thereafter that you have a majority that are acquittals, but not proven was the one that was used the least.

In 2015-16, there were 59 verdicts of not guilty, 45 of not proven and 104 of guilty. In 2016-17, there were 106 not guilty, 42 not proven and 98 guilty verdicts. Moving on to 2017-18, there were 87 not guilty, 48 not proven and 106 guilty verdicts. In 2018, there were 97 not guilty, 70 not proven and 142 guilty verdicts, and, up to 2020, there were 95 not guilty, 74 not proven and 130 guilty verdicts. I am unaware of any data after that date. In some ways, the not proven verdict has been slightly maligned—perhaps unfairly; I am not sure—but it is certainly not, as it were, the go-to verdict in rape cases.

John Swinney (Perthshire North) (SNP): If we were to address Pauline McNeill's point about the perennial discussion of the not proven verdict, it might help us to understand exactly what "not proven" means. I am struck by the reference in the faculty's written submission, which describes not proven as a "measured means of acquittal." I would be grateful for an explanation of the thinking behind that description of the not proven verdict. What does it actually mean?

Ronnie Renucci: It comes back to the direction that used to be given, which was that it was a matter of emphasis. Stuart Murray is correct about the jury manual's direction when a jury comes back and asks, "What is the difference between not proven and not guilty?". That question is not frequently asked by juries, but it certainly is asked. Jurors are now told that there is no difference; the outcome is the same, as it is one of acquittal. That is the only information that a jury is given. Previously, however, a jury was usually told by the judge that it was really a matter of emphasis.

John Swinney: A matter of emphasis about what?

Ronnie Renucci: It was about the verdict and the difference between not guilty, when a jury categorically says to someone, "You are not guilty. That is our finding", and not proven, where it is more likely that the jury might be saying that the Crown has failed in its task to prove the matter beyond a reasonable doubt.

I suppose that there are two interpretations of that. The not guilty verdict, which says, "This person is not guilty", and the not proven verdict, which says, "The Crown has failed in its task and has not been able to prove the case against this person".

John Swinney: There is probably another sentence that goes with that that is about the interpretation of a not proven verdict. In the circumstances in which the Crown has been deemed to have failed to prove a case beyond a reasonable doubt and the jury is unconvinced that the individual is not guilty, does it suggest that they are somehow—forgive my colloquialism—sort of guilty?

Ronnie Renucci: No, not at all. It is not the case that the jury is unconvinced that the person is not guilty. That is not part of its task. The jury is not there to decide whether a person is not guilty. Its primary function is to decide whether the Crown has proved its case against the accused. There is no requirement on the defence to prove that the person is not guilty. The burden is entirely on the Crown.

John Swinney: I understand that, but the point that I am getting at is this: what is the definition of "not proven" in the type of circumstances that we are talking about, where the jury is not convinced that the Crown has proved its case beyond reasonable doubt but where there is space for there to be a measured means of acquittal? That sounds to me like a conditional acquittal. Mr Renucci, you just put on the record a point about how, if a jury asks about the difference between not proven and not guilty, a judge will say that there is no difference. The faculty's written submission, however, suggests that there is a bit of a difference.

11:15

Ronnie Renucci: As you said, it all comes down to what the definition is of "not proven" in reality. We do not know what the definition of not proven is, but there must be a difference. It stands to reason that there must be a difference if some juries return verdicts of guilty, some return verdicts of not guilty and some return verdicts of not proven. There must be a difference, but we do not know what that difference is.

John Swinney: A judge, however, in answering a jury's question about the difference between the two verdicts will say, "There is no difference". Am I correct?

Ronnie Renucci: There is no practical difference, because both result in a verdict of acquittal. That is as much as can be said, really.

John Swinney: Mr Murray, the Scottish Solicitors Bar Association's written submission states:

> "a juror may think that the accused is guilty but be unsure as to whether or not the Crown have proven that beyond a reasonable doubt.
>
> It is this lack of assurance as to guilt beyond a reasonable doubt, alongside a belief that an accused may not be innocent, that requires there to be a third option."

Stuart Murray: It is a safety valve.

John Swinney: That suggests to me that there is some residual doubt about the accused, given that—to go back to the point that Mr Renucci made a moment ago—a judge, in answering the question, will say that there are two types of acquittal.

Stuart Murray: Just to be clear, the focus in a trial is on the test, and the test is this: has the Crown proven guilt beyond a reasonable doubt? It is not for the accused to prove anything. A judge will direct a jury to ignore any emotion in the trial—often, the circumstances are highly emotive—be it on behalf of the complainer, the accused or, for that matter, any witness. A jury will be directed to ignore not only the emotion but, in fact, the consequences for the accused person. That is certainly contained in the jury manual. The test is only about proof beyond a reasonable doubt.

It would, however, be churlish to suggest that there are no circumstances at all in which jurors face a moral dilemma on hearing what are often very emotive pieces of evidence. That is an example of why it is vital that we retain the not proven verdict. There are a number of influences put on individual jurors, and they require that safety valve.

Another issue is that I do not think that there is a real understanding of how little a judge will say to jurors in respect of the not guilty and not proven verdicts. Very little is said about the test of beyond a reasonable doubt either. Usually, what is said is that a reasonable doubt is something that might cause you to stop and consider something in the conduct of your day-to-day life, which is also suitably vague. It is not that more emphasis is put on something for the Crown than it is for the defence. As Ronnie Renucci said, there are no opening speeches in this jurisdiction. The jury is just given the evidence, and it will make of that what it will.

John Swinney: What I am driving at is the potentially unsatisfactory nature of how people are left after a not proven verdict. If I follow the rationale of the arguments that you have just deployed, individuals who were accused and then acquitted following a not proven verdict might have some stain on their character because it was, to use the terminology, a "measured means of acquittal" or a conditional acquittal. From the perspective of complainers—the victims—they are likely to feel dissatisfied with a not proven verdict, because the outcome that they believe that they should have achieved was not achieved, but there is a question mark over the verdict. I am just probing in order to determine whether anybody ends up in a good position as a consequence of that verdict.

