Criminal Justice Committee

34th Meeting, 2023 (Session 6), Wednesday 13 December 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—

Part 4

Criminal juries and verdicts

Contains measures reforming criminal trials.

- Removes 'Not Proven' as a verdict in all criminal trials, leaving verdicts of 'Guilty' and 'Not Guilty'.
- Changes the size of a jury in a criminal trial from 15 to 12 members.
- Changes the majority of jurors required for conviction from being a simple majority (where there is a full complement of jurors) to a two-thirds majority.

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 1

- **Michael Meehan KC**, Faculty of Advocates
- **Stuart Munro**, Law Society of Scotland
- **Stuart Murray**, President, Scottish Solicitors Bar Association

Panel 2

- **Laura Buchan**, Procurator Fiscal, Policy and Engagement and **Alisdair Macleod**, Principal Procurator Fiscal Depute, Policy Division, Crown Office and Procurator Fiscal Service

7. The relevant sections of written submissions from the Faculty of Advocates, the Law Society of Scotland, the Scottish Solicitors Bar Association, and the Crown Office and Procurator Fiscal Service covering Part 4 of the Bill are reproduced at the Annex. The full submissions, where available, can be found online at the following links.

- Faculty of Advocates
- Law Society of Scotland
- Scottish Solicitors Bar Association (see pages 10-12 of the paper)
- Crown Office and Procurator Fiscal Service

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, was circulated with the committee papers for last 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 Committee has previously taken evidence on Part 4 of the Bill from—

- 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
- Sandy Brindley, Rape Crisis Scotland
- Joe Duffy

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

Clerks to the Committee
December 2023

ANNEX

Extract from Submission from Faculty of Advocates

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?

Faculty opposes the abolition of the not proven verdict. Faculty can do no better than repeat the answer it gave to the Scottish Government's Consultation Paper on the Not Proven Verdict and Related Reforms:

> "Experience tells us that in rape cases in particular, the factual questions are often hard to determine. It is the experience of Faculty that cases of rape, and attempted rape, are the most frequent types of case to present a jury with heavily nuanced competing evidence from lay witnesses, often affected by alcohol or other substances, in situations where it is rare to have other eyewitnesses, or forensic evidence that speaks to existence or absence of consent. Faculty notes that this may make it difficult for juries to establish the essential elements of the offence beyond a reasonable doubt. That may leave a jury unable to convict, but by no means assured about innocence (beyond that it is presumed).
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> This may be a reason why rape and attempted rape cases yield the verdict more frequently than other charge categories. It is the experience of Faculty that there are often more factually difficult questions in such cases than in any others. It may be that juries appreciate that and communicate it through this measured means of acquittal.
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> Faculty is concerned that, should the not proven verdict be removed, there is a potential danger of jurors wrongly convicting an accused person. Removing this verdict may force jurors who have not been convinced by what they have seen and heard into one of the two polar verdicts, where they feel uncomfortable with either but are left with no choice. To do so undermines the presumption of innocence and may turn the trial into an examination of the morals of the accused rather than whether the prosecution have proved their case beyond reasonable doubt.
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> Whilst many lawyers would translate every 'not proven' verdict into one of 'not guilty' in the event that such a verdict were removed, Faculty notes that there are those who consider that any such change would result in cases which may presently result in not proven verdicts ultimately returning guilty verdicts. While Faculty is not aware of the evidential basis for this belief, it is concerned that emotive cases may produce such a result, where jurors are unwilling to pronounce innocence (as they may understand a not guilty verdict to be) and accordingly return a guilty verdict.
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> In our system, where eight votes out of fifteen for "guilty" will deliver simple majority verdict, just one juror yielding to this influence could deliver an unjustified guilty verdict and change the course of a citizen's life wrongly and

forever. Every single wrongful conviction erodes public confidence in our system of justice.

Faculty considers that the not proven verdict may be a safety valve for jurors who have not reached the threshold for conviction but reject the impossibility of guilt. It is in practice now tied closely to our unusual system of majority verdicts. There may be cases which should not end in conviction, but where the removal of the safety valve could turn them into false and wrongful convictions, as jurors may find the polarity of 'not guilty' is repellent in the hard evidential landscape of rape and attempted rape cases."

