OFFICIAL REPORT
AITHISG OIFIGEIL

Criminal Justice Committee

Wednesday 29 November 2023

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 29 November 2023

CONTENTS

CRIMINAL JUSTICE COMMITTEE
32nd 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:

Eamon Keane (University of Glasgow)
Professor Fiona Leverick (University of Glasgow)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 29 November 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 32nd meeting in 2023 of the Criminal Justice Committee. We have received no apologies. Fulton MacGregor joins us online.

Under our first item of business, we will continue to take evidence on the Victims, Witnesses, and Justice Reform (Scotland) Bill. We are beginning phase 2 of our scrutiny of the bill. That focuses specifically on part 4, which covers the abolition of the not proven verdict and changes to jury sizes and majorities. We expect phase 2 to run to the end of this year, after which we will consider the last two parts of the bill.

We are joined, from the University of Glasgow school of law, by Professor Fiona Leverick, professor of criminal law and criminal justice, and Eamon Keane, lecturer in evidence and criminal procedure. I welcome you both.

I refer members to papers 1 to 3. I intend to allow about 90 minutes for this session, but it might run on, if required, as part 4 is a key area of the bill.

I will begin with a general opening question, which I will direct to Professor Leverick. The Scottish jury research that you were involved in informed the approach that the Scottish Government has taken in part 4 of the bill. Before we consider the relevant findings of the research, will you outline what you see as the strengths and possible limitations of the research methodology in relation to, for example, the use of mock juries?

Professor Fiona Leverick (University of Glasgow): I can do that. Can I assume that everybody knows what the methodology was, or should I run through that, too?

The Convener: It might be helpful if you give a quick run-through, if there is such a thing.

Professor Leverick: I will try. As you probably know, the Scottish jury research was commissioned by the Scottish Government to inform consideration of the issues that we are talking about today. The main purpose of the research was to try to get a sense of the impact that various conditions might have on verdict choices. Those conditions included having the not proven verdict, having only two verdicts, having different jury sizes and having different jury majority rules. We also hoped to get a sense of how jurors understood the not proven verdict by considering how they talked about it in their deliberations.

I will describe what we did as briefly as I can. I should say that the research was done not just by me but by a team that included people from Ipsos MORI, Vanessa Munro from the University of Warwick and James Chalmers from the University of Glasgow.

We ran 64 mock juries, who watched trial videos, which we tried to make as realistic as we could. They did not all watch the same trial, as we had two trials—a rape trial and an assault trial. Half the juries watched the rape trial and half watched the assault trial. The trials were scripted in conjunction with legal professionals and the roles were performed by actors who were coached by legal advocates to get their delivery as accurate as it could be.

The trial videos were just over an hour long and we had a real judge—Lord Bonomy—to give real legal directions at the end. The jurors watched one trial video and then went away to deliberate to a verdict, which they had up to 90 minutes to do. We made things as realistic as we could, but there are limits to that. The trials were filmed in a real courtroom. To make the setting as solemn as we could, we used relatively imposing buildings. The jurors all made the affirmation before they went away to deliberate.

Half the juries had three verdicts available and half had only two verdicts. Half were juries of 15 and half were juries of 12. Half the juries had to strive for unanimity—of 15 or 12 jurors—or close to unanimity, which meant agreement from 13 out of 15 or 10 out of 12. The other half of the juries used a simple majority decision-making rule.

We took verdict choices from the jurors individually and from the juries collectively. We also video recorded juries' deliberations so that we could see how they talked about the not proven verdict.

Jurors were chosen to reflect the balance of the local population. Sometimes people use students in such experiments, because that is convenient, but we had Ipsos MORI recruit people to reflect the make-up of the general population in terms of sex, age, education level, race and so on. That is probably about it for describing what we did.

On the methodology's strengths and weaknesses, I will do the weaknesses first. Obviously, we did not have real juries, and the jurors knew that the trials were not real—we did not use deception. Against that point, I put the fact that all the jurors took the exercise seriously. They

often forgot that the trials were not real—I heard jurors referring to people's motivations and saying things such as, "Oh well, she can't be that good an actress," when talking about the level of emotion, which showed that they had forgotten that the person was an actress. The jurors took the trials seriously and discussed the cases seriously, but we could not make the trials real.

There simply would not have been a way to do such research with real juries, because we had to hold everything constant. All the juries had to watch the same trial, because we needed to see what difference varying the verdict conditions and size conditions would make. That cannot be done with real juries. We could not run a real trial 64 times with different jury sizes and different decision-making rules. There was no other way to see what difference the different conditions made.

The situation was made as realistic as it could be; I do not think that we could have done anything else to make it more realistic. People sometimes make the criticism that such people are not real jurors, and we do not know whether real jurors would behave differently. It is true that we do not know whether they would behave differently, but the thrust of what we found—I can come to that in a bit—probably holds.

We simply cannot say from our research that, if we took away the not proven verdict, we would get X more convictions, but I think that we can say that if we did take it away, we know what the direction of travel would be. In other words, if we were to take away the not proven verdict, we know what direction things would go in terms of jurors being more or less likely to convict, but we cannot put any numbers on that change. There was no way of being able to do that, anyway. I do not know whether that response is helpful.

The Convener: That is very helpful in setting out the context and the reality of the limitations that you faced in your research.

Can I tease out a little bit more about the strengths of the process that you engaged in while running what was obviously a big piece of work?

Professor Leverick: Is there a specific question on that?

The Convener: Can you say more about your observations of what you felt were the strengths of the mock jury trials that you arranged?

Professor Leverick: One strength, which I have mentioned already, is that holding the trials is the only way that we could do this sort of research. The strengths of it really were that although the trials that the jurors watched were shorter than trials would normally be—they are normally longer than an hour—they contained all the essential features. Witnesses gave evidence and were cross-examined. The cross-examination was realistic; it was scripted by us, but with input from people who had actually acted in rape and assault trials, so the dialogue was realistic. The actors were professional actors who were coached on their performance by real advocates. We did several takes, in conjunction with the advocates who were advising us, just to make sure that the delivery was as realistic as possible. Those were definitely strengths.

There were also strengths in the sense that the environment in which we did the trials was as realistic as we could possibly make it. The jury sizes were realistic. Sometimes research of this type, which includes deliberation, uses tiny jury sizes, but our jury sizes were realistic. In short, we tried to make the mock trials as realistic as we possibly could.

There were two sets of findings from the research. One set related to what difference it made to people's verdict choices when we varied the trial conditions. The other findings were on how jurors discussed the not proven verdict and what that meant in their deliberations—what you could call the more qualitative aspects of it.

I see no reason why those qualitative findings from our research would be any different from reality, because our jurors watched a trial that was as realistic as possible. They were given real directions from a real judge that were exactly the same as real jurors would hear in a real trial. I do not see how those things would differ very much in a real trial. There is no magic stardust when you put jurors into a different room in a real trial that affects the way they discuss their understanding of the not proven verdict. I think that that aspect of the research is particularly strong, because I cannot see many limitations of it at all. The way that our jurors talked about the verdict and their understanding of it is not going to be different from how real jurors would talk about and understand it.

I do not know whether that was the sort of answer you were hoping for.

