Victims, Witnesses, and Justice Reform (Scotland) Bill
Criminal Justice Committee
Supplementary submission from James Chalmers, Eamon Keane, Fiona Leverick and Declan McLean, University of Glasgow School of Law
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Fiona Leverick and Eamon Keane gave evidence to the Criminal Justice Committee on 29 November 2023 as part of its scrutiny of Part 4 of the Victims, Witnesses, and Justice Reform (Scotland) Bill, following the submission of a response to the call for views along with James Chalmers and Vanessa Munro. During that evidence session, and in subsequent correspondence, they agreed to provide further information on three issues, as summarised in an email sent on behalf of the Committee on 29 November:

- Why the Scottish criminal justice system has evolved a simple majority jury system, as opposed to unanimity (or attempt to first achieve unanimity) in terms of retuning a verdict,

- Some comparative information on which legal jurisdictions similar to Scotland's which have a system where a jury is initially asked or expected to attempt to reach a unanimous decision on a verdict, before then attempting to reach a verdict on which a specified majority of jury members must agree, and

- Some comparative information on which legal jurisdictions similar to Scotland's has changed this rule. For example, any systems (as Russell Findlay observed today) which have changed from a requirement for unanimous agreement on a jury to one where some qualified majority of the jury is acceptable to reach a verdict. Or vice versa, where a system that did have some qualified majority rules moved to a position of requiring jury unanimity for a verdict.

This submission covers each of these issues in turn (the second and third are taken together). James Chalmers and Declan McLean have also contributed to this submission. This is not intended as a comprehensive account of the law in all relevant jurisdictions. It draws, with updates, on prior work carried out by James Chalmers for the Post-Corroboration Safeguards Review.[1]

<u>The history of majority verdicts in Scottish jury trials</u>

The authoritative source on the development of the Scottish jury is Ian Willock's *The Origins and Development of the Jury in Scotland,* published by the Stair Society (a society formed to encourage the study of the history of Scots law) in 1966 and based on a doctoral thesis completed at the University of Glasgow in 1963. Willock himself regards the history of the Scottish jury as patchy and ambiguous.

[1] J Chalmers, "Jury majority, size and verdicts", in J Chalmers, F Leverick and A Shaw (eds), *Post-Corroboration Safeguards: Review Report of the Academic Expert Group* (2014) 140.

Willock notes that the majority verdict 'appears to have always'[2] been the voting system used by Scottish juries from at least the fifteenth century, with it being probable that the system was derived from a practice that arose in the early medieval period by taking 'what we would call today the sense of the meeting'.[3] Willock suggests that the sense of community and of individual identity in Scotland in this period hardened into a rule where verdicts could be delivered in a manner in which the right to differ was recognised, in distinction to the English practice of requiring unanimity. Legal developments in the 15th century, Willock notes, 'brought out into the open the then latent rule of majority verdicts'.[4] The rule is of such long standing that it does not appear to be possible to identify in any meaningful sense a decision to adopt the practice. It has simply always been the practice and the available justifications and criticisms of it alike post-date rather than pre-date its adoption.[5]

In part, poor political relations between Scotland and England during and after the war of independence are also cited by Willock as a possible justification for pursuing different rules in the systems of trial by jury. He notes in this respect that it is 'at least conceivable that the avoidance of the number twelve [used by England] was on political rather than juridical considerations'.[6] The choice of an odd number of jurors is itself relevant to the use of majority verdicts. Willock notes that whilst the number of persons forming the Scottish criminal jury fluctuated in the medieval period, the general preference for the use of an odd number of jurors, evident 'from the earliest records', is 'plainly a reflection of the Scots rejection of the English rule of unanimity, for a majority verdict demands there be no possibility of an equal division of votes'.[7] By the 16th century the justiciary court began to favour the number of 15 as the normal size of the Scots jury in criminal matters.[8]

Voting systems in comparator jurisdictions

In common law countries, a requirement of unanimity is the normal starting point for jury deliberation in criminal trials: 'there is a clear consensus across the common law world… that jury verdicts should be reached by unanimity. This is regarded as a consequence of the requirement of proof beyond reasonable doubt, the presumption of innocence, and the view that a jury verdict is a collective decision'.[9]