Faculty notes that the Bill proposes a reduced size of jury and a qualified majority for conviction. It does not seek to introduce the additional safeguard of the requirement for a unanimous decision, failing which a 10-2 majority if directed by a judge. Accordingly, the same criticism advanced in relation to the abolition of the not proven verdict remains. Faculty considers that the not proven verdict cannot be removed without other fundamental changes being made in the jury system, particularly in relation to the size of any majority required for conviction.

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

Faculty refers to its response to Question 8 of the Scottish Government Consultation Paper on the Not Proven Verdict and Related Reforms:

"Faculty considers that the abolition of the not proven verdict would not be, in itself, a basis for reducing the size of a jury in a criminal trial. As is noted on page 21 of the consultation document, Lord Bonomy's Post Corroboration Safeguards Review recommended that research should be undertaken to ensure any reforms made to the Scottish jury system, including the size of the jury, were made on an informed basis. Faculty considers that there remains a need for such research.

Faculty notes that there is continuing debate regarding the reliability of both the jury research carried out in England, with real jurors in real trials, and that carried out in Scotland, with mock jurors in mock trials. It is extremely important to note that the many of the findings of the respective research conflict with each other. As has been recognised throughout the consultation document, the research in Scotland was carried out using mock jurors and mock trials and cannot therefore be said to reflect real life juries. The limitations of the Scottish Government research as outlined in the consultation document can be summarised as follows:

- Sample size.
- Findings based on mock jurors' responses to only two specific types of trial.
- The unknown impact of mock jurors knowing that they were not participating in real trials.

Faculty is of a view that proposing reform based on research that has such significant limitations would be rash. There is a real risk that such reform would have a detrimental impact on the overall administration of justice.

Faculty observes that a further limitation exists in the use of only finely balanced mock trials within the mock jury research. By definition, finely balanced trials are those that are on the cusp of meeting the necessary standard of proof. These are exactly the type of trials that, in the experience of Faculty, might well result in a not proven verdict. That may be the most appropriate verdict in that case. Faculty has concerns that the jury research does not tell us anything other than how mock juries behave in a very specific set of circumstances.

Faculty has further concerns regarding some of the findings from the Scottish Government jury research. On page 21 of the consultation document, it is asserted that mock jurors in 15 person mock juries were less likely to change their minds on a verdict than mock jurors in 12 person mock juries. It is not clear to Faculty what is to be taken from this observation. It might be thought that mock jurors being cajoled or even bullied by others was more keenly felt by participants in a smaller group. The desire not to be a lone voice or part of a small minority may have led to mock jurors changing their minds. It might be that groups of 15 providing a greater degree of diversity also provide a greater degree of comfort for those with views that differ to many others in their group. Faculty considers that the research available at present does not sufficiently explore the relationship between the number of persons on a jury and the decision making process that juries undertake.

Faculty is also concerned by the suggestion, also on page 21 of the consultation document, that reducing the number of jurors on Scottish juries from 15 to 12 might lead to more jurors participating more fully in the deliberations. It is submitted that such an uncertain conclusion is no basis on which to reform such a fundamental part of the Scottish justice system. On page 7 of the consultation document, it is noted that caution must be taken when generalising results from the mock jury research to real juries. Standing the limitations summarised above, Faculty suggests that should be great caution.

A jury is the most democratic body we have, and we are lucky that we have a larger jury than other jurisdictions, which better reflects our society. As was pointed out in the 2008 Scottish Government consultation "The Modern Scottish Jury in Criminal Trials", a jury of 15 is more likely to include a mix of gender, ethnicity, experience, and social awareness. That has never been truer than today, as our society becomes increasingly diverse.

It is noted, on page 8 of the consultation document, that nothing in the Scottish Government jury research should be taken to undermine confidence in individual verdicts. It follows that we remain confident in the verdicts that our juries deliver. Faculty considers that, unless there exists compelling evidence that juries get it wrong, great care must be taken in altering a system that ostensibly works."