The Convener: It is helpful for us to understand a bit about the background detail and just how robust the research was, so that was very helpful. Eamon Keane, would you like to come in on anything?

Eamon Keane (University of Glasgow): There is not terribly much I can add to that. I would just emphasise Professor Leverick's point that, from a methodological perspective, there was no other way to assess the unique features of the Scottish criminal jury, which is what the research set out to understand, for the reasons that she has given.

10:15

The Convener: The joint submission that you sent to the committee supports the removal of the not proven verdict. Professor Leverick, what does the Scottish jury research tell us about the use and impact of that particular verdict?

Professor Leverick: It tells us a few things, and they come from looking at the way in which the jurors discussed the verdict during their deliberations. First, there was no universal understanding among the jurors of what it means, which is not terribly surprising because, as I am sure you know, it does not really have a clear definition that sets it apart from a verdict of not guilty. Directions that jurors will be given by the judge will basically say there are two verdicts of acquittal—not proven and not guilty—and they have exactly the same effect. There is no clear definition of not proven.

In their deliberations, it came across that jurors had rather different understandings of what a not proven verdict might mean, and they were projecting on to a verdict that does not really have a definition at all, apart from being the same as not guilty. For example, some jurors would say that the not proven verdict should be used if they thought that the accused was guilty, but they were not absolutely sure about it. Other jurors would say that they should use that verdict when they are just not sure at all. They would say, "We are really not sure which way to go, so we will just go for not proven."

Some jurors—this was more of a collective thing—would use not proven as a kind of compromise verdict. If the jury was finding it difficult to agree, and it was split between conviction and acquittal, somebody would say, "Oh, well, why don't we just say not proven then, because we can all agree on that?" They used it as a kind of a collective compromise verdict, which is a slightly different meaning to attach to it.

Some of them used it because they wanted to send a distinct message through the verdict, but that message was not always the same. Some jurors wanted to send a message to the accused person and say, "Actually we think you are really guilty, but we just don't think the evidence is there to prove it, so sort of not guilty, but we know, really." Others used it to try to send a message to the complainer, particularly in a rape case that we had, that the jurors believe what the complainer is saying, but they do not feel that there is quite enough evidence there for conviction, so they will choose not proven because they think that it is a slightly more palatable verdict for the complainer than not guilty.

We basically found that there are a lot of different understandings of not proven. Unsurprisingly, they were not all the same.

The other thing that I would say is there were sometimes some—not many—distinct misunderstandings. We had jurors who thought that there was a difference between the two verdicts, despite the fact the judge had told them there was not. So some jurors thought that the difference was that if someone got a not guilty verdict, they could never be tried again, but if they got a not proven verdict, the door was left open to try the accused again if more evidence came to light, and that is a mistaken understanding, because that is not the case in law. That came up despite the fact that jurors were actually directed that that was not the case, but it did not happen that often.

The Convener: Thank you. That is really helpful. I am just going to bring in other members because I know that they will be keen to probe those findings. Rona Mackay would like to start off.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning. Does the judge explain what not proven is at any point in a real courtroom, either in his summing up or in direction? That is my first question. I genuinely do not know what is actually said.

Eamon Keane: I can offer some guidance on that.

The jury manual, which is a document that is produced by the judiciary and provides guidance to members of the judiciary about how they are to approach charging, says:

> "It is dangerous to attempt to explain any difference between the not proven and not guilty verdicts",

because, in law, they mean exactly the same thing, given the progression of the law and where we have ended up. This is perhaps a question for later on, but the manner in which the verdict has come to be used—as a simple verdict of acquittal—is not how it was originally introduced into Scots law, when we had a different system relating to general and special verdicts. In essence, if a judge in a trial were following the guidance in the jury manual, they would say very little about the distinction between the two verdicts other than that they are both verdicts of acquittal, because it is dangerous to attempt to explain the difference between them.

Rona Mackay: It is quite surprising to hear that juries will have to make that decision even though they do not fully understand the difference between the two verdicts. Should more training be given to juries? Is the manual adequate in that respect?

Eamon Keane: I would not go so far as to say that juries do not understand the difference. We do not know that definitively. If they deliver a verdict of not proven in a case, having been told that not proven is a verdict of acquittal, I think that we can assume that, in some instances, they are simply following the directions that they have been given and that they feel that the Crown has not proven its case beyond a reasonable doubt.

Attempting to deliver any further guidance is difficult, because, in recent years, the law has developed in a way that suggests that there is no distinction between the two verdicts, so I am not sure what guidance we would seek to give a jury. The jurors are told that a verdict of not proven is a verdict of acquittal and, if they deliver that verdict, we can assume that, in some instances, they are simply following the directions that they have been given, applying their minds to the evidence that has been led in the case.

Rona Mackay: So, when you heard jurors deliberating in the mock trials, did you hear them say, for example, "I don't think there is enough evidence for that, so we might as well say that it is not proven."?

Professor Leverick: Yes—that came up quite a lot. We would hear one person say something like, "I think we should say not guilty, because I think the person is definitely innocent," and another person say, "Well, I'm not sure whether he's innocent or not, but I don't feel there's enough evidence, so I'll go for not proven." However, it is important to stress that that is not a legal distinction; it is the meaning that the jurors are putting on to the verdicts. To be honest, I do not blame them, because it is difficult for jurors to get their heads around the concept of there being two different verdicts that are exactly the same. I think that anybody would think that there must be some sort of difference between them, so it is not really the jurors' fault that they started putting different meanings on to them. Nonetheless, the verdicts are exactly the same in law.

The position is confusing for not only jurors but everybody involved in a trial, especially complainers and so on, because you cannot really explain to somebody the difference between the two verdicts. If you get a not proven verdict at the end of a trial, it is very hard to say to somebody what that means, other than that it is just the same as not guilty.

John Swinney (Perthshire North) (SNP): It might be helpful for the committee's inquiry if we could actually hear why we have not proven as a verdict.

Professor Leverick: I think that I will give that one to you, Eamon.

John Swinney: Mr Keane, you tiptoed into this area earlier, so I agree that it is probably a question for you. For completeness, we could do with an understanding of how we got here.

Eamon Keane: In retrospect, yes, that was silly of me, but I will try my very best to provide a brief summary.

In essence, the original verdicts in Scots law were guilty and not guilty—perhaps slightly different language was used for them, given the type of English that was spoken in Scotland at the time. From that, we developed a system in which we ended up with verdicts of proven and not proven because, in the 16th and 17th centuries, there arose a practice whereby the Crown in prosecuting cases would have a minor and major premise in an indictment—that would be the charge. The minor premise would list the facts of the case and the major premise would list the legal consequences of same. As a result of that practice, the defence bar started making quite lengthy submissions prior to probation—that is, prior to evidence being led—to the effect that, even if the minor premise were found proven, the major did not follow. Those were what we would call in today's law of evidence "pleas to the relevancy of indictments".

It all became a bit of a power struggle, really, between the defence, the Crown and the judiciary at that time—we are talking about hundreds of years ago, of course. The situation became ever more complicated and a practice arose whereby the judiciary would issue lengthy interlocutory decisions prior to the jury trial, saying that if the facts were found proven, the minor premise would be found proven and the major premise would essentially follow.