The table below sets out current practice in a range of comparable common law jurisdictions. All of these systems have twelve-member juries. "Qualified majority" in

[2] I D Willock, *The Origins and Development of the Jury in Scotland* (1966) 226
[3] ibid
[4] ibid
[5] ibid
[6] ibid 185
[7] ibid 187
[8] ibid 187
[9] Chalmers (n 1) 150.

this table is used to denote a system which allows verdicts to be returned where only ten or eleven jurors (depending on the particular system) agree.[10]

Systems which permit qualified majority verdicts normally require jurors to attempt for a specified time to reach a unanimous verdict before permitting a majority one. The general trend in law reform over some decades has been to move from the traditional common law rule of accepting only unanimous verdicts to permitting verdicts by a qualified majority. The exception to the rule is the United States, where the Supreme Court ruled in 2020 that qualified majority verdicts were unconstitutional in state trials for serious crimes, although almost all states required unanimous verdicts prior to that decision regardless of the constitutional position. This was on the basis that the Sixth Amendment right to jury trial entailed a requirement that the jury be unanimous, that being the common law position which provided the backdrop to the drafting of the constitutional right.[11]

Country/Jurisdiction	**Voting system**	**Are majority verdicts allowed only after an attempt at reaching unanimity?**
England and Wales	Qualified majority	Yes. Allowed after at least two hours of deliberation, or longer if the court considers that reasonable having regard to the nature and complexity of the case. (Juries Act 1974 s 17)
Ireland	Qualified majority	Yes. Allowed after at least two hours of deliberation, or longer if the court considers that reasonable having regard to the nature and complexity of the case. (Criminal Justice Act 1984 s 25)
Northern Ireland	Qualified majority	Yes. Allowed after at least two hours of deliberation, or longer if the court considers that reasonable having regard to the nature and complexity of the case. (Criminal Procedure (Majority Verdicts) Act (Northern Ireland) 1971)
Australia – Australian Capital Territory	Unanimity **but** in October 2023, the Attorney-General introduced a Bill which would allow majority verdicts in trials where 11 of 12 jurors agree on a decision.	

[10] Practice varies in instances where the jury has been reduced below twelve members e.g. because a juror has fallen ill during the course of a trial. This table does not attempt to set out comprehensively the applicable rules in such instances.
[11] *Ramos v Louisiana,* 140 S Ct 1390 (2020).

	This will only be possible after six hours of deliberation.[12]	
Australia – New South Wales	Qualified majority, in cases with juries of at least 11	Yes. Allowed after jurors have deliberated for not less than eight hours and the court is satisfied that the jury is unlikely to reach unanimous verdict. Where a jury consists of fewer than 11 members, unanimous verdict required. (Jury Act 1977 s 55F)
Australia – Northern Territory	Qualified majority	Yes. Allowed after six hours of deliberation. (Criminal Code s 368)
Australia – Queensland	Qualified majority, except in cases of murder or offences under s 54A(1) of the Criminal Code where the offender would be liable to life imprisonment, or in cases where there are only ten members of the jury.	Yes. A judge may ask a jury to reach a majority verdict if after eight hours of deliberation, there is no unanimous decision and the judge is satisfied that one is unlikely after further deliberation. (Jury Act 1995 ss 59-59A)
Australia – South Australia	Qualified majority, except in cases of murder or treason	Yes. Allowed after four hours of deliberation. (Juries Act 1927 s 57)
Australia – Tasmania	Qualified majority	Yes. Allowed after two hours of deliberation. In treason and murder cases, a not guilty majority is permitted after six hours of deliberation but guilty verdicts require unanimity. (Juries Act 2003 s 43)
Australia – Victoria	Qualified majority, except in cases of murder, treason or offences against ss 71 or 72 of the Drugs, Poisons and Controlled Substances Act 1981	Yes. Allowed after six hours of deliberation. Alternatively, after this time, the jury may be discharged. (Juries Act 2000 s 46)

[12] J Lindell, 'Majority verdicts to stop jury hold-outs forcing retrials in ACT', *The Canberra Times* (Canberra City, 26 October 2023) <https://www.canberratimes.com.au/story/8401430/majority-verdicts-to-stop-jury-hold-outs-forcing-retrials-in-act/> accessed 6 December 2023.