Faculty remains of the view that the size of criminal juries should remain at 15 jurors. The research on which the proposal to reduce jury size is based has significant limitations. It is based on volunteer mock jurors playing the part of real jurors. Real jurors are cited and must attend. The mock jurors knew they were not participating in real trials and knew that the complainer, the accused and the witnesses were not real. Mock juries cannot be said to reflect real life juries. Findings in jury research with real jurors in real trials in England conflict with the findings in the Scottish mock jury research. Faculty is of the view that changing the size of real juries on the basis of mock jury research would be rash. There is a real risk that such reform would have a detrimental impact on the overall administration of justice.

If the size of criminal juries remains at 15 jurors, then the qualified majority in favour of conviction should be 12 jurors.

If the jury size is reduced to 12, Faculty is of the view that the qualified majority should be 10 jurors. The vast majority of legal systems with a jury size of 12 jurors require unanimity or a qualified majority of 10 jurors. Faculty is of the view that Scotland should not stand apart with a lower threshold. Higher jury thresholds are adopted because they provide higher protection against wrongful conviction of serious crime.

If the jury size is reduced to 12, then in event of death or discharge of jurors Faculty is of the view that the trial should not proceed unless there remain at least 10 jurors. The safeguard of a qualified majority to convict should remain at 10 jurors. A person should not be convicted of a serious crime by a jury of fewer than 10 jurors.

Extract from Submission from the Law Society of Scotland

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?

Section 35 abolishes the not proven verdict in solemn trials by providing for a jury returning either a verdict of guilty or not guilty (abolition of the not proven in solemn trials) and for a qualified majority in favour of a guilty verdict being 8 jurors in the case of a jury of 11 or 12 jurors and 7 jurors in the case of a jury consisting of 9 or 10 jurors.

Section 36 abolishes the not proven verdict in summary trials.

These provisions, if enacted, would constitute a profound change to the balance of a criminal trial.

We opposed the abolition of the not proven verdict in our response [https://www.lawscot.org.uk/media/372551/22-03-11-crim-final-npv-response.pdf] to the Scottish Government consultation on the not proven verdict and related reforms in March 2022, as did our members in our survey in 2021 [https://www.lawscot.org.uk/media/371397/not-proven-survey-report-_6august2021.pdf]. We adhere to that position on the basis that the criminal justice process is a complex system and the availability of the not proven verdict at present provides an important safeguard against wrongful convictions.

If the not proven verdict is removed in terms of Sections 35 and 36, then the simple majority verdict cannot be maintained.

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?

Section 34 reduces the size of a jury from 15 to 12 jurors and reduces the quorum required from 12 to 9 jurors.

Section 33 provides for a qualified majority in favour of a guilty verdict being 8 jurors in the case of a jury of 11 or 12 jurors and 7 jurors in the case of a jury consisting of 9 or 10 jurors.

While we support the removal of the simple majority verdict (currently 8 out of 15 jurors) we do not consider that the proposed move to a qualified majority verdict would strike the correct balance in safeguarding the delivery of justice and fairness for all.

The proposals to reduce the size of the jury and increase the majority appear to be based in the mock jury research [https://eprints.gla.ac.uk/201280/1/201280.pdf] commissioned by Scottish Government in 2018 and undertaken by Professor James Chalmers (University of Glasgow) and others. While we acknowledge that this research was a comprehensive and much valued piece of work, it was further acknowledged by the researchers themselves that it has its limitations. Lady Dorrian's Report [https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/Improving-the-management-of-Sexual-Offence-Cases.pdf?sfvrsn=6] at paragraph 5.31 notes that although the mock jurors took the exercise extremely seriously, they were all aware they were playing a role. Also, self-selection bias was identified in that the mock jurors chose to be involved as opposed to real jurors who are randomly selected. Rather than conducting a trial in real time, jurors watched a pre-recorded film. While the use of a single scenario for the rape trials enables them to say how jurors reacted to some aspects of the evidence, it is not possible to say what difference these aspects make in the absence of similar studies without these specific features. Also, the scope of the case and the issues considered would clearly be constrained compared to those which might arise in a real trial. A one-hour trial is unheard of in practice.

The overarching finding of this research was that juror verdicts were affected by how the jury system was constructed. The research found that the number of jurors, the number of verdicts available, and the size of majority required do influence verdict choice.