The situation became incredibly complicated and, during that period, there was a shift towards juries reacting to those judgments that had been given prior to the leading of evidence and no longer delivering verdicts in the kind of general sense. Instead, they delivered verdicts in this kind of special sense of proven and not proven, and it was for the judge thereafter to interpret the verdict and impose the consequences of same.

That situation continued for some time until, eventually—in the 18th century, I think—

Professor Leverick: Perhaps 1736?

Eamon Keane: Yes, in 1736. Essentially, the jury regained control of the system, so to speak, because of a famous case in which the jury wanted to deliver a verdict that would have resulted in acquittal, but doing so was difficult, as the interlocutory decision of the court curtailed what the jury could do. A jury speech was made that has since been lost in the mists of time. Although we do not have a record of what was

said, we still have the verdict and can see that, in essence, the jury went back to delivering a verdict of not guilty as opposed to one of proven or not proven, which had been in operation before. Thereafter, there is a stretch of hundreds of years in which there is a varying incidence of the use of various types of verdicts.

Some of the great figures of Scots law wrote about the verdicts. Hume offers a view on the distinction between them, calling it a matter of emphasis. He says—I am paraphrasing, of course—that not guilty would be appropriate where there is clear innocence, whereas not proven might be appropriate where there is a lingering suspicion of guilt, but the jury nonetheless does not feel that the Crown has proven its case.

In essence, the approach that I have described continued until the appeal court in the 20th century started to issue judgments effectively saying—again, I am paraphrasing massively—"We should not be explaining the distinction between these two things. It is dangerous to do so, because the current dispensation we have is not the original purpose of the verdicts." As a result, not proven became a simple verdict of acquittal. The notion of interlocutory decisions—those issued before the trial in respect of the special verdicts and the minor and major premises—fell away in Scots law and instead of the verdict of not proven going away, it retained its status as a simple verdict of acquittal.

That is a hurried and probably somewhat muddled exploration of hundreds of years of Scottish legal history, but I hope that it is of some limited assistance. To conclude, I would point out that it is not a recent phenomenon to suggest that this dispensation is illogical. If you look back over the course of many years, you will find people saying the same and, equally, you will find people on the other side of the argument who think that it is a valuable feature of Scots law.

Professor Leverick: I would like to place something on the record. You sometimes hear people saying that not proven is the original Scottish verdict but, although it might have a rich Scottish history, it is not the original Scottish verdict. The original Scottish verdict system was not guilty and guilty. It is important to be aware of that. The not proven verdict was not introduced to the system as a matter of design and it is not some great, genius Scottish idea—it is nothing more than a historical accident. Whatever the reasons might be for keeping it or getting rid of it, its being some sort of original, Scottish great idea is not one of them.

10:30

John Swinney: Thank you very much for that. In no way do I regret asking the question, because it is important that we have an understanding of the context in which the verdict emerged. Would it be fair to say that the historical development of the position in which we find ourselves has fuelled a lack of clarity in juries' decision making?

Professor Leverick: Well, kind of. It has probably fuelled a lack of clarity in the general understanding of what not proven and not guilty mean, simply because, over the verdict's history, it has meant different things at different times. I suppose that that historical development has led to jurors having a lack of clarity about it, but perhaps only in more recent history. The lack of clarity that jurors have now is simply that they are told—as they should be, because it is the law—that there is no difference between the verdicts. They find that confusing.

John Swinney: Based on your observations of the mock trials, your research suggests a multiplicity of views as to what the verdict means, whether it is that the Crown did not prove its case sufficiently or that the juror wants to send a signal to A N Other.

Professor Leverick: Absolutely, but that comes about because of the definitional void that jurors can put their own meanings into—and they do not all come up with the same meaning.

John Swinney: In a sense, that is my point about the lack of clarity. In the minds of jurors, they are perhaps not making the hardest of judgments between guilty and not guilty. You have marshalled a number of scenarios in which different perspectives might pertain as they make those decisions.

Professor Leverick: Yes, I agree with that.

John Swinney: In relation to the research work that you undertook, I would be interested to hear whether any differences in perspective or substance of view on the question emerged between the jurors in the sexual assault mock trial and those in the non-sexual assault trial.

Professor Leverick: Yes. If we start with the slightly easier part, which is how people understood and used the not proven verdict, there was a distinct difference in the sexual assault trial, because that was the only trial in which jurors tried to use it to send a message to the complainer that she was believed. If I remember correctly, almost all the cases in which jurors used it as a compromise verdict because they could not agree were in that trial. There might have been a couple in the non-sexual assault trial, but it was definitely more common in the sexual assault trial to have jurors with polarised views about the case and for

them to use not proven as a way of trying to reach agreement. As a result, jurors' understandings and the way in which jurors used the not proven verdict were a little bit different between the two trials.

There were also slight differences in the numbers game for the verdict choices. I will refer to my notes here, as I always get this the wrong way round. First, I will cover the general position and then I will talk about the two different trials.

In general, in the three-verdict condition—that is, with the not proven option—jurors were more likely to go for an acquittal verdict, or were less likely to find the accused guilty. That is the direction in which that condition pushed the system. Fifteen-person juries were more likely, after deliberation, to favour conviction, as were juries under the simple majority condition; they, too, were more likely, after deliberation, to favour conviction.

That is basically what we found when we took the sample as a whole. However, those findings were statistically significant—I can explain what that means in a moment, if you want me to—only in the assault trial, except for the effect of the simple majority. The effect of simple majority verdicts was so strong that it held for both types of trials. Simple majority verdicts push jurors, after deliberation, to favour conviction; as I have said, that held across both types of trials and it was statistically significant.

The other changes were statistically significant only in the assault trial. I have to read this stuff to make sure that I get it right—I appreciate that it is quite a lot to get your head around. The difference that the availability of the three verdicts made was significant only in the assault trial—that is the one point to get across—and that might have been because there are other factors at play in sexual offence trials.

I do not know whether that helps at all.

John Swinney: That is helpful, and it brings me to the other area that I want to discuss. To broaden out the topic, I want to address the interaction and the relationship—which your research in your evidence paper helpfully draws out for the committee—between the size of the jury, the question of majority versus supermajority and the presence or absence of the not proven verdict.

I am interested in the relationship between those three factors. One might take the view—for all the arguments that Mr Keane gave us a moment ago—that the not proven verdict does not help us to have a clear criminal justice system. However, the implications of that need to be carefully considered in relation to the impact on the other two questions: what is the optimum size of a jury and what are the arguments for a simple majority versus a supermajority?

Can you air some of the dynamics of the relationship within that triumvirate of jury size, a simple majority versus a supermajority and the presence of not proven?

Professor Leverick: Yes. As I said at the start, the one thing that we cannot do is give a definitive answer as to exactly what effect changing some parts of the system would have on verdicts in real trials. We cannot do that—

John Swinney: Can I interrupt you for a second, Professor Leverick? That is not what I am asking—

Professor Leverick: I am getting to what you are asking.

John Swinney: I totally accept that you cannot do that, but I am interested in what issues we have to consider to ensure fairness to all parties—I stress "all parties"—to a trial.

Professor Leverick: I will say two things; if you let me finish both of them, you can come back to me if you want.

