Criminal Justice Committee

32nd Meeting, 2023 (Session 6), Wednesday 29 November 2023

Victims, Witnesses, and Justice Reform (Scotland) Bill

Note by the clerk

Background

1. The Committee is taking evidence on the Victims, Witnesses, and Justice Reform (Scotland) Bill at Stage 1 of the Parliament's legislative process.

2. The Bill proposes changes to the law to try to improve the experience of victims and witnesses in the justice system. The Bill also proposes changes to the criminal justice system to try to improve the fairness, clarity and transparency of the framework within which decisions in criminal cases are made.

3. The Committee is adopting a phased approach to its consideration of the Bill, to divide the Bill into more manageable segments for the purposes of Stage 1

Topics to be covered

4. At today's meeting, the Committee will begin taking evidence as part of the second phase of its scrutiny. This will cover the following provisions in Part 4 of the Bill, namely—

5. The Committee's scrutiny of Part 4 of the Bill will continue until the end of the year. Further details of the Committee's phased approach can be found online.

Today's meeting

6. At today's meeting, the Committee will take evidence from the following witnesses.

   Panel

   - **Eamon Keane**, Lecturer in Evidence and Criminal Procedure, School of Law, University of Glasgow
   - **Professor Fiona Leverick**, Professor of Criminal Law and Criminal Justice, School of Law, University of Glasgow

7. The two witnesses have provided a submission to the Committee (written jointly with two of their colleagues). The relevant section of the submission covering Part 4 of the Bill is reproduced at the Annex.

8. Today's evidence session will only cover Part 4 of the Bill. The Committee will be taking evidence on Parts 5 and 6 of the Bill in January and February.

Further reading

9. A SPICe briefing on the Bill can be found online.

10. The responses to the Committee's call for views on the Bill can be found online.

11. A SPICe analysis of the call for views, covering Parts 4, is circulated with the committee papers for this week's meeting.

Previous evidence sessions

12. At previous meetings the Committee has taken evidence from a range of witnesses on Parts 1-3 of the Bill.

13. The Official Reports of these meetings can be found online.

Clerks to the Committee
November 2023

ANNEX

Extract from Submission from Professor James Chalmers, Eamon Keane, Professor Fiona Leverick and Professor Vanessa E Munro

This is a joint submission in response to the Commitee's Call for Views on the above Bill. We are academics working in law schools in Glasgow and Warwick with expertise in criminal law, evidence and procedure. Three of us (Chalmers, Leverick and Munro) were members of the team which carried out the Scottish Jury Research which has informed aspects of the Bill. We have also conducted research on rape myths (Leverick individually and Chalmers, Leverick and Munro jointly) which has been cited by the Government in the Policy Memorandum accompanying the Bill. Keane has (with Convery) carried out work on independent legal representation which was relied upon by the Dorrian Review in its recommendations which have led to Part 8 of the Bill.

We have written an article examining the Bill's provisions, "Putting victims and witnesses at the heart of the justice system? The Victims, Witnesses and Justice Reform (Scotland) Bill" which will be published later this year in the Criminal Law Review. This submission draws on that article but is framed around the questions asked by the Commitee with cross-references to the article (referred to as "the Criminal Law Review article") for further detail where appropriate, which we hope is of practical assistance.

James Chalmers, Eamon P.H. Keane and Fiona Leverick, University of Glasgow
Vanessa E Munro, University of Warwick
15 September 2023

4. What are your views on the proposal in Part 4 of the Bill to abolish the not proven verdict and move to either a guilty or not guilty verdict?

We support this proposal, one of us has previously criticised the verdict's contemporary status (Keane "Scotland's not proven verdict: the nightmare of history?' in Keane and Robson (eds) The Ian Willock Collection on Law and Justice in the Twenty-First Century (2023) and three of us have already written at length in favour of abolition (Chalmers, Leverick and Munro, "Beyond doubt: the case against 'not proven'" (2022) 85 Modern Law Review 847-878, freely available via https://doi.org/10.1111/1468-2230.12707). That work drew both on the Scottish Jury Research and separate work by Munro with complainers on their experience of the not proven verdict (Piecing Together Puzzles: Complainers' Experience of the Not Proven Verdict (2020), freely available at http://wrap.warwick.ac.uk/137857/). We have previously summarised the arguments in favour of this change in a blogpost (https://www.uofgschooloflaw.com/blog/2021/12/7/beyond-doubt-the-case-against-not-proven) and repeat the relevant parts of that summary here for ease of reference:

Rebutting the arguments in favour of the not proven verdict

New empirical evidence from the Scottish Jury Research project allows us to undertake a fuller and more informed analysis of the arguments for and against the not proven verdict than previously possible.

One argument for the not proven verdict might be that it is valuable because it sends a message to the accused about the nature of their acquittal. While mock jurors might believe that they are sending a particular message through their choice of the not proven verdict, however, the meaning of that message is variable and is not always received as intended. In sexual offence cases, in particular, there is a mismatch between what jurors believe they are communicating to complainers and the message which is actually heard. In terms of communication to the wider community, the lack of any clear and settled meaning for the verdict, and differing juror understandings as to what it signifies and when it should be used, undermines any potential communicative function and makes it difficult for criminal justice professionals to explain to complainers how they should best interpret the jury's verdict.