In our response to the Scottish Government consultation on the not proven verdict and related reforms as referred to above, we referenced the mock jury research which suggested that 12 may be the optimal number for jury size. On the one hand, the larger the jury, the greater the spread of background and experience that can be drawn upon. However, with a jury of 15 there was also a greater risk of more dominant jurors meaning other jurors were less likely to effectively contribute to deliberations.

Many common law jurisdictions, including England and Wales, Ireland, Australia, Canada, New Zealand and many US states have 12 jury members.

Section 34 (3) repeals Section 90 of the Criminal Procedure (Scotland) Act 1995 Act (the 1995 Act) and provides for the court in its discretion, to determine that a trial should proceed before the remaining jurors where a juror has died during a trial or is discharged because it is inappropriate for that juror to continue to serve. We note that, while the court must give the prosecutor and the accused an opportunity to make representations on whether the trial is to proceed, this is a departure from Section 90 of the 1995 Act where the court considers an application from either the prosecutor or accused to proceed in the event of the death or illness of a juror.

Section 35 inserts a new Section 99A into the 1995 Act which removes the not proven verdict. This will mean that a jury will have a choice to deliver a verdict of either guilty or not guilty. Section 99A (4) also provides for a weighted majority of at least 8 jurors in favour of a guilty verdict where there are 11 or 12 jurors and at least 7 jurors in favour of a guilty verdict where there are 9 or 10 jurors, otherwise a verdict of not guilty must be returned.

There is no doubt that the current simple majority verdict is unsatisfactory. It is incompatible with the criminal standard of proof beyond reasonable doubt. It exists in no other comparable jurisdiction. Its traditional justification is that it acts in balance with other features of the Scottish system, including the not proven verdict. Removal of the not proven verdict inevitably requires removal of the simple majority.

In terms of our previous response, we outlined that most other jurisdictions require unanimity in reaching in guilty verdicts or something close to unanimity. This is a consequence of the standard of proof being one beyond reasonable doubt, the presumption of innocence and the burden of proof and the view that a jury verdict should be a collective decision of the jury as opposed to simply the result of counting votes in a ballot. Although most other systems allow qualified majorities in recognition that one or two jurors may not have effectively participated in the process, this has allowed for the principle of the qualified majority not to interfere with the collective decision of the jury.

Scotland has stood apart from most other systems which have adopted unanimity or near unanimity of either 10 or 11 out of 12 jurors as we have a distinctive system of a 15-person jury, a simple majority in favour of a guilty verdict otherwise the accused must be acquitted, three available verdicts of guilty, not guilty and not proven, and the requirement for corroboration. This approach has been justified as the proper approach to the aim of the criminal trial to convict the guilty and acquit the innocent. It is an approach, albeit distinctive, with which we have previously agreed.

On the basis that we move to a 12-person jury and two available verdicts, then unanimity comparable to other common law jurisdictions should be considered.

In this respect we note the United States of America Supreme Court case of Ramos v Louisiana [https://www.supremecourt.gov/opinions/19pdf/18-5924_n6io.pdf] decided on 20 April 2020. In 48 out of the 50 states and federal courts, unanimity is required to convict and therefore a single juror’s vote will result in acquittal. The two states where a 10-2 majority was permitted were Louisiana and Oregon. Evangelisto Ramos was convicted of second-degree murder a on a 10-2 majority verdict in a Louisiana state

court. This would have resulted in a mistrial almost anywhere else, but he was sentenced to life imprisonment without the possibility of parole. The U.S. Supreme court agreed and overturned his conviction, holding that the Sixth Amendment which guarantees among other things the right of the accused to speedy and public trial, by an impartial jury, also guarantees a unanimous jury in order to convict.

Overall, the Society is of the view, that a jury of 12 should require a unanimous verdict. Although this may result in the possibility of hung juries and re-trials, research conducted by professor Cheryl Thomas K.C. [https://discovery.ucl.ac.uk/id/eprint/10165027/1/2023_CrimLR_Issue_3_Print%20%28Cheryl%20Thomas%29.pdf] indicates that the number of re-trials in England is exceptionally low at around one per cent.