First, the changes push in different directions. If you take away the not proven verdict, that pushes the system a little bit more towards—if I can use this phrase—being a little bit more conviction-y. If you change the numbers on the jury from 15 to 12, that pushes the system, after deliberation, a little bit more towards being a bit less conviction-y. If you change the simple majority verdict and have a qualified majority requirement—or even a unanimity requirement, which I appreciate is not what is in the bill—that will push the system more towards acquittal.

We cannot tell the magnitude of the changes, but those factors are pushing in different directions. If you change one aspect, you will probably have to think about the other two. In the research, which I have in front of me, we looked at eight different possible combinations of variables. For example, you could have 12 people with unanimity and three verdicts, or there could be 15 people with a simple majority and two verdicts. We looked at the proportion of jurors who would have chosen a guilty verdict in each of the eight scenarios. That varied from 3 to 37 per cent, depending on the combination of factors or the design that was used. They are all interlinked. It would be a little bit dangerous to change one part of the system without also thinking about the other parts of it, which is what you are getting at, I think.

John Swinney: That is an incredibly helpful and illuminating answer. I will press you on one last point about the question of magnitude, in order to make sure that I have correctly understood what you said about the data point of 3 to 37 per cent.

Is that the scale of magnitude of difference that can prevail, given all the potential permutations that you have set out? It is quite a wide variation.

Professor Leverick: Yes, it is. However, we have to remember that we were looking at two specific trials. I cannot sit here and say that that would make the same difference in reality.

John Swinney: Do you agree that it would not be wise for the committee to ignore the fact that there is the potential in the relationship of that triumvirate to create a set of circumstances that might lead to quite a large variance of between 3 and 37 per cent?

Professor Leverick: I can see where you are trying to take your question, but I stress again that I cannot say that that would happen in reality. Those two trials were very specific and were designed for the purposes of research. They tell us the direction of change, but they cannot tell us the magnitude of it in reality. I am confident that they show us the direction that the change is going in, but I am not as confident about saying what the magnitude of the changes might be. However, in those two trials, we found that there was a range between 3 and 37 per cent.

John Swinney: Thank you. That is tremendously helpful information.

Pauline McNeill (Glasgow) (Lab): Good morning. This is complicated—I will say that.

Professor Leverick: I find it complicated, and I have been looking at this stuff for seven years.

Pauline McNeill: I apologise if my questions do not make sense, but I will try my best.

When you explained the mock trials in your answer to the convener, you talked about the way that mock juries view a not proven verdict against a not guilty verdict. You said that, in cases in which the juries would say, "We just do not think the evidence is there," they would select not proven. When we are looking at the issue, it is important to frame it in the context that, as well as explaining the differences between the verdicts, the judge will give direction to the jury.

Is it fair to say that the presence of reasonable doubt is key? The jury will be told, "When there is reasonable doubt, you should not convict." If you work back from that, is it fair to say that, if a juror had doubts about conviction, either way, the verdict that they would give would not be guilty? Is it fair to say that that context is quite important?

Professor Leverick: I think so. Some of the things that jurors did were down to misunderstanding. However, that is not a misunderstanding. That is a completely legitimate way to reach a verdict. If a juror thinks, "Well, I have reasonable doubt in my mind and I am not sure, therefore, I will go for an acquittal verdict," whether that verdict is not proven or not guilty is, in some way, neither here nor there. In that sense, the jurors were not behaving illegitimately. They were doing what they were supposed to do.

10:45

Pauline McNeill: Which is?

Professor Leverick: Which is that, if they do not feel that the case is proved beyond reasonable doubt, they should deliver an acquittal verdict. There were other areas where their understandings were a bit more problematic, but that particular understanding is not problematic at all.

Pauline McNeill: I want to examine a paragraph on page 6 of our paper 1. It says:

"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.'"

Professor Leverick: I might have to find that.

Pauline McNeill: I will just read it out. The paragraph continues:

"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 proconviction in that research ... The policy choice [made by the Government in the Bill] was a difficult one."

The next part of the paragraph is where, for me, the complexity lies. It says:

"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."

The cabinet secretary, Angela Constance, has said that the reforms are not targeted specifically at the low conviction rate.

Professor Leverick: I do not want to disagree with her—she is the only one who can say what the purpose of the reforms is.

Pauline McNeill: It says that it "may be thwarted." The Government may have started off there, but it is clear to us now that that is not the Government's intention. More importantly, you say in the article:

"But the proposal for eight out of twelve might be criticised for creating an unacceptable risk of wrongful conviction."

That is what I want to ask you about. Do you have concerns about the jury numbers?

Eamon Keane: There is important context here. My understanding, at least, is that no other

adversarial common law jurisdiction convicts on the basis of those numbers. That said, eight out of 12 is still a two thirds requirement, but it is not one that is replicated in other adversarial common law jurisdictions. It is important to acknowledge that.

I can only echo what is in the *Criminal Law Review* article, which is that that is an extremely difficult policy choice. I accept what you have said about the purported aims not being in respect of increasing the conviction rate. Equally, though, I understand why, if people were in favour of that, they might look at the majority as a central part of that problem, if you perceive it to be a problem. However, it is a very difficult choice.

I do not know whether Fiona Leverick has anything to add.

Professor Leverick: Only that, for me, too, this is the most difficult part of the decision that has to be made. I cannot sit here and say that I have all the answers, because I do not.

One thing that is important to remember—we spoke about this earlier—is that any reforms that we make affect the whole system and not just sexual offence cases. It is not on the table to have a different verdict system in relation to sexual offence cases. Under the current proposals, an eight out of 12 verdict would, for example, be enough to send somebody to prison for life if they were found guilty of murder. We did not test an eight out of 12 system in the jury research, so I have nothing in particular to offer from that research about that use of the numbers, but I feel slightly uncomfortable about eight out of 12. It just feels a little bit too low for a decision that has such magnitude for the accused person.

It is important to say that I am not coming from any particular perspective here. I have done as much work on sexual offence cases and issues that arise there as I have on preventing wrongful conviction. I really have no axe to grind here but, for me, eight jurors out of 12 feels a little bit low. As Mr Keane said, and to my own knowledge, no other country in the world that uses a jury system would convict on that basis. Some countries, such as Canada, and many of the American states require unanimity; others go for 10 or 11 out of 12 jurors. I do not know of anywhere else that uses an eight out of 12 system.

Eamon Keane: I agree with everything that has just been said. However, for context, it is important to note that the Scots criminal jury is a peculiar institution. No other system in the world convicts on the basis of a simple majority with 15 members and a requirement for corroboration in the way that we do. Therefore, although I am definitely uncomfortable with the eight out of 12 figure, I am equally uncomfortable with the simple majority as the law currently stands.

Pauline McNeill: But the important point is that we have three verdicts and a simple majority, is it not? The reason for allowing a simple majority is that we currently have three verdicts.

Eamon Keane: That is a really astute observation. In the past, the shortcomings, or what might be called the problematic aspects, of the various idiosyncratic features of the Scots criminal jury have tended to be justified or rationalised on the basis that they form a package. People have said, “There’s a corroboration requirement, but there are also three verdicts, so it’s okay to have a simple majority.” I do not think that that is a particularly compelling argument. Over the course of history, it has led us not to introduce reforms that we perhaps should have introduced, because we perceive that package to be—

Pauline McNeill: I am not disagreeing.