Stuart Murray: I do not think that that issue relates purely to the not proven verdict. We operate in an adversarial system, in which, very often, there are no winners, certainly in respect of how people go on to live their lives. That is just a by-product.

John Swinney: Do you take my point, Mr Murray, that one will have a fundamentally different view of the outcome when the verdict is guilty or not guilty versus one of not proven?

Stuart Murray: Potentially. I have to say that—

John Swinney: Is the point that it leaves people feeling differently about the verdict accepted?

Stuart Murray: I do not know that. The research has not been done, but I could provide anecdotal evidence. Let us be clear: in the absence of a guilty verdict, someone is a complainer rather than a victim. They may have a different view of themselves, but, in the law, they are not a victim. I appreciate that different language and terminology is used in the committee and its papers, but that person is a complainer. I could give anecdotal evidence from information that I have received indirectly, that when they were faced with a not proven verdict, some complainers took some comfort in the fact that the verdict was not a clear not guilty, because that could be taken as a comment on the evidence that they gave in court. It is clear that not enough research is being done on that.

Ronnie Renucci: One thing that I will say is that the discussion about the not proven verdict only takes place within the current system, which is the 15 members of a jury and the simple majority requirement. No one is suggesting that we would retain the not proven option if we were going to a different system. That is why we said at the start that the not proven option is one of the integral links or building blocks in our current system. The faculty has no difficulty with removing the not proven option if another safeguard is put in its place, but our response is in relation to the current system and where it fits with that. If we are changing and going to a smaller jury size with a different threshold for a majority, there would clearly be no place for a not proven option in that new system. It is however a fact that the not proven option is in our system and it has its place within it, but, if we move away from the present system, we would also move away from the not proven verdict.

John Swinney: The faculty's position is therefore that, if we are going to have the potential for an eight to seven decision in a jury, we have to have the reassurance of an option such as the not proven verdict. We can design an alternative that gets rid of the not proven option, but we will have to take account of the variables that come about as a consequence.

Ronnie Renucci: We can retain a jury of 15, but if we do so and get rid of the not proven option, we will have to change the definition of a majority, whether that be to 12 to three, which would be an appropriate majority, or 10 to five, as I have heard people talk about. If we take away the not proven option, we must put a safeguard in its place.

I refer back to what Pauline McNeill was saying. I am aware of what happened in 2016. Back then, as I understood it, the Justice Committee agreed that there was no appetite for the not proven option, but the difficulty came in deciding what went in its place. That is the difficulty: something has to go in its place. What is that? The natural thing would be a change in what constitutes a majority. There are those who recommend that the not proven verdict is removed, but Fiona Leverick, Eamon Keane and various others are saying, "Yes, but if you do remove it, you have to put something in its place". That is all we are saying. Under the current system, it must stay. We are not saying that any system has to have a not proven option, because there would be no place for it within a different system. However, there is certainly a place for it within the current system. I recognise that there is a consensus for getting rid

of the not proven option, but we must replace it with something else. That is our position.

John Swinney: Stuart Munro made a comment about sexual offences having a higher conviction rate in England than in Scotland. Why do you think that is the case?

Stuart Munro: Again, I do not have the numbers in front of me, but I remember seeing published data that related to the conviction rates of cases started. It is not from the number of reports that were made to the police; it is from cases that were actually in court turning into a conviction. The number that I have in mind is about 71 per cent in rape cases in England, compared with something north of 50 per cent in Scotland for the comparable period. I can dig that information out and share it after the committee meeting, if that would be of assistance. There is always a danger in comparing data from other jurisdictions, because there are inevitably features that come into that.

John Swinney: It would be helpful to have whatever information you can share with us, because it begs the question—obviously there is no not proven verdict in England—of the extent to which the absence of that factor contributes to the difference, if the numbers that you have just given us are correct. I appreciate that you will supply the numbers later. There is a material difference between 50 per cent and 71 per cent, if that is the case. It strikes me that whatever is driving that needs to be explored. What is the potential significance of removing the option of the not proven verdict in Scotland? We have to understand the implications of any move to remove such a provision.

Stuart Munro: Of course. The point that I sought to make at the end of my previous answer was that one has to be careful in taking statistics from one jurisdiction and applying them in another because of the different considerations that might apply. The obvious different consideration is about marking policies—what the Crown Prosecution Service decides to do when faced with a reported case as opposed to what the Crown Office and Procurator Fiscal Service decides to do. For instance, in Scotland, perhaps because of the requirement for corroboration, there is more of a sense that any case that meets the corroboration threshold should be prosecuted, whereas in England there might be more of an assessment of, if you will forgive the expression, the quality of the evidence, essentially—a weighing up of the likelihood of conviction. Inevitably, that would have an impact on the conviction rates. Put simply, if we prosecute the cases where we are more certain of getting a conviction, we will probably have higher conviction rates than if we do not. All those extraneous elements have to be factored in.

Then there is the trial process. To what extent do things like written directions and routes to verdict assist the process and increase the prospect of conviction? What about any other elements that we have not thought about, such as timescales, quality of investigations and resources in investigations? We have to tread carefully when looking at that kind of data. The point of referring to the data was simply that we should not assume that requiring unanimity or something close to it means that you will never get any convictions, because that simply is not borne out by the data from elsewhere.

11:30

The Convener: We are over time. I will come in, if I may, with a final question for Stuart Munro, and then we will draw the session to a close. The question is about the survey of members that was undertaken by the Law Society. It is my understanding that more than 70 per cent of members who responded believed that the not proven verdict should be retained. Will you expand a little on the survey and the results, including the minority view, which obviously consisted of around 30 per cent?

Stuart Munro: The difficulty is that, if you ask 100 lawyers for their view on something, you will get about 120 responses. The Law Society went to its membership with a predefined questionnaire that it invited people to respond to, and there are caveats that have to go with that. The questions asked might inform the answer. The question “Do you think we should retain the not proven verdict?” might provide a different response if it is framed in the context of “Do you think we should retain the not proven verdict if we move to a system of unanimity or 12-member juries?” and so on. That level of detail was not asked about.