Submission from Scottish Solicitors Bar Association

REMOVAL OF NOT PROVEN VERDICT

It is often said that the verdict of Not Proven arrived by way of accident in Scots Law. Emanating from a time when Juries were asked to decide on whether individual facts of a case were proven or not proven. Whilst the law moved on from here, the term persisted and jurors began to use two forms of acquittal. This has been the case since the 1700's.

The passage of time however has not assisted in providing a definition for this uniquely Scottish form of acquittal but the last 300 years or so has seen the Not Proven verdict become an important feature of Scots Law.

The Scottish Solicitors Bar Association (SSBA) has serious concerns that the removal of this verdict would undoubtedly result in an increase in conviction rates. It is a cornerstone of justice that an accused person is deemed innocent until proven guilty. It is for this reason that the Crown must prove guilt beyond a reasonable doubt. Jurors are required to consider weighty matters and often in cases such as murder, rape and other serious sexual offences. These are matters which can evoke levels of emotion which many are unaccustomed to dealing with. Whilst judges give specific direction that emotion must be set to one side, it is not difficult to imagine a scenario where jurors have listened to highly emotive evidence which simply cannot be completely dispelled from their minds.

Having heard difficult and often graphic evidence, the jurors are very often left with little to assess, except the credibility or reliability of competing witnesses. By way of example, rape cases often have little by way of eye witness statements or forensic evidence. The testimony alone, of a complainer, may be emotive enough to cause a juror to consider the verdict of guilty. Likewise, 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. An option that allows the jury to demonstrate that the Crown have failed to prove guilt beyond a

reasonable doubt. An option that minimises a miscarriage of justice by forcing jurors into a polarised decision. A black or white decision.

Whilst high profile cases such as the Amanda Duffy murder trial, have caused many victim support groups to call for the abolition of the Not proven verdict, there is simply not enough evidence to demonstrate that there have been a significant enough number of miscarriages of justice, within the current 3 verdict system, to justify the change to this tried and tested approach. It is of some significant concern that research and the resulting findings lack any degree of realism in that the research was carried out using a "mock" approach, as opposed to work carried out south of the border, which took the views of real and past serving jurors.

Greater concerns arise out of a move to abolish the not proven verdict, when viewed alongside further proposals to alter the landscape of the criminal justice system.

The consideration to altering the size of the jury is a particular concern to the profession.

JURY SIZE and QUORUM

The inclusion of lay persons in the administration of Scots Law is vital. They are an essential cog in the wheels of justice. Without them, lawyers would have a complete monopoly over the law and we therefore require the life experience and collective wisdom that jurors bring to the courts. Jurors are chosen at random and the system is designed to bring life experience from a cross section of society, to the decision making process. It goes without saying that the more jurors that are involved in this process, the wider the cross section of society and the greater collective knowledge that can be applied to reaching a verdict in these most serious of cases.

It is of course human nature for individuals to have either learned or built in beliefs and biases. By way of example, some jurors may have preconceived notions or biases regarding race, religion or indeed the fairness of the court process. The larger the cross section of society therefore, the less chance there is of "majority" of individuals with similar views or biases. It follows therefore that any attempt to reduce the jury size from 15 to 12, significantly reduces the collective life experience and wisdom of that Jury.

In addition, it is often said that there is safety in numbers. The profession is concerned that a jury sitting with a smaller number of individuals, may be prone to influence by more dominant and vocal members of the jury. There may well be "safety" within the body of a larger jury which allows those members who are less dominant and less vocal, to have their voices heard. Again, the research carried out to date, on the reduction of juries from 15 to 12, is simply not sufficient to risk the destabilization of the jury system. It is however the view of the profession that 15 jurors will provide the broadest range of views and therefore improve the quality of deliberation and the likelihood of a just verdict.

In relation to the number of Jurors required, the profession is of the view that there is entirely insufficient research or evidence to allow consideration of a change to the number required or the size of majority required to reach a verdict.

Finally, at a time when the criminal justice system is already facing developments in the law in relation to Sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 and in respect of the High Court's recent decision in Smith v Lees and the long held requirement for corroboration, the SSBA warns against any significant changes to the current legal system and the destabilising effects these changes could bring about.