Eamon Keane: No; that is—

Pauline McNeill: I am just trying to get my head around the point that you are uncomfortable with a simple majority, but you acknowledge that the reason for having a simple majority is that we have three verdicts.

Just finally, in England, is it 10 out of 12 jurors?

Eamon Keane: Yes.

Professor Leverick: Yes. An important aspect—one that is possibly missing from the bill and which you might want to consider—is that that is the case in England, but there is also a rule that the jury has to try to reach unanimity. All the jurors have to attempt to agree; it is only if they cannot do so—I think that it might be after two hours—that they can return a 10 out of 12 verdict if they wish. Again, it is a pretty universal approach, in all the criminal justice systems that use juries that I know of, that the jury must at least attempt to reach a unanimous verdict. It is only if they cannot do so that the majority rules kick in.

Pauline McNeill: I have a final quick question on corroboration, which Eamon Keane mentioned. There has been a bit of discussion about the retention of the requirement for corroboration. Would you have further concerns if we removed that requirement under the current proposals in the bill, which would mean having a qualified majority and two verdicts?

Eamon Keane: I think so, yes. That is a difficult question to answer in its generality, but those features of our system are all interlinked. I had not understood that such a proposal was on the table, but perhaps that is my misunderstanding.

Pauline McNeill: It is not. It is just that some witnesses, and people with an interest, have said that they have had discussions with the Government about their views on corroboration.

There has also been recent commentary from the judiciary. Who knows where we will end up on that? I just point out that there has been talk.

The Convener: John Swinney wants to come in with a supplementary.

John Swinney: I will follow up on Pauline McNeill's line of questioning by asking about the impact of the recent decision of the High Court of Justiciary, sitting as an appeal court, on aspects of corroboration in sexual offence cases. Do you consider that that affects the balance that I am interested in?

Eamon Keane: Yes; in one sense everything affects that balance, so that can be quite a difficult point. The judgment that you refer to, which was given on a Lord Advocate's reference, is in certain respects transformative for how sexual offences are to be investigated and prosecuted. It will inevitably make the evidential requirement of sufficiency easier to obtain. Therefore, I cannot sit here and say that it is not an important judgment—it is a very important one. Naturally, it will impinge on the committee's consideration of further reform.

John Swinney: Thank you.

Russell Findlay (West Scotland) (Con): I find the insight into the not proven verdict fascinating and helpful to our considerations. The committee has struggled to find legal practitioners who support the abolition of the verdict to give evidence. There is very strong opposition to the proposal. I also get the sense from speaking to different people that they seem to accept that the battle has perhaps been lost. Can you give us any sense of how significant the opposition is and what continues to motivate that, given the direction of travel?

Professor Leverick: You can do that one.

Eamon Keane: I can perhaps give some sort of insight. I come to this as a qualified and practising solicitor, albeit that academia is now my first job. Not that anyone would want to read it, but I have also written a book chapter about the Scottish legal profession's cultural attachment, in some respects, to the not proven verdict. The chapter is subtitled "The nightmare of history?", which perhaps gives away its message.

To answer your question, Mr Findlay, about why it is perceived to be such an important factor or matter, I have identified two overarching reasons. One reason goes back to what Mr Swinney said about the system being a package and the discussion that we have had about the three unique features of Scots criminal law: practitioners have worked in the system and they think that they have seen it work. That would be their view, I would imagine. It is certainly one factor.

We also cannot overlook the fact that some of the verdict's importance relates to what I deem to be a notion of Scots legal nationalism—that is what I call it in my book chapter. There is a strong attachment to that feature of Scots law because it is unique and it is Scottish. People who work in the system have pride in it. Other people and groups might disagree with that, but the people who get up and do the job every day value the system. That goes some way towards explaining the attachment to the verdict.

I qualify all that by saying that sometimes the commentary on the not proven verdict is just historically inaccurate, because there is this lacuna around the definition. What does it mean? It means the same thing as acquittal. I think that I have also seen lawyers fill that gap, in the same way that the jury research showed that some mock jurors were saying that the jury uses it when it wants to send a bit of a message. That does not align with the current legal definition.

Russell Findlay: Is the book still available?

Eamon Keane: Yes, in all good bookshops.

Russell Findlay: We might as well give your chapter a plug.

Professor Leverick: I agree with everything that Eamon Keane said, but I think that some of the resistance is also just about the fact that nobody likes change. I do not like change in my job. If I have to do my job slightly differently because things have changed, it is not very pleasant.

There is at least one decent argument for the not proven verdict, which is that it might have a slight protective effect against wrongful conviction. It is not as though there are no possible arguments for the verdict. However, if that argument holds, it is outweighed by a lot of the arguments against it. People who are attached to the not proven verdict are not necessarily irrational, because the argument could be made that it might have a slight protective effect against wrongful conviction, but the other arguments against it are much stronger.

Russell Findlay: I have spent some time reading the 2014 academic expert group report—

Professor Leverick: Oh, good grief!

Russell Findlay: It is lengthy.

Professor Leverick: That is huge.

Russell Findlay: It contains quite a significant chapter on jury sizes and the issue of majority versus unanimity. This is a brief summary, but in England, Wales, Ireland, Australia, New Zealand, the United States and Canada, a jury of 12 is typical. The chapter describes Scotland as being very peculiar, having 15 jurors, and because of the

other issues that we have touched on. In almost all of those other jurisdictions, a majority is either 10 or 11 of 12, with various other considerations sometimes coming into play, such as the seriousness of the offence or the length of time that has been spent considering and not being able to reach unanimity.

In response to what is being proposed in the bill on Scotland reducing its jury size from 15 people to 12 people, and on the verdict being reached by eight out of 12 people, the Faculty of Advocates criminal bar association said:

"The inevitable consequence of Scotland adopting a majority of eight from twelve would be an international communication that Scotland places less value on protecting its citizens accused of crime than any and every other nation with a jury system."

That is a very strong thing to say. I note that, in your submission to us—and you have touched on it verbally, as well—you welcome the majority of eight of 12, but not unconditionally; you said that somewhat tentatively, and you also said that a judgment call needs to be made. Now that you are here, what is your judgment on the ideal number?

11:00

Professor Leverick: I know that you want an answer to that, but I cannot give you one.

Russell Findlay: Can you give us a sense of what you think? You are clearly not comfortable with eight out of 12.

Professor Leverick: I would probably run with a system that has been tried and tested in other nations—not necessarily just England and Wales, because I realise that that has sensitivities. I would want to see the jury strive initially for unanimity, but if it cannot get there, maybe 10 out of 12 would do. However, that is not a particularly firm view.

Russell Findlay: That was helpful. Eamon Keane, do you have a view on that?

Eamon Keane: Yes. If pushed—and I am being pushed—that is where my thinking would end up, at the moment. However, equally, I see arguments that come from other organisations about whether the purpose of the change—and I know that we have been told that this is not the purpose—relates to complainers in sexual offences cases, in which case that particular threshold might have an impact.

However, my view is aligned with Professor Leverick's; if a jury strives for unanimity but cannot get there and 10 out of 12 agree, that seems to be a reasonable place to end up.