It is only fair to say that the Law Society is a society of all its members. It represents all solicitors in Scotland, including fiscals, and those who go nowhere near the criminal courts—conveyancers, commercial lawyers and others of that nature—so the raw data has to be taken in that clear context.

Undoubtedly, a multiplicity of views was expressed, and there is a multiplicity of views within the profession. For instance, those whose primary job is to represent complainers might have a different view of the not proven verdict because of the experiences of the clients whom they represent. It might be that, if asked individually, fiscals would have a slightly different view from those who work mainly on the defence side of the profession.

What we were able to take away from the survey was that a range of views were expressed.

There was a real sense that we should be proud of the Scottish system and should not always be apologising for doing things slightly differently from the way in which they are done elsewhere. However, the Law Society's position is ultimately broadly in line with what Ronnie Renucci just described and, indeed, the way that Mr Swinney put it in his final question. In essence, it was suggested that we need to look at whether we can design an alternative to what we already have that meets the concerns, ensures that the balance is right and, fundamentally, comes back to the primary aim of convicting the guilty and acquitting the innocent.

The Convener: On that note, I thank you all for attending. We will have a short suspension to allow us to change witnesses.

11:33

Meeting suspended.

11:39

On resuming—

The Convener: We move to our second panel of witnesses. From the Crown Office and Procurator Fiscal Service, I welcome Laura Buchan, who is procurator fiscal for policy and engagement, and Alisdair Macleod, who is principal procurator fiscal depute in the policy division. I intend to allow around 60 minutes for the session.

I will open up with a general question on the jury research that has been undertaken in Scotland. Laura, what weight do you give to the findings of the available research, including the Scottish jury research, as part of the evidence relating to the proposals in part 4 of the bill?

Laura Buchan (Crown Office and Procurator Fiscal Service): Thank you, and good morning. It is best if I start by saying that, obviously, COPFS operates as part of the criminal justice system, which is created and determined by legislation. Decisions in relation to change of jury size, abolition of the not proven verdict, and size and majority requirements of juries are, ultimately, matters for the Scottish Parliament. However, we have made some observations in our submission, particularly in relation to the jury research. In our experience as prosecutors, we urge caution about extrapolating the results from mock jury research to a real criminal justice system.

It is unclear to us, as prosecutors, why the removal of an acquittal verdict would tend to lead to an increase in conviction rates. As we heard from our colleagues this morning, when trials are conducted, almost the very last thing that a jury is told by either the presiding sheriff or the presiding judge is that, if the case is not proved beyond reasonable doubt, the jury must acquit. There are two options for those jurors in an acquittal verdict: not proven and not guilty.

I can go into more detail on some of the things that we need to highlight about the mock jury research. We totally understand that it is the largest mock jury research of its type in the United Kingdom. We understand the limitations that were placed on Professor Leverick, even when she gave evidence to the committee two weeks ago. I sat on a mock jury as a student. That was in a court setting, but the mock jury research was not. Mine was undertaken by advocate deputes; there was a judge, and there were actors. We took it seriously and earnestly, but we knew that the ultimate decision that we made would not impact on either a real victim or an accused. It is really difficult to replicate a real jury sitting in mock jury results.

We urge caution, because we worry about an unintended consequence. The aim of the bill is to improve the service to victims and witnesses and to improve the system for all users, including the accused. However, changing the majority that is required for a verdict, for example, could lead to an increase in the number of acquittals. That would be an unsatisfactory outcome. We appreciate, though, that not proven is unsatisfactory for the accused and many witnesses.

The Convener: It is probably helpful to point out that the mock jury research that we heard about from Professor Fiona Leverick and Eamon Keane is one part of the evidence that the committee will take. I do not think for one minute that the bill's provisions are based solely on the findings of mock jury research. Thank you for that helpful response.

Katy Clark: I have a question about what was said in the previous evidence session. I think that both of you were in the public gallery for that session. It is to do with the Contempt of Court Act 1981 and the fact that we are relying on mock jury research because there is a view that it is not possible to carry out research with real jurors. Have you looked at that? Do you think that that is why there is no academic research on real jurors in Scotland? Do you have any information in that regard?

11:45

Laura Buchan: We, as prosecutors, know that jury deliberations are confidential; we do not know what deliberations take place. That is why it is very difficult. The evidence this morning outlined why not proven verdicts might be returned. We can hypothesize about why jurors determine to return a not proven verdict, but, because of the confidentiality of those deliberations, nobody

knows. The most that we know at the end of a trial is whether a verdict is unanimous or by majority. That is all the information that we have. It is very difficult, again, from that information to know what weight is put on different verdicts and why different verdicts are chosen.

At the moment, jurors are not spoken to, in terms, because of the Contempt of Court Act 1981, as I understand. As my colleague Stuart Munro explained, it is, to a certain extent, to protect the confidentiality of those deliberations and the weight of the majority.

Katy Clark: I think that Stuart Munro also said that he was not convinced that it was not possible to carry out research and that there had been discussion about it in England. That is a UK-wide piece of legislation, and, because there was a lack of clarity, the UK Government in Westminster introduced legislation to enable research to take place. Is it clear that we cannot carry out research? Is that particular aspect—that narrow issue—something that you have given consideration to? It can be a yes or no answer.

Laura Buchan: No, I have not.

Katy Clark: That is fine. No problem.

Laura Buchan: I do not know whether my colleague Alisdair Macleod has.

Alisdair Macleod (Crown Office and Procurator Fiscal Service): The only thing that I was going to say is that I am unaware of the changes that Westminster might have implemented, but, on the research in England, it is important to note that Professor Chalmers's research, although conducted with jurors, was a study that was undertaken with individuals who had sat on a jury. The research was not in respect of a particular jury that they had sat on; they were simply identified as people who had sat on a jury and were then asked questions. In a way, it was just an expansion of mock jury research, albeit the selection of people that were questioned had recently sat on a jury. They were not discussing their deliberations or the jury that they had recently sat on; they were merely identified as individuals who had sat on a jury. That is my understanding of the research.