Australia – Western Australia	Qualified majority, except in the case of murder	Yes. Allowed after at least three hours of deliberation. (Criminal Procedure Act 2004 s 114).
Canada	Unanimity	N/A
New Zealand	Qualified majority	Yes. Allowed after at least four hours of deliberation and where the foreperson has stated in open court that there is no probability of a unanimous verdict but a majority verdict has been reached. (Juries Act 1981 s 29C)
United States of America	Unanimity. Prior to the decision of the Supreme Court in *Ramos v Louisiana,* 140 S Ct 1390 (2020), majority verdicts were constitutionally permissible but very few states had laws permitting such verdicts. *Ramos,* overruling previous cases, held that a unanimous verdict is required to convict a defendant of a serious offence in a state trial.	N/A

The following section summarises the reasons offered in some of these jurisdictions for the changes made to verdict rules.

<u>England and Wales</u>

The Criminal Justice Act 1967 allowed majority verdicts to be reached. The rationale behind the change was linked to bribery and intimidation. An article from 1967 explained that:

> ‘In an age of highly organised crime there is evidence of bribery and intimidation (“nobbling”) of jurors in important cases involving professional

> criminals (“the big fish”), leading to disagreements… Under a 10:2 system it is unlikely that three jurors can be successfully nobbled.’[13]

Ireland

Majority verdicts have been allowed since the Criminal Justice Act 1984.

The Minister for Justice explained the reasons for introducing majority jury verdicts, saying:

> ‘There has been an increasing number of jury disagreements in recent times with more than a suspicion in some cases that there was an element of intimidation present. This particular reform will avoid the need for a retrial in a case in which not more than two of the 12 jurors disagree.’[14]

Australia

As seen in the table above, the practices differ between Australian jurisdictions, but a paper produced by the New South Wales Parliamentary Library Research Service recognised that ‘unanimous verdicts were a potential source of expense and unfairness in the case of a dissenting juror’.[15] In addition, managing courts efficiently and fairly[16] was also cited as a reason for accepting qualified majority verdicts.

This paper also cites a number of arguments in favour of majority verdicts, noting as with New Zealand below, the opportunity to avoid a hung trial as a result of a rogue juror. The New South Wales Law Reform Commission defined a rogue juror as a member of the jury who ‘enters the jury room having prejudged the verdict, and stubbornly refuses to participate in the debate or listen to the evidence or the views of the other jurors’.[17]

Majority verdicts are also expected to be used in Australian Capital Territory trials assuming the successful passage of a Bill introduced in October 2023. The Attorney-General proposed this change ‘to minimise the prospects of mistrials or hung juries’[18] as well as avoiding delays in the justice system.

New Zealand

The Juries Amendment Act 2008 permitted majority verdicts following proposals by the New Zealand Law Reform Commission. On the rationale for adopting majority verdicts, the New Zealand Law Reform Commission said that:

> ‘We consider that the primary reason why majority verdicts are justifiable is that there is sometimes one member of the group who is simply unreasonable

[13] A Samuels, “Criminal Justice Act” (1968) 31 MLR 15
[14] 345 *Dáil Debates* 1269 (Second Stage, 2 November 1983).
[15] T Dransch, *Majority Jury Verdicts in Criminal Trials* (New South Wales Parliamentary Library Research Paper, 2005) 13.
[16] ibid
[17] ibid 32
[18] Lindell (n 12).

or unwilling to properly take into account the views of the others – the rogue juror. It is to eliminate the influence of these people that majority verdicts are arguably required. If two jurors are opposed to the views, of the majority, there is a greater chance that their views are not simply unreasonable but reflect some genuine basis for doubt which should be debated rather than ignored. For that reason, we recommend a majority of 11:1.'[19]

[19] New Zealand Law Reform Commission, *Juries in Criminal Trials* (Report 69, 2001) para 435.