Russell Findlay: In some jurisdictions the jury has two hours to deliberate and in some it has six hours. Do you have a view on what Scotland might want to adopt?

Professor Leverick: I really do not have a view on that, other than that it is important that the jury should try to reach unanimity. We have not really had a culture of doing that in Scotland because we have always had majority verdicts. If we value juries and deliberation, there is something to be said for trying to get all members of the jury to agree. That is the best way to bring out the various different arguments, perspectives and views on the evidence, and it is the best way to give the public confidence that the case has been discussed properly.

As to how long you ask a jury to deliberate, I really could not say.

Russell Findlay: What about the issue of the seriousness of the crime requiring unanimity in certain cases?

Professor Leverick: I would not have a system that is that complex, in which there are different requirements for different cases. Where would we draw the line, and what would be done if there were two different charges on the indictment?

Russell Findlay: Good point.

Professor Leverick: A system of that kind would be too complicated.

Russell Findlay: There will be people in the legal profession who will want to question the methodology of your research because they do not agree with a lot of what is being proposed. How did you find your mock jurors?

Professor Leverick: They were recruited by Ipsos MORI. I have a previous life; I used to work as a market researcher, so I have some insight into that. They were recruited using a mixture of on-street recruiting—which is where researchers go to a public place, approach people and ask whether they would like to take part in some research—and door-to-door recruiting. Basically, they went to places where they would find the general public and they told them that we were doing this research project.

Russell Findlay: Were the people paid?

Professor Leverick: Yes, they were paid.

Russell Findlay: So, they were all willing participants. One thing that differs in that situation from that of real jurors is the sense that I get, anecdotally, that most real jurors are rather reluctant, but I guess that there is nothing that you can do about that.

Professor Leverick: I am not really sure that any of that makes much difference to the findings, to be honest. Those people were paid, because we were asking them to give up four or five hours

of their time. We had to pay people—it would not be fair if we did not. However, very few people who were approached by Ipsos MORI and asked to take part actually refused to do so. I do not have the figures on that, but that is the sense that we got at the time.

Some people have said that our research is different, because it is all volunteers and we are therefore getting a completely different segment of the public than we would get on real juries, given that jury members are compelled to serve. I do not think, to be honest, that there is much in that argument. First, most of our jurors—the people who were approached on the street—agreed to take part, and secondly, everybody on our mock juries was eligible for jury service; they could easily be real jurors in a real case.

Russell Findlay: Has either of you been a juror in the past?

Eamon Keane: I am not allowed to be a juror because I am a qualified lawyer.

Professor Leverick: I actually could be, because I did not go all the way through to qualifying as a lawyer. I would love to be on a jury, but the one time that I was asked to do it was about two weeks after I had had my daughter, so I just could not get there, and they have never asked me since.

Russell Findlay: Oh well.

Professor Leverick: They would probably reject me if I was there, to be honest.

Russell Findlay: I think that there is every chance of that. [*Laughter.*] Thank you very much.

The Convener: I call Rona Mackay.

Rona Mackay: My question was going to be exactly the same as Russell Findlay's question—I was going to push you both to say what your preferred balance would be.

However, to go back to sexual offence cases, I just want to get on record that the not proven verdict is used disproportionately in rape cases. Not proven made up 44 per cent of rape and attempted rape acquittals in comparison with 20 per cent of all crimes and offences. That is a huge imbalance.

Your research has led you to believe that we should abolish the not proven verdict, and you have answered the question that I have just outlined by saying that you cannot really say what your preferred balance would be.

My next question is another tricky one. In your estimation, if the verdict were to be abolished, what would be acceptable to the legal profession? What do you think that it would suggest as an optimum?

Eamon Keane: I think that you would have to ask the representatives of the legal profession.

Rona Mackay: I know—I just thought that, with your background, maybe you would have a view.

Eamon Keane: I would not want to speak on behalf of every solicitor or advocate in Scotland.

Rona Mackay: I accept that—I understand. That is fine.

Professor Leverick: I simply do not know.

Rona Mackay: I just wondered whether there was an easy path that you thought might be acceptable. However, I appreciate what you are saying and that we would need to ask the legal profession.

Professor Leverick: Sorry.

The Convener: Professor Leverick, I want to pick up on the point that you made earlier about the potential for not proven to be used almost as a compromise verdict. That is linked to the issue of public confidence.

In your submission, you have a section headed

"Arguments against the retention of the not proven verdict".

You say that the first argument is around stigma—we can maybe come to that. You go on to say:

> "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."

How important is the issue of public confidence in the deliberations? What are your observations in and around that, in particular from the research that you have done?

Professor Leverick: I have obviously thought about the topic a lot over a long period, and I have come round to thinking that that is probably the strongest argument for getting rid of the not proven verdict. We have to put all the qualifications in place: our research did not involve real trials or real jurors. However, in our research, jurors were distinctly using the verdict as a way of saying, "Oh, this is all getting too difficult—let's just compromise."

We do not know if that happens in real trials; perhaps it does not. However, if there is even the slightest risk that that might be happening in real trials, that is a very strong argument against having the verdict.

One of my colleagues, Professor Vanessa Munro, was involved in another strand of research that involved her speaking to complainers in sexual offence cases whose cases had ended in a

not proven verdict. It came out strongly from that research that the people whom she spoke to felt that the not proven verdict gave juries too easy a way out. Those people really wanted to know that their case and the evidence had been discussed as fully, as properly and as diligently as they possibly could have been. They thought that getting a not proven verdict might have meant that the jury simply did not go there—that it avoided other, more difficult deliberation that it might have had to have if not guilty and guilty were the only verdicts available.

It is really important that everybody—the public and complainers—has confidence. Given how crucial the decisions that juries take are and the massive impact that they have on lots of people's lives, the public confidence argument is a really strong one. We should ensure that juries treat the process of reaching a decision with the seriousness and the diligence that it deserves. The availability of the not proven verdict means that there is a risk that they might not do that, if that makes sense.

The Convener: Eamon Keane, do you have anything to add?

Eamon Keane: I echo all that. I emphasise the point that public confidence in the criminal justice system is absolutely key. That crosses both sides of the bar, so to speak, in the sense that witnesses who come to court need to have the view that they will be treated fairly and that the system is logical and coherent, just as individuals who are accused of crimes need to believe that the system will treat them fairly and protect their rights. Public confidence is at the absolute core of what the committee is considering as it looks at the bill.

My personal view—I was of this view long before it was trendy to say so in certain circles, and before the jury research was published—is that the not proven verdict in its current dispensation is illogical and irrational and that, if people were going to design a system, they would not design the one that we have. Surely the law should be about logic and clarity above all else. In my view, the current situation, with the availability of the not proven verdict, does not give us that.

To go back to your other question, I think that public confidence is key. The perception that the not proven verdict is a sort of halfway house, which was evident from Professor Munro's work with people who have given evidence in such cases, is damaging.

The Convener: Professor Leverick, I want to pick up on the point that you made about sexual offences. In your submission, you said:

"There was also evidence that this use"—

that is, the use of not proven—

"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."

That is quite powerful commentary.

Professor Leverick: Those are not my words—that view comes from the people to whom Professor Munro spoke.