Pauline McNeill: Good morning. Have you any comment to make on some of the evidence that we have heard on the use of not proven in rape cases? I am trying to understand this. There is the use of not proven in not guilty verdicts in rape cases, and then there is the comparison with other crimes, which, I imagine, will look different. Is there anything that you can tell the committee from your experience or practice about the use of not proven in rape cases? Do you have any concern that it is used too often, or do you have no concerns at all?

Laura Buchan: We can see in, I think, a Scottish Government document that relates to the use of not proven that it is not a verdict that is used significantly. The Scottish Government paper says that not proven is returned in about 1 per cent of summary cases. We know that it is used more regularly in relation to sexual offence cases. I am trying to find the figures here. There is certainly a difference in the way in which the verdict is returned in relation to sexual offence cases as opposed to other cases. Again, it is difficult to know why.

Pauline McNeill: I understand. Do you have any view on why that is?

Laura Buchan: As we discussed earlier, we know that, in general, conviction rates in relation to rape and sexual offences cases are lower than for any other types of case. It is about four convictions out of 10 for rape and serious sexual offence cases, and the rate is far higher for other offences. Earlier, our colleagues spoke about the difficulty in prosecuting sexual offence cases, and that will no doubt have some impact. We as prosecutors and our colleagues at the defence bar know how difficult and complex sexual offence cases are and how traumatic they are for victims and witnesses, so we can see how those cases are difficult for juries. We really want to improve the system for victims of violence, women and children, particularly in relation to sexual offence cases.

On the conviction rates, we know that we obtain and secure convictions in cases where there are multiple victims. I suppose that is, to a certain extent, not surprising, with a jury hearing the evidence. We also know that the conviction rate is slightly higher in serious sexual offence cases or sexual offence cases where children are victims. Anecdotally, we know from our prosecutors in the High Court that the conviction rate is far lower when you have a single complainer and a single accused.

Pauline McNeill: Thank you. That is really helpful.

I said to the previous panel that most of us are laypeople so are a bit unfamiliar with a lot of practices, certainly in relation to prosecution policy. Broadly speaking, when you are marking a case—for example, a rape case—I presume that there is some guidance for prosecutors on how to decide whether the evidence is there to take a case forward. Is it harder to do that in rape cases than in other cases?

Laura Buchan: It is important to set out in front of the committee the way in which other evidence has been heard. There has been comparison with other jurisdictions, but we urge caution with that. We have a unique legal system and our own

criminal justice system, so it is very difficult to compare it with those of other jurisdictions.

Throughout our system, there are robust checks and tests for all cases. When a case is reported to us, our primary consideration is whether there is sufficient evidence. Then, we consider whether it is in the public interest to prosecute the case. In cases of sexual offences and rape, that is considered by a case preparer, who considers the evidence thoroughly. It is then considered by a senior legal manager to determine whether there is a sufficiency of evidence. Ultimately, it is considered by an advocate, who will agree or disagree about whether there is a sufficiency of evidence and whether we should prosecute. Those types of serious cases go through a range of tests to ensure that there is a sufficiency of evidence. That happens before we make the decision about whether we will take it to court and prosecute.

It has been mentioned today that we also have corroboration in Scotland. That can be distinguished from the system in England and Wales, where there is no requirement for corroboration. Corroboration is another in-built check in the system for prosecuting cases.

Pauline McNeill: Finally, your submission suggests that, if there were an increase in the majority that is required for a jury to convict, consideration should be given to the prosecution being able to seek a retrial where the higher majority is not reached. Is that your policy position? In other words, are you arguing for that anyway? Why would you not argue for having a retrial policy in the current verdict system? How radical a suggestion is that? From a layperson's reading, it seems quite radical to introduce that question. While we have been debating the three verdicts and the majorities, you have thrown into the mix the idea that there should be scope for a retrial. I have absolutely no idea how radical that is. If you could speak to that, that would be great.

Laura Buchan: I will speak to that, and I will ask my colleague Alisdair Macleod to come in. Obviously, our current system is unique in that there are 15 jurors and that a majority of eight is needed for a guilty conviction. This morning, my colleague Stuart Munro opened by saying that we have a broadly safe system, with eight out of 15 being needed for a conviction. If you have one more person, that will result in a conviction. If the system is broadly safe at present and the aim of the bill is to neither increase nor reduce the number of convictions, our caution is that changing the majority would mean that there is a risk of increasing the number of acquittals.

I will hand you over to my colleague Alisdair, who can talk in particular about why we feel that it would be unsatisfactory to have a greater number of jurors voting for guilt, yet an acquittal could be returned. In a very small percentage of cases, therefore, we would want the opportunity to seek a retrial.

Alisdair Macleod: The provisions on changing the majority are somewhat unique, as well. There has been a lot of discussion comparing the system in Scotland with a number of other systems. The US system was mentioned, England and Wales have been mentioned, and we could also mention New Zealand. All those systems are common law systems. Going back to my distant memories of law school, we were always taught about Scotland's uniqueness. It is not a common law system or a civil system, which is the European version; it is a mixed system. As a consequence, we have a rule for corroboration. We also have the simple majority. All the other systems with which ours has been compared—it has been suggested that we should try to mimic their majority of 10 out of 12 or 12 out of 12—have the ability for retrial. That is because they seek to have the jury reach unanimity or a majority on either a guilty or a not guilty verdict. If you do not reach the majority of 10 out of 12 for not guilty, there is a hung jury.

The proposal that is before the Parliament just now is that only a majority of eight would be required for guilty. There is no requirement to reach the same majority for not guilty. You could, and will, have a situation in which, if you move to 12 jurors and you are operating on eight to four, seven jurors could vote for guilty and five jurors could vote for not guilty. From my experience, I am relatively sure that the jury would come back and ask the judge—because juries do—"What do we do now? We have not reached the eight, and we do not have a majority for not guilty". Under the provisions, the jury would be instructed to acquit.