Another possible argument for the not proven verdict is that it is a valuable safeguard against wrongful conviction. Evidence from the Scottish Jury Research does suggest that the not proven verdict may reduce the propensity of jurors to convict. However, this does not itself demonstrate that it operates as a safeguard against wrongful conviction. It may equally result in the acquittal of the factually guilty. The use of the verdict is particularly prevalent, but particularly problematic, in sexual offence cases, where it may enable juries to give weight to myths and stereotypes in avoiding verdicts of conviction. And while there is no clear evidence that the verdict does in fact safeguard against wrongful conviction, its existence has been used to justify Scots law not introducing other measures which would, meaning that it may in fact be actively harmful in this regard.

Arguments against the retention of the not proven verdict

This serves to rebut the core arguments in favour of the not proven verdict. In addition, we would note two strong arguments against its retention in the Scottish criminal justice system.

The first is in terms of the stigma that attaches to the verdict – in the Scottish Jury Research, jurors regarded it as a lesser acquittal than not guilty ("you walk away innocent, but everybody knows"). We do not know to what extent stigma is in fact experienced by those acquitted via not proven, but regardless, there is a normative argument that an acquittal verdict should not be stigmatising, and that in itself is a powerful argument against its retention.

The second argument is that it risks a loss of public confidence in the criminal justice system, as it allows jurors to use it as a compromise verdict to bring deliberations to an end, rather than engaging in more rigorous discussions. There is empirical evidence from the Scottish Jury Research that the verdict operates in precisely this way, with participants using it to bring deliberations to

> a premature end. There was also evidence that this use was 'read into' the verdict outcome by sexual offence complainers, undermining their belief that jurors discharged the weighty responsibility placed upon them with appropriate diligence.

In addition, the Commitee may receive submissions advocating the use of verdicts of proven and not proven rather than guilty and not guilty. We would oppose such a proposition, and in the blogpost summarised the case against it as follows:

> **Could we keep "not proven" and abolish "not guilty"?**
>
> An occasional response to criticisms of the three verdict system is to argue that if Scots law were to move to two verdicts, it should be "not guilty" that is abolished, with a system of "proven" and "not proven" being introduced. Invariably, the argument made here is that the jury's role is not one of determining guilt or innocence, but simply of assessing proof. That is not a position we would support.
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> For one thing, it represents a very denuded conception of the jury's role, which is not limited simply to questions of 'what happened'. It frequently involves an evaluative role – such as, for example, determining whether the use of a particular level of force in self-defence was reasonable – a point recognised by early decisions of the Scottish courts which suggested that a judge might legitimately withdraw the option of 'not proven' from the jury in cases which turned solely on such a question.
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> Moreover, it would be odd, given the demonstrable problems of the not proven verdict, if a decision were taken to retain it rather than not guilty – against which no case has been made. We are not starting from a clean sheet here. A single acquittal verdict of not proven is likely to carry a residual element of stigma. It is also unlikely to be well understood by anyone outside the jurisdiction, who may attach a stigmatic meaning to it through lack of understanding, especially as the verdict would be out of step with the use of not guilty by the vast majority of other legal systems.

5. What are your views on the changes in Part 4 of the Bill to the size of criminal juries and the majority required for conviction?

We support both changes, although somewhat tentatively in relation to the majority requirement. We note that, in increasing the majority requirement from the simple majority rule, there is also a judgment call to be made about the exact nature of that increase, where views can reasonably differ.

In respect of the changes to jury size, as we note in the Criminal Law Review article, "the Scottish Jury Research [found] that juries of 15 people deliberated less effectively than juries of 12. Within that study, jurors in 15 person juries were more likely to be observed wanting to contribute but not being able to, and they gave lower ratings of their own influence over the verdict. Deliberations were also less ordered, with jurors more likely to speak over one another and side conversations involving only a small

number of jurors developing in parallel with the 'main' deliberation." (text before fn.60, footnotes omitted). While opposition to this change is sometimes justified on the basis that a greater jury size allows for a more diverse range of views to be heard, this argument is undermined if jurors are unable to participate effectively in the discussions.

In respect of the changes to the majority required for conviction, we say in the Criminal Law Review article that "the Scottish Jury Research [found] that jurors were more likely to favour conviction in a system of two verdicts than when the not proven verdict was available. Given proposals elsewhere in the Bill to abolish not proven and reduce jury size, without parallel reform to the jury majority requirement, this would have seen the Government proposing the combination of variables identified as most pro-conviction in that research… The policy choice [made by the Government in the Bill] was a difficult one. Raising the majority required to, say, ten out of twelve would run the risk that other reforms targeted, at least in part, at the low conviction rate in sexual offence cases may be thwarted. But the proposal for eight out of twelve might be criticised for creating an unacceptable risk of wrongful conviction." (text around fns.70-71, footnotes omitted).

We note also that the two changes are interlinked. As we note in the Criminal Law Review article, "a change in jury size may be an important aspect of alleviating concerns about the effects of modifying the majority required for conviction. There is widespread evidence from other common law jurisdictions, demonstrated by the relative rarity of hung juries, that juries of 12 are generally successful in reaching a consensus, while no such evidence exists (or could exist) for the 15 person jury. While the Scottish Government has rejected the possibility of introducing hung juries into Scots law, this evidence suggests that juries do not routinely split "down the middle" and that a change to a two-thirds majority may increase confidence that individuals are not being too readily convicted in marginal cases while not significantly affecting the rate of conviction in categories of case, such as sexual offences, which are a matter of political concern." (text around fns.64-66, footnotes omitted).