It is difficult. If a not guilty verdict had been reached at the end of the cases of the complainers whom Professor Munro spoke to, I am not sure that they would have felt a lot better. Obviously, complainers want to get a conviction, but it came across very strongly that people felt that the not proven verdict was particularly difficult for them to take. As has been mentioned, they felt that there was a risk that the jury had simply not discharged its function properly. If the not proven verdict was not available, the jury would have been forced to engage in further, difficult deliberation that might have resulted in a guilty verdict. It might not have done, but at least the complainer would have known that the case had been discussed as fully as it could have been.

The Convener: I will bring John Swinney back in.

John Swinney: Our panellists have commented on the unanimity provision that exists in certain other jurisdictions. I am interested in understanding why our tradition is one of majority rather than one of unanimity.

Professor Leverick: Do you know the answer to that, Eamon?

11:15

Eamon Keane: I could perhaps do a bit more research on it and find out. Culturally, because of how the jury has developed in Scotland, the notion of a collective decision has never had the same strength here that it perhaps has had in America and Canada, where it is an absolute requirement. However, I do not want to start guessing—I can look into it and provide you with some information, but I suspect that, because we ended up with a jury of 15 members, and because of our way of delivering a verdict, things developed organically over time. There is one definitive PhD thesis on the history of the Scots jury, and I can certainly go away and provide information in that respect.

John Swinney: That answer is very helpful, in a sense, as it adds to the committee's consideration of what we must think about—and this goes back to my earlier questions—with regard to the relationship between jury size, majority versus supermajority and the potential abolition of the not proven verdict. That answer—and the lack of absolute certainty about why we are where we

are—is part of establishing the proper relationship between those three factors.

If we went to a unanimity position, that would strike me as a really significant move in Scottish jury approaches, and it would require a very significant raising of the bar for potential conviction, which must of course be substantiated. Going back to your earlier point, Mr Keane, there must be public confidence in the criminal justice system, and we must be careful that we do not place the bar too high up.

Eamon Keane: Absolutely—I would agree with that entirely. Yes, we can get guidance from similar legal systems and jurisdictions, but those jurisdictions still do things in a very different way from how we do them in Scotland. For example, we do not allow juries to hang in criminal trials. Nobody has touched on that thus far, but it is an important consideration when we discuss our cultural and historical approach in Scotland. Without speaking unnecessarily on that topic, I would agree entirely that public confidence must remain key, and we need to be sure of the relationship between all the things that we have discussed and Scotland's cultural and legal historical heritage when it comes to trial by jury.

Sharon Dowey (South Scotland) (Con): This certainly is confusing. We have majority, supermajority, simple majority and unanimity systems. From what you have said, I think that you are in favour of unanimity—no?

Eamon Keane: No.

Professor Leverick: No.

Sharon Dowey: But going for 10 out of 12.

Professor Leverick: We would be in favour of trying to reach a unanimity decision.

Sharon Dowey: Or striving to reach it.

Professor Leverick: Yes, because that encourages a good discussion. Personally, however, I would not go for an absolute unanimity requirement.

Sharon Dowey: So, it is all about striving for unanimity, but 10 out of 12 would be fine.

Professor Leverick: Yes, although I should say that the committee has really pushed me on the 10 out of 12 thing, and I am really not sure about it.

Sharon Dowey: Okay. I have just one wee quick question. The convener has asked about not proven as a compromise verdict, and you have answered that point, but my question is about changing to a two-thirds majority. The Crown Office has suggested introducing a system for retrials, should the two-thirds majority be missed—if, for instance, there is agreement among seven out of the 12 jurors. Do you think that that should be incorporated into the bill?

Professor Leverick: Possibly. This is slightly dodging the question, but I am not sure that it would make that much difference. If we introduced a threshold of eight out of 12, we would probably find that almost all juries would get there. The evidence from other countries with qualified majorities or even unanimity requirements is that the jury almost always reaches the threshold eventually, with hung trials being very rare.

I am not sure that I have a firm view on whether we should allow for the possibility of retrial after a hung jury, but whether we do or not, it is probably not going to make an awful lot of difference. We have not discussed this—I do not know whether you agree with me, Eamon.

Eamon Keane: Yes, I think so. Juries have to reach a verdict in Scotland. Again, to go back to the cultural and historical context, I would point out that we have never had in the criminal justice sphere a system in which we allowed juries to simply not agree. They need to reach a verdict—a verdict needs to be delivered. Introducing a mechanism by which a retrial could be sought and authorised if there were an inability to reach a decision would be a significant change. I suspect that that is not quite what your question was about—it was about the Crown's proposal that it be allowed to seek a retrial. I suppose, tentatively, that that could be useful, but I would need much more detail. For example, what would be the court's criteria for granting that? Would it simply be the split in numbers? Would there be other factors?

Professor Leverick: There has to be some sort of public interest test, I think, because having a retrial costs money and time and you will be bringing everyone together again.

Eamon Keane: In England, the percentage of criminal trials that result in a hung jury and a retrial might be as low as 1 per cent, I think.

Professor Leverick: It is even lower than that, because in England—where, in cases with a hung jury or where the majority is not reached, you can apply for a retrial—that actually happens in fewer than 1 per cent of cases.

When jurors are pushed—I was going to say "forced", but that is the wrong word—towards trying to reach a certain qualified majority or unanimity, they generally manage to do so. Even in Canada, where they have an absolute unanimity requirement, jurors fail to get there in only 1 per cent of cases. I admit that 1 per cent of 100,000 cases, say, represents a significant number of potential retrials, but it is still only a small minority of cases in which the jury does not eventually reach whatever the requirement is.

Sharon Dowey: Perhaps there needs to be a bit more conversation about the issue, then. I have heard comments about being pushed towards a verdict and juries almost always getting a verdict, but we are still talking about four out of 12 jurors saying that the person is innocent if you are going for a guilty verdict and a conviction.

Russell Findlay: On the point about juries being unable to reach a verdict, the most recent research—which is, I think, from New Zealand and dates from 2000—talks about a hung jury rate of 8.7 per cent, which is quite significant. If the bill does not include the ability to have a retrial, should there be some robust post-legislative scrutiny of the impact, which would require the Government to revisit that particular issue?

Professor Leverick: That particular piece of research is possibly slightly misleading. Did you say that the rate was 8.7 per cent?

Russell Findlay: Yes.

Professor Leverick: They will have included in that any case in which there were multiple charges and in which they failed to reach a verdict on any one of them. For example, the jury might have reached a verdict on the three most serious charges but not on, say, a minor offence. Therefore, the 8.7 per cent rate is probably slightly misleading.

Russell Findlay: So, we do not know this, but we might expect the numbers here to be similar to what we see elsewhere. That rate is maybe a bit more unusual, but notwithstanding what the number might be, should there be that safeguard of post-legislative scrutiny?

Professor Leverick: Yes, possibly. It would certainly be worth looking at, but we have to work out what we are doing first—

Russell Findlay: Of course.

Professor Leverick: With any of these changes, post-legislative scrutiny would be a good idea.

Russell Findlay: And then, of course, we will need to decipher what might be considered normal and regular and what might be considered concerning.