We have all accepted that, for victims and accused, a not proven verdict has an unsatisfactory nature. A not proven verdict is often described as a stain being left on the character of the accused. There is a real concern that, if someone is acquitted where there is a majority of seven to five for guilty, there is perhaps even more of a remaining stain for that individual.

In such situations, for victims and complainers, in particular, who have heard that the majority of the jury believed that the accused was guilty and that the Crown had proved its case beyond reasonable doubt but there was an acquittal, that would be an unsatisfactory position, particularly in circumstances in which the jury is reduced through illness or for other reasons. The provisions allow for the jury to go as low as nine. In those situations, a majority of seven to two is required, so you could have a six to three vote for guilty—obviously, six to three is equivalent to two thirds of the jury, as it is with a majority of eight to four—but

the return would be a not guilty verdict. Given those situations, if the Parliament is considering changing the majority, it might be worth considering whether that majority should remain for both guilty and not guilty verdicts. If we are requiring unanimity or a majority of 10 to two, that should be for guilty and not guilty, as in the other systems with which ours has been compared.

Provisions for retrial are not unknown in Scots law. The appeal court has the power to order a retrial where a conviction is overturned, or, rather, it has the power to provide the Crown with the authority to reraise proceedings if the Crown so chooses. The Double Jeopardy (Scotland) Act 2011 also allows the Crown to apply for permission to hold a second trial to retry an accused. There was some discussion about the level at which that would occur and about the number of hung juries. Research from England suggests a rate of about 1 per cent, and evidence was given that that might include a single charge among other charges. However, that could be the murder charge in an indictment of smaller assaults, so it might be a significant charge. We are suggesting not that there be an automatic retrial provision but that the Crown have the ability to ask the court for permission to consider reraising proceedings on the charges that have not met the majority—

Pauline McNeill: You have said quite a lot.

Alisdair Macleod: I am sorry.

Pauline McNeill: I understand most of it, but I just want to clarify that, as the proposals stand—not for the other suggestion—it is still the Crown's position that there should be the option of a retrial under the Government's proposal for a majority of eight to four. Would you still argue for that?

12:00

Alisdair Macleod: Yes. In the current proposals, where the identified majority for guilty—it is only a majority for guilty—is not met but the majority of the jury has returned a guilty verdict, there should be an option—

Pauline McNeill: That is in your seven to five scenario.

Alisdair Macleod: A seven to five or six to three scenario.

Pauline McNeill: But that is what the provisions are.

Alisdair Macleod: No, the provisions are that, if seven of the 12 jurors vote guilty and five of the 12 vote not guilty, that would be a not guilty verdict, and our position—

Pauline McNeill: But the Crown is not satisfied with that.

Alisdair Macleod: Our position is that we do not think that anyone would be satisfied with that, so the Crown should have the ability to consider it on the terms on which we currently consider retrying an individual or reraising proceedings. That would mean consideration of the public interest, which I anticipate would include the views of the complainer, although, with the advent of prerecording of evidence, there might not be a requirement for a complainer to give evidence again.

It would not be an automatic decision, and it might arise in only 1 per cent of the trials that occur. However, it would provide reassurance to the public at large that it is a possibility where the Crown has proved the case beyond reasonable doubt to the majority of a jury but the majority has not reached the arbitrary number that has been selected for guilty verdicts only.

Pauline McNeill: If you are right and there would be public concern, why does the Government not just legislate for a majority of seven to five?

Alisdair Macleod: We could retain it as a simple majority, which is probably the most sensible option because, then, either verdict has to reach a majority and, at the end of the day, the decision has been made by the majority of the jury. As soon as you start qualifying majorities, you get non-qualified majorities.

Pauline McNeill: I know what you are saying, but the legislation would not say that, if it were passed.

Laura Buchan: There is discussion about it at the moment, which I think is against the creation of a provision for retrial because of additional trauma for a victim who has to give evidence again. Our position is that that is a very fine balance, and we want the opportunity, in situations where a seven to five guilty verdict is returned, to do the consideration and seek a retrial.

Rona Mackay: I have a short supplementary question on the conviction rate in sexual offence cases. Laura, will the Lord Advocate's recent ruling that distress can be used as evidence have an impact on the conviction rates?

Laura Buchan: I do not think that we can tell yet whether that will have an impact on conviction rates and, again, it is really difficult, in this setting, to not conflate it with the discussions that we are having about the abolition of the not proven option and changes to jury size. It is a significant decision by the court. We are working through that decision in detail to see how it will impact not just on the rules of corroboration in sexual offence cases but more widely on other types of offences. The position in Scotland remains that no one can be convicted on one source of evidence, but the

ruling has confirmed that, although the accused must be proven guilty by corroborated evidence, that is not required for the separate elements of a crime.

I will give an example. Before the ruling, we believed that we were required to corroborate every step. With fingerprints, two people had to speak to the lifting of the prints and two people had to speak to the comparison. We are taking some time to go through the terms of the comprehensive ruling really carefully and to work out the impact on our wider case load. That change to the corroboration requirement will inevitably allow us to prosecute more cases and to bring more cases before a court but, ultimately, it is still too early to tell what it might mean for conviction rates.

Rona Mackay: Thank you. That is helpful.

Russell Findlay: I will pick up on Pauline McNeill's line of questioning about the attempt to seek a retrial in particular circumstances. This is a rapid-fire question and is just for my understanding. My understanding is that, under the change that you propose, a retrial would be at the court's discretion. It would not be an arbitrary power that the Crown would have.

Laura Buchan: It would depend on how it was legislated for. We are talking about what we understand to be a small proportion of cases in which seven members of the jury return a guilty verdict but the result is an acquittal, which we consider to be unsatisfactory.

Russell Findlay: Is it not the case, though, that, as things stand, we cannot find out the breakdown of the jury numbers?