Extract from Submission from the Crown Office and Procurator Fiscal Service

Part 4 - Abolition of Not Proven and Change to Jury Size

21.COPFS operates within the structure of the criminal justice system that is created and determined by the legislature and any decisions as to changes to the size and majority requirements of a jury, and the verdicts that are available to the jury, are matters for the Scottish Parliament and are not matters on which COPFS intends to provide submissions.

22.COPFS consider it appropriate, however, to provide information to the Committee on the potential consequences of the proposed changes, and linked ancillary provisions, for the operation of the criminal justice system.

23.Within the Policy Memorandum of the Bill, it is suggested that key research supports a view that jurors may be more likely to convict in a two-verdict system. Consequently, a number of the provisions in Part 4 of the Bill are predicated on the assumption that the removal of the not proven verdict would increase the number of convictions returned by juries.

24.It is submitted that closer analysis of studies referenced in support of this position demonstrates that the studies do not evidence an increase in convictions by juries where there are two verdicts available as opposed to three.

25.The Scottish jury research undertaken in 2019 observes in its report that "**juries asked to choose between three verdicts were no more or less likely to return a guilty verdict than those with two verdicts available**." Further, in the study where juries had only 2 verdicts available to them, they returned conviction in 3 out of 32 "trials". Where juries had 3 verdicts available to them, they returned convictions in 4 out of 32 "trials".

26.The second research referenced in the policy memorandum was the study "**A Third Verdict Option: Exploring the Impact of the Not Proven Verdict on Mock Juror Decision Making**." In this study 142 individuals were split into 28 "juries" of between 4 – 8 individuals. 14 juries were provided with the option of returning 2 verdicts and 14 were provided with the option of 3 verdicts.

27.The study indicated that 79% of the "juries" returned a not guilty verdict where 2 verdicts were available whilst only 71% of "juries" returned an acquittal verdict where 3 verdicts were available. This demonstrates that there was a 21% conviction rate in the study where 2 verdicts were available to the jury and a 29% conviction rate where there were 3 verdicts open to the jury.

28.Finally, the third study referred to in the policy memorandum “**Proven and not proven: A potential alternative to the current Scottish verdict system**.” Divided participants into 3 groups and each group was given the option of returning a verdict if (i) “Guilty”, “Not Guilty” or “Not Proven”; (ii) “Guilty” or “Not Guilty”; or (iii) “Proven” or “Not Proven".

29.The study indicates that that there was a 28% conviction rate where there were 3 verdicts available compared to a 46% conviction rate where there were two verdicts of “Guilty or “Not Guilty”. However, where there were 2 verdicts of “Proven” or “Not Proven” the conviction rate was 20%. Additionally, this study was conducted online with “jurors” participating individually with no interaction between individuals and so was an analysis of individual juror’s verdicts and not the collective verdict of a jury of 15 persons following discussion. The study recognises that the limitations of how the study was conducted decreases the generalisability of the results.

30.It is also submitted that caution should be exercised in extrapolating the results of the mock jury research to real juries. The Scottish Jury research report recognises that the study saw a not proven acquittal rate of 92% in the juries that were part of the study whilst in actual jury trials in the year 2017-2018 the acquittal rate by not proven was only 17%. Similarly, the not proven acquittal rates in the other two studies were between 42% - 64%. This discrepancy in the accuracy of the research in relation to not proven acquittal rates should be recognised when assessing their value in application.

31.The experience of prosecutors suggest that it is unclear why the removal of the “not proven” verdict would result in an increase in the number of jurors voting to convict an accused person. For a juror to return a verdict of “not proven”, it is assessed that the juror is likely to have determined that the Crown did not prove the charge “beyond reasonable doubt”.

32.The Judicial Institute for Scotland publishes the Scottish Jury Manual which provides guidance for the justiciary on the conduct of jury trials and suggested directions for jurors. At page 116.1/118 in relation to directions on verdicts the Manual indicates that an appropriate direction to jurors is that “if you’re satisfied beyond reasonable doubt that he’s guilty, **your duty is to convict him**.” (emphasis added). It is not clear, therefore, why a juror, who did not find that the Crown had proved a charge beyond reasonable doubt and who would otherwise have returned a verdict of “not proven”, would, on the basis of the same evidence, return a verdict of guilty in the absence of the not proven verdict.

