OFFICIAL REPORT
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Criminal Justice Committee

Wednesday 6 December 2023

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Wednesday 6 December 2023

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CRIMINAL JUSTICE COMMITTEE
33rd 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:

Sandy Brindley (Rape Crisis Scotland)
Joe Duffy

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Criminal Justice Committee

Wednesday 6 December 2023

[The Convener opened the meeting at 10:00]

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

The Convener (Audrey Nicoll): Good morning, and welcome to the 33rd meeting in 2023 of the Criminal Justice Committee. We have no apologies this morning.

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

We are joined by Sandy Brindley, who is chief executive of Rape Crisis Scotland, and Mr Joe Duffy. I welcome you both.

I refer members to papers 1 and 2. I intend to allow around 60 minutes for this evidence session.

I will begin with a general opening question. I will go to Sandy Brindley first and then to Mr Duffy. We understand that you support a move to a two-verdict system and the removal of the not proven verdict. What are your reasons for that position?

Sandy Brindley (Rape Crisis Scotland): The not proven verdict is used disproportionately in rape cases. Scotland is unusual in having two acquittal verdicts, and we have a number of concerns about how the not proven verdict is used in rape cases in particular. With the significant evidence on the impact of jury attitudes and decision making in rape cases, our worry is that the not proven verdict could be contributing to wrongful acquittals in such cases.

Fundamentally, it is not correct to have a verdict that cannot be explained. I am sure that the committee will hear from academics who were involved in the mock jury research in Scotland. The study is the largest of its kind and it found that people really do not understand what the not proven verdict is and when it should be used compared with the not guilty verdict. Judges cannot give any definition or any guidance on when the not proven verdict should be used. It seems to me simply incompatible with a transparent and accessible justice system to have a verdict that nobody can define. In particular, there are concerns about how it is used in rape cases. Therefore, we support its abolition. I think that that is the right decision. The not proven verdict is an anomaly, and it is time for it to go.

The Convener: Okay. Thanks very much.

Joe Duffy: I reiterate what Sandy Brindley said. Quite frankly, the system is outmoded, outdated and unnecessary. There is no requirement for three verdicts, especially when two of them mean exactly the same thing. I am on record countless times as having said that the only difference between not proven and not guilty is the spelling. That is a fact.

In 2012, I sat on a jury in a drugs trial in Hamilton, and I can tell members categorically that virtually nobody on that jury had any understanding of why there was the not proven option. They thought that it was some form of safeguard and that, if there was insufficient evidence and they could not make up their mind, there could be a retrial. There was a complete misunderstanding. Some people asked about the not proven verdict. The sheriff categorically refused to define it and said that he was not in a position to do so.

The verdict leaves people traumatised. We deal with murder victims' families. I am talking from a personal viewpoint, and I can tell members that the verdict leaves people further traumatised, because it is a complete anomaly that should not be there. Allegedly, it is an accident, but I am not entirely sure about that. We know the language that Sir Walter Scott used about it, and he was right. It simply should not be there. It is a total anomaly.

A two-verdict system is perfect. It works everywhere else in the world, and there is no reason why we should be different. I agree with Sandy Brindley. We were all involved in the mock trial system, the Warwick investigation and the report on it. I will repeat myself: the verdict is outmoded, outdated and unnecessary, and it needs to be removed.

The Convener: Okay. Thanks very much.

I will go back to Sandy Brindley. In your submission, it is very clear that your experience of working with survivors is that they feel that the not proven verdict does not necessarily support them. They feel that it is unclear and confusing, and they feel let down by it. However, you also comment that some survivors derived some comfort from a verdict of not proven rather than not guilty. Is it therefore fair to say that that is not reflective of the majority of survivors' views, as you understand them?

Sandy Brindley: It is important and helpful to reflect a diversity of views. Survivors are not a homogenous group. It is totally natural that there

will be different perspectives. A small number of survivors have said to us, "at least it wasn't 'not guilty'" and that it felt as though the jury was communicating some degree of belief.

However, the majority of survivors that we have been in contact with are absolutely supportive of the removal of the not proven verdict. Campaigners such as Ms M, Hannah Stakes and other survivors—anonymous and not—have spoken about the devastating impact of getting a not proven verdict in their case.

There is a useful piece of research by Vanessa Munro from the University of Warwick, who interviewed some survivors about their experience of the not proven verdict. Overwhelmingly, they said that it got in the way of their being able to come to terms with the outcome of the court case, because they were left with nothing and with no way of understanding it.

Broader issues speak to the lack of reasons being given for a verdict, particularly if somebody gets a not proven verdict. The survivor simply does not understand what has gone wrong in the case or why the jury came to the decision that it did. The bigger issue about the reasons for decision making is picked up in other parts of the bill.

The Convener: Mr Duffy, in your submission, you say:

> "The vast majority of people are totally unaware of the court system and do not know that the Not Proven Verdict exists."

Earlier, you spoke about the confusion about what exactly that verdict means. I am interested in your thoughts on whether it would be more effective if the not proven verdict was better explained to people, so that their understanding was clearer, and whether that, in itself, might make the use of the not proven verdict more effective.

Joe Duffy: An explanation would be beneficial to everyone. Nothing about the Scottish legal process or system that is worth talking about is taught in schools. It is not learned about in school or afterwards. People do not know that Scotland is unique in having three verdicts. Nobody else in the world has three verdicts.

If you asked judges and sheriffs to explain or define what "not proven" means, their definition would be that it does not change anything—that it is exactly the same as "not guilty". That would be beneficial in the first place. However, they do not define it at all. I still deal with murder victims' families who have received not proven verdicts. I was in a meeting yesterday with such people and they are traumatised by the verdict because they do not understand it. They thought that it must mean something. That is the understanding: if the verdict exists, it must mean something.

The explanation is therefore paramount. What the not proven verdict is and why it exists must be explained. If it has a meaningful use, why can it not be defined? That comes back to those in power, who decide on what verdicts there are and how they should be described in court.

The not proven verdict is not described or defined at all. If you went out into the street anywhere and asked 100 people to define "not proven" and say why it exists and what it means, you would not get a clear definition. Most people do not know what is there.

Back in 1992, the man that I can categorically say murdered my daughter got a not