Alisdair Macleod: That is correct. Obviously, this is only likely to arise in situations where it becomes apparent that there was a seven to five split. I have conducted jury trials where the jury has come back and said, "Five of us want to vote guilty, five of us want to vote not guilty and five of us want to vote not proven. What do we do?". Automatically, there is disclosure in the court as to the jury position. Under the provisions in the bill, that is most likely to arise in situations where the jury comes back and says, "We cannot reach eight. We do not have a majority for not guilty. What do we do?". In such situations, the jury will be instructed to return a verdict of not guilty by the court, but the Crown should have the opportunity, if that is what is disclosed, to apply to the court. We are not suggesting an automatic right of retrial. It would be similar to the provisions that are undertaken in cases of double jeopardy, where the accused would have a right to make submissions and the court would judge whether it was in the interests of justice to grant that authority.

Russell Findlay: What discussions has the Crown had with the Scottish Government about the issue?

Laura Buchan: In the discussions on the bill and the preparation of it, the Scottish Government has of course seen our submissions. Alisdair Macleod is the head of our victims and witnesses team. We have regular discussions with our colleagues in the Scottish Government.

Russell Findlay: Obviously, as things stand, the Government is not willing to include such a provision, but you have lobbied hard to have it considered. Would you seek an amendment on the issue, if the Government is not forthcoming?

Laura Buchan: We will continue to discuss the issue with our colleagues in the Scottish Government. Of course, it is dependent on what the bill ultimately looks like.

Alisdair Macleod: Primarily, we are flagging up the possibility of an unintended consequence in removing the not proven verdict to abolish the uncertainty in decisions. The provisions might create even more significant uncertainties in trying to find a solution that would square that circle.

Russell Findlay: As MSPs, we are being asked to radically alter the entire criminal justice process, and that is quite daunting. We have found that there is a dearth of data, not least in respect of cases of a sexual nature, including rape. We cannot establish how many appear to have been reported or are reported to the Crown Office, how many are then prosecuted, how many are single or multiple complainers or the outcomes in each case—as in guilty, not guilty or not proven. Last week, Rape Crisis Scotland put the blame for that lack of transparency on the Scottish Government. Is the Crown Office willing or able to share that specific data with the committee?

Laura Buchan: We can share the data. We can go through it, and we might need to discuss, after the meeting, what data exactly the committee wants. We hold data, and we heard the evidence last week. It was eloquently put forward by Sandy Brindley. We all use case management systems, and those that Police Scotland, the Scottish Courts and Tribunals Service and the COPFS use are different. They are primarily used for our operations in marking and prosecuting. Pulling data like that from the systems is not straightforward. However, I can tell you how many cases are currently in the High Court, what proportion of those are sexual offence cases, how many cases are reported to the COPFS every year and how many sexual offence charges are made, but the data that, I suspect, the committee would like is a breakdown of conviction rates.

As I said, anecdotally, our view as prosecutors is that there is a low rate of conviction in cases of

intimate rape. However, it is difficult to identify what that figure is. We are doing some work in the COPFS and with our colleagues in the Scottish Courts and Tribunals Service and the Scottish Government to see what we can do, but it is a manual process whereby we have to pull out cases case by case. We have to weigh up whether, operationally and resource-wise, we can dedicate that resource to pulling that from our system.

Russell Findlay: I find it extraordinary that we appear to be flying blind. This is critical, and we do not have that basic data.

The bill's policy memorandum says:

"jurors may be more likely to convict"

with the two-verdict system. The Scottish Solicitors Bar Association says that removing the not proven verdict would "undoubtedly"—that is the word used—result in more convictions. However, the Crown Office submission says that the 2019 jury research suggests that the opposite would happen and that jurors would be potentially less likely to convict. I wonder whether the bill is progressing on the false assumption that removing the not proven verdict will lead to an increased rate of conviction when, in fact, it is the opposite. Do you have any views on that?

Laura Buchan: As I outlined at the opening of the evidence session, we are urging caution in extrapolating the mock jury research and extending it across to the actual criminal justice system. The mock jury research looked at 64 juries. Today in Scotland, there are 22 High Court juries and around 25 sheriff and jury trial courts running. That gives some idea of the number of jury trials that we run each year and the experience that we can garner.

I listened to our colleagues earlier this morning, and we understand their views and agree with them about the risks in basing changes on that jury research. It is difficult to amalgamate the two views. There is the view from my colleagues in the defence about not wishing to rely on the mock jury research, so it is difficult to extrapolate the one part about an increase in convictions and seek to rely on it in arguing that there requires to be a safeguard.

Russell Findlay: One thing that Mr Renucci said—I have not seen it anywhere else—is that the mock jury trials lasted for one hour. That seems incredible and completely artificial. Is that the case?

Laura Buchan: Yes, from my understanding of reading the mock jury research, that is the case. Again, this is no criticism. It was interesting to hear Professor Leverick and Eamon Keane when they gave evidence a couple of weeks ago and to have an insight into the discussions that were heard by those mock jurors. Professor Leverick identified the reality. In the research, she spoke about the weakness and the limitations. She said that it was not a real jury and that the people involved knew that the trials were not real.

There were two different trials—a sexual offence trial and a non-sexual offence trial—and they went on for a little over an hour. There were videos of a trial taking place, which were shown to the jurors. So, although they were in a court building, there was not that experience of being in a court with a prosecutor and defence counsel, and with the victims and witnesses potentially giving evidence. I suppose that it is a matter of reflecting on the difficulty and limitations in carrying out that research.

Russell Findlay: I want to come back to the research. Given how important this is and what we are seeking to do, it strikes me as incredible that it seems to be beyond the finest legal and academic brains in Scotland to conduct much more meaningful and robust research, while still respecting jury confidentiality and various other issues. Does that not need to happen first, before we make these radical proposed changes?

Laura Buchan: I do not think that I can answer that, other than to emphasise again that we understand what the difficulties and limitations are. I have never seen a jury in Scotland being spoken to about its deliberations and their outcome.