33.Every juror will consider the evidence in a unique way that is personal to them as they fulfil their role, assess the evidence and determine whether the standard of proof has been met. It is unclear why a juror properly discharging their oath and properly directed would return a guilty verdict when provided with only 2 verdicts, when they would have acquitted where three verdicts were available.

34.In addition to the proposals to remove the not proven verdict the provisions in the Bill seek to reduce the size of a jury from 15 to 12 members to facilitate the effective participation of jurors and maximises the opportunity for meaningful and robust deliberations. It is also intended to reduce the impact of jury service on society by requiring fewer people to miss work or other commitments due to serving on a jury.

35.The provisions also increase the majority required for a conviction to a two thirds majority as opposed to a simple majority. This is to "**safeguard the delivery of justice through maintaining fairness and the balance of safeguards in the system" and will "help maintain confidence in the jury system and the decisions being made and bring Scotland closer to other jurisdictions with common law traditions…"**[1]

36.At present a majority of 8 is required for a conviction. Where the jury comprises 15 members, this equates to 53% of the jury voting in favour of a guilty verdict before the accused is found guilty. If the jury size was to be reduced to 14 members, 57% of the jury would require to find the accused guilty and this would rise to 62%, where the jury was reduced to 13 members.

37.The current proposals are that the two-thirds majority required to return a guilty verdict in a case would be 8 out of a jury of 12. This is the equivalent of 67% of the members of the jury.

38.Where jurors have been excused, the majority required for a guilty verdict remains at 8 for a 11-person jury (73%) and decreases to 7 for a jury of 10 or 9 persons (70% or 78% respectively).

39.Where the jury does not reach the required majority to return a guilty verdict a not guilty verdict will be recorded, and the accused will be acquitted. This is different to the common law systems, such as England and Wales, where there is potential for a retrial in such circumstances.

40.It is observed that, when considered alongside the position that jurors who would previously have acquitted the accused through a finding of "not proven" are unlikely to change their verdict to one of guilty if the not proven verdict is removed, the requirement to prove the case beyond a reasonable doubt so as to satisfy a higher proportion of the jury that they would be entitled to find the accused guilty, will place an increased burden on the Crown in prosecuting in the public interest.

41.While it is not possible to predict the outcome in any trial, the proposed changes to the jury system may result in an increase in the number of acquittals in cases which would previously have resulted in conviction. This will impact on complainers, the public interest and the proper operation of the criminal justice system.

42.Furthermore, unlike other common law jurisdictions which operate a system of juries of 12 jurors, with 2 verdicts open to them, such as in England and Wales, the provisions do not allow for an application by the Crown for authority to raise a further prosecution where the majority of jurors have returned a guilty verdict but the required majority of 8 has not been reached in juries of 12 or 11 jurors, or the majority of 7 in juries of 10 or 9 jurors (which would be a verdict of 7-5, 7-4, 6-4 or 6-3 respectively).

43.This creates a scenario where, should a jury of 12 reach a verdict where seven jurors return a guilty verdict and 5 jurors return a not guilty verdict, the accused would be acquitted notwithstanding that 58% of the jury had returned a guilty verdict, which as identified above, is a greater majority than currently required for a conviction.

[1] Policy Memorandum paragraph 251

44.In such a scenario it is suggested that there is merit in the court having the authority to consider and grant a Crown application for a retrial. This could be structured so that a court, following the returning of a verdict where the majority of a jury returned a verdict of guilty but where the statutory majority was not reached, would consider if it was in the interests of justice not to acquit the accused of the charge but grant an application of the Crown to permit the accused to be retried.

45.It is noted that one of the arguments against the creation of a provision for retrial is that it risks additional trauma for the complainer in having to give evidence more than once. However, this should be balanced against the trauma experienced by a complainer following an acquittal, particularly where the majority of the jury would have found the accused guilty. Further, it is submitted that the proposed increased use of pre-recorded evidence may remove or reduce the requirement for a complainer to have to give evidence at a second trial.