Professor Leverick: Yes. That is the difficulty with all of this. There are very few cases about which you can actually say for sure what the correct verdict or outcome ought to be. It will be quite difficult to evaluate any changes in the balance of verdicts after the proposals are put into action, because you would need some sort of objective standard to evaluate that against, but it is really difficult to know what the right rate of conviction might be. There is no easy answer to that, but I still think that post-legislative scrutiny is a good thing.

Russell Findlay: Interestingly, the Scottish Office estimated in 1994 that, if the possibility of having a hung jury were introduced into Scots law, in line with practice in England, the number of such verdicts annually would be in single figures. So, on the basis of that research, it does not seem to be a huge issue.

Professor Leverick: You have researched that even more thoroughly than I have.

Russell Findlay: I don't know about that.

Professor Leverick: Do you want my job? [*Laughter.*]

The Convener: I see that John Swinney and Sharon Dowey want to come back in.

John Swinney: I am interested in hearing your views on an issue that I have raised with you this morning. In trying to strike the appropriate balance, and given the possible implications of the changes, should we also consider revisiting the approach to—or the threshold for—involving the Scottish Criminal Cases Review Commission in possible miscarriages of justice? Should that be considered in our pursuit of the right balance?

Eamon Keane: I used to work there, but that was a long time ago.

Professor Leverick: Am I allowed to push that question on to you, on the basis that you actually worked for the commission?

Eamon Keane: I think that you would have to ask the commission. However, I do not quite follow the thread of the question.

John Swinney: Let us say, for the sake of argument, that the Government's proposal prevails and that the majority would have to be eight out of 12. You have expressed some reservations about whether that is the appropriate balance. The question that I am airing is: would the committee need to be mindful of other issues, if the Government was intent on pursuing that approach, in order to maintain confidence in the criminal justice system?

Eamon Keane: I understand that, but I do not understand what the commission's role would be. We do not ask juries for a breakdown of their verdicts, and there is a body of law that prohibits any exploration of their discussion of the evidence. The commission can consider cases if it believes that there has been a miscarriage of justice and that it would be in the interests of justice to refer the case back to the appeal court, but I do not see the connection between that and a jury verdict.

There is a ground of appeal in Scots law known as "unreasonable verdict", but that is very

infrequently encountered in the legal system. It is more about a jury behaving patently irrationally in respect of the charge that it has been given than about whether it got something wrong or about the internal dynamics of the jury, which we really do not know anything about, because of the Contempt of Court Act 1981 and the common law that protects the sanctity of those discussions.

I agree in general that post-legislative scrutiny is a good idea, but the committee would have to think very carefully about measures that could be introduced, because we do not really have a ground of appeal in Scots law that a jury made a decision that we disagreed with.

Professor Leverick: I can see where you are going with your question. Correct me if I am wrong, but I think that you are thinking that, if the bill results in a small risk of an increase in the number of wrongful convictions, we might have to look at other protective measures.

John Swinney: That is exactly what I am getting at.

11:30

Professor Leverick: We should possibly look at that, but I am not sure that the Scottish Criminal Cases Review Commission is necessarily the right direction to go in that respect, as it would not really do anything to help prevent wrongful conviction in the first instance.

I do not want to open this up to issues that are outside the remit of the bill but, if we were to follow that line of thought, it might be worth looking at some of the research on the causes of wrongful conviction and some of the more problematic types of evidence, such as the potential for forced confessions, eyewitness identification evidence and so on. We could look at some of the things that we know can contribute to wrongful conviction and think about whether we have addressed those as well as we possibly can. I can see where you are going, but my train of thought takes a slightly different direction to yours and goes towards looking at the sort of things that we can do to prevent wrongful convictions from happening in the first place.

John Swinney: Thank you.

Sharon Dowey: You have just touched on what I was going to ask about. In the joint article in the *Criminal Law Review*, you noted that changing the majority to two thirds might create

"an unacceptable risk of wrongful conviction."

Will you expand on that a wee bit?

Professor Leverick: I can only really say what we have said already. In a sense, talking about changing the majority to two thirds is probably not quite the right way of putting it. At present, it is eight out of 15, so it is perhaps not the change that is the important thing here. However, as I said, having eight out of 12 feels a little bit dangerous in terms of wrongful convictions. You could have a situation where quite a sizeable proportion of the jury did not think that a person was guilty, but there could still be a conviction.

Eamon Keane: I have already put on record that that is my tentative position, too, but I suspect that, if you were to speak to other academics, they would disagree. We would call it a difficult judgment call, because that is exactly what it is for politicians. Where politicians eventually land in that respect will be hard, as there are arguments on both sides for having eight, 10 and 12.

Professor Leverick: Public confidence comes into it, too. The most important thing is to have a criminal justice system that has the confidence of the people of Scotland. Would eight out of 12 command public confidence? I am not sure. I am not an expert on these things, but I suspect that, if you laid it out to somebody—not specifically in sexual offence cases but in all cases—that they could be sentenced to life imprisonment on the basis of eight out of 12, they might be a little uncomfortable with that. Having said that, we have operated with a system of majority verdicts for many hundreds of years, so maybe not.

Eamon Keane: Equally, on that notion of public confidence, I am sure that if you spoke to those who represented victims of crime, they would tell you that they would be uncomfortable with 10. Difficult decisions need to be made, but understanding that dynamic and the cultural heritage is key.

The Convener: I have one final question, which comes back to something that I noticed in your submission and was curious about. It is on the issue of safeguarding against wrongful conviction in sexual offence cases. In your submission, you say that the use of the not proven 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."

You go on to say:

"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."

I am looking for a bit more commentary on that.

Professor Leverick: There are two different things going on there. In relation to the second point—the idea that the not proven verdict has been used as justification for not introducing other measures that might help prevent wrongful

conviction—there have been a couple of examples of that in the past with various criminal justice reform committees that have been set up. The one that springs to mind was called, I think, the Bryden committee, which was a while ago now, maybe back in the 1980s—or possibly the 1970s. It looked at the difficulties of wrongful convictions based on mistaken eyewitness identification, which is one of the known causes of wrongful conviction.

That committee decided to not really do anything, because measures in Scotland already protected against wrongful conviction, one of which was the not proven verdict. That committee did not bring in any particular measures to address the mistaken eyewitness identification problem, because we already had all the other features to address wrongful conviction in a general sense. That is just one example of that.

The first point, which is slightly different, is around the way in which the not proven verdict is used in sexual offence cases. This starts to interact a little with later parts of the bill, but there was evidence from the jury discussions that some jurors held false and quite prejudicial beliefs about sexual offences and sexual offence complainers. That seemed to interact with the not proven verdict in ways that I cannot really quantify—it kind of left a space where those things could creep in. This is maybe not the time to say more about that, because it relates to a different part of the bill.

The Convener: That was helpful.

We will bring our session to a close. Thank you both very much for what has been a helpful and informative session.

Professor Leverick: Thank you for having us.

The Convener: That concludes our public agenda item for today. At our next meeting, on 6 December, we will continue our evidence taking on the Victims, Witnesses, and Justice Reform (Scotland) Bill by hearing from representatives of survivors of crime on the abolition of the not proven verdict and on jury majorities.

11:37

Meeting continued in private until 12:27.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

The Scottish Parliament
Pàrlamaid na h-Alba