Russell Findlay: That is the point. Why not?

Laura Buchan: There may be some merit in exploring that. On the point that you made, the researchers undertook the largest mock jury research of its kind—

12:15

Russell Findlay: We are being asked to be mind readers of juries when, in fact, there is no real reason why academia and the legal profession could not have conducted some meaningful research, or so I believe.

Laura Buchan: There is reason because, currently, we are not allowed to speak to jurors and, because of confidentiality, we cannot ask what their deliberations are.

Russell Findlay: The Crown Office cannot, but I am saying that, collectively, given what we are looking to do here, on the basis of what we think jurors might think currently, and might do in the future based on the changes, that research should really have been done.

Laura Buchan: How that might be done is not an area that I have explored in detail. At present, it cannot be done.

Russell Findlay: No. Okay—thank you.

Alisdair Macleod: May I come back in quickly, just to clarify one point? You mentioned the Crown Office submission in relation to the analysis of the mock jury research. I can confirm that the submission of the Crown Office is not that the indication that should be drawn from the research is that there will be fewer convictions in a two-verdict system. What we are highlighting is that the bill is based on the proposition that there will be more convictions, and that is not what the research demonstrates. The research accepts that

"the exact pattern of verdicts returned is unlikely to reflect the pattern of verdicts that would be returned by juries in a wider range of differently balanced cases."

The research accepts that you cannot draw anything from the verdicts that have been returned. The research had 95 per cent not proven verdicts, which is four and a half times the normal amount. All that we are doing is highlighting that perhaps there should be some caution before extracting from the research the conclusion that convictions would increase, because that is not what we believe it shows.

Russell Findlay: That makes sense. However, you said at the end that the 95 per cent not proven rate was something like four times the regular amount. We do not even know what the regular amount is, because we do not have the data. Where did you get that from?

Alisdair Macleod: The report indicates that the not proven return rate for 2017-18, when the jury research was done, was 17 per cent.

The Convener: I know that that is an important issue, but I need to move on and bring in John Swinney.

Russell Findlay: Thank you.

John Swinney: I just want to carry on with that line of discussion with Mr Macleod. One of the fundamental conclusions emerging from the evidence is that, whichever bit of this Rubik's cube you move around, there will be implications for other bits of the Rubik's cube. We are trying to feel our way towards where the right balance lies in protecting the process of justice. I am interested in the extent to which you can illuminate our discussions with where you think the greatest risks lie in changing the existing arrangements. We do not want to end up in a worse position; clearly, we want to end up in a better position.

I am keen to explore where that all rests, given the key factors that we have to bear in mind in what might change and what might produce different outcomes from those that we currently have in the criminal justice system.

Alisdair Macleod: I am not sure that I have the definitive answer. However, I can say that, when we consider the balance in the Scottish criminal justice system and look at how other jurisdictions do it and whether we should do something similar, we have to consider the uniqueness of the Scottish system, which we are often keen to point out. As Laura Buchan indicated, in Scotland, no one can be convicted on the evidence of a single person, no matter how believable or compelling the evidence is. That is different to other systems that operate jury trials and jury systems. We have the requirement for corroboration. The Crown is required to corroborate not just that a crime took place but that the accused is the individual who committed the crime.

When the jury is instructed at the end of the deliberations, the whole question for the jury is, "Has the Crown proved beyond reasonable doubt that the accused has committed the crime?". That is the answer that is required to be given by the jury. It is not a question of, "Is it not proven?", "Is he not guilty?", or "Is he guilty?". The question is, "Has the Crown proved beyond reasonable doubt what it has set out to prove and what it has libelled against the accused?".

On a binary level, the outcome of a jury trial is a conviction or an acquittal but, in the acquittal, there are two sub-categories. The binary question is convicted or acquitted, but we have two routes to it. Then, we have the simple majority of the verdict. I do not claim to be a legal historian. I know Eamon Keane discussed the history of how we approach juries in Scotland. I think that the senators, in a previous response, discussed the differing views on whether we are seeking the decision of the jury in its entirety or seeking the decision of 15 members who are then added together to find the majority. The very nature of being tried by your fellow citizens is that it is an individual decision by a citizen.

You have the balance of corroboration, simple majority and the three-verdict system. When you shorten or remove one, there may be a tilt the other way. How large that tilt will be is difficult to establish. What may be of note in the Scottish jury research is that, if I remember correctly, this question was asked of individual jurors: "What is the correct verdict if you believe that the accused is guilty but the Crown has not proved the case?". In two-verdict juries, 4 per cent suggested that the correct verdict was guilty and, in three-verdict juries, 7 per cent suggested that the correct verdict was guilty. We have to be reliant on the jury system and trust that a properly directed juror who is properly discharging their oath will ultimately acquit, if they do not find that the case has been proven beyond reasonable doubt.

Removing the not proven verdict does not remove the ability of a juror to acquit; it potentially removes the confusion or the unsatisfactory nature of that acquittal, but a juror is still able to acquit. It

is difficult to see what balance is required, given that you are not removing the jury's ability to acquit altogether. You are merely suggesting that the correct answer to the question of whether the Crown has proved its case beyond reasonable doubt is, "No, therefore the verdict is not guilty," rather than, "No, therefore the verdict is either not guilty or not proven." The fundamental question has not changed. There has to be caution when considering whether there needs to be a balance to make it the case that more people have to be persuaded.

John Swinney: Thank you for that. It was very helpful.

I will now put to you some of the questions that I put to the panel of legal professionals about the perception of the not proven verdict. If I remember correctly, the words of the faculty representative were that it is "a measured means of acquittal". From the Crown's point of view, is the judgment that matters to you whether the case has been proved beyond reasonable doubt?

Laura Buchan: We, too, noted that discussion about its being a measured means of acquittal this morning, but we cannot know that, because we do not know why a jury opts for not proven. Ultimately we will know whether the verdict is not proven or not guilty, which, to us, is an acquittal, and the jury is told very clearly about what a result of not proven or not guilty means.

Eamon Keane helpfully gave the history of why judges make no effort to define not proven and not guilty and instead just make it very clear that either of those verdicts will be an acquittal. That comes back to the point that I was making earlier when I talked about what not proven might mean. We can think about it—and we know that victims say that a not proven verdict is unsatisfactory for them and that accused persons who have been acquitted with a not proven verdict say that it is unsatisfactory for them, too—but we cannot comment on why jurors opt for the verdict, because we just do not know.

John Swinney: My final question is on the vexed question that you put in front of us about a seven to five majority for a guilty verdict that then leads to an acquittal. In the other jurisdictions with which we are often compared, where you might have an eight to four or a nine to three guilty verdict leading to an acquittal, to what degree is there public concern about such a result?

Alisdair Macleod: I cannot speak to the public perception of the criminal justice system in Canada, England, Wales or New Zealand. Certainly, in those jurisdictions, there is a requirement for the jury to reach a verdict, so it has to reach a majority for not guilty, too. If it comes back and says that it cannot reach a majority on either verdict, that is classified as a hung jury. That is the result.

I am not sure of the position of the victim and the accused when a hung jury is the outcome. It might be something similar to what is experienced when a not proven verdict is returned, in that there is that uncertainty. Certainly, as far as I am aware, there is no similar situation in those other jurisdictions where you do not reach a majority, because, in this system, the majority is there only for guilty verdicts; in the other systems, the majority has to be there for all verdicts. You do not have those circumstances in which, although nine out of the 12 voted guilty, the verdict is not guilty. It is not; in that case, it is a hung jury. If nine out of 12 voted not guilty, that would be a hung jury, too. That is my understanding of how those systems work. There is a push for unanimity or near unanimity before a verdict can be delivered.

John Swinney: So the very nature of the decision about the composition of a jury decision can be conditioned or nuanced. It is about trying to avoid, understandably, the situation that you have put to us where you have a seven to five majority in favour of conviction and somebody is acquitted, which, I understand, is a hard sell.

Alisdair Macleod: It would be unsatisfactory to all parties if that were the outcome of a trial and if it became known that that was the outcome.

John Swinney: Okay.

The Convener: Thank you. I call Fulton MacGregor.

Fulton MacGregor: Good afternoon to you both. This has been a really interesting session so far. The conversation has moved on, but I want to go back to provide you with an opportunity to clarify the position for the record and for me, so that I understand it.

You have stated clearly that you are worried about an increase in the number of acquittals under the current proposals. I seek clarification on that, because, in the previous evidence session, we heard about the number of convictions, acquittals, not proven and not guilty verdicts. Are you worried about those that are currently not proven, or are you also worried about the numbers that are currently being convicted? Can you clarify the point on the increase in acquittals?

Alisdair Macleod: The issue is that, currently, the Crown has to prove its case to eight of 15 members of a jury, which is a 53 per cent majority. If you were to move to an eight to four majority of 12 jurors, the Crown would be required to persuade 67 per cent of the jury that the case had been proved. Therefore, increasing the requirement from a simple majority would increase

the percentage of a jury that you had to persuade in order to get a conviction.

Another difficulty with the lack of research on the way in which the current system operates is that we cannot tell you how many juries return an eight to seven verdict. It might well be that every jury in the land comes back with a unanimous 15 to nil verdict or a 14 to one majority verdict. There is no way of knowing how many cases are decided on an eight to seven verdict—there might be very few.

It might also be that, in a lot of cases, the percentage does not matter and there is no impact. The point that we are trying to raise is that there should be some caution with regard to the possibility that increasing the majority that is required to return a guilty verdict might result only in fewer convictions. It might not—we cannot tell. We are simply highlighting that that might be an unintended consequence of trying to balance the removal of not proven.

12:30

Fulton MacGregor: That brings us back to Russell Findlay's point that a lot of this lacks, for the reasons that you have outlined, research and data, and we are not able to understand what juries think. As Russell and others have said, the committee has, over the past few weeks, begun to feel the weight of the decisions that are being put on us now. These are significant changes, and one thing that we do not want to do is make things worse for people who use the justice system, particularly victims and witnesses.

Laura Buchan: I am sure that the committee has gathered data and shared it. However, if there are particular questions that you think that the Crown might be able to assist with on the data that we hold, you can ask us, and we will provide the committee with what we can.

Fulton MacGregor: Thank you for that.

I have a second question on this issue. I think that I hear what you are saying about the acquittals: you are worried that they will come not only from the current pool of not proven but, because of the higher threshold, from the current pool of convicted. I think that you have already answered this question, so you can be brief—as I am sure that the convener will be glad to hear. What if we, as a Parliament, decided—for want of a better phrase—to get rid of not proven, but left the jury numbers as they were? Do you think it possible that that might result in the reverse of your concerns occurring and, as many in the legal profession have similarly raised concerns about, lead to wrongful convictions instead? Are you concerned or worried about that? I am just putting that out there.

Alisdair Macleod: It has to be established that the question that the jurors will be asked will remain the same and that the decision that the jury will have to make will not alter. The jurors are being asked to decide whether the Crown has proved the case to them beyond reasonable doubt. There is no change to that test. It is, therefore, difficult to see how a juror who would previously have voted for an acquittal but selected not proven would suddenly, in discharging their duty correctly, decide to vote guilty instead.

I should clarify something. You mentioned our concerns about convictions coming from the not proven side. The fact is that not proven is an acquittal; any acquittal verdict should remain an acquittal verdict. If not proven were removed and everything else in the system remained the same, consideration would have to be given to why juries would suddenly start deciding that a case had been proved when, the day before, it had decided that it had not been proved. Our view is that the test on the question that is asked of the jury does not change by the removal of not proven; all that changes is one of the routes to acquittal. One of the options for acquittal changes, but the option of acquittal remains.

The Convener: If no other members want to come in, I will draw the session to a close and thank the witnesses for attending this morning.

That completes our agenda item. We now move into private session.

12:34

Meeting continued in private until 13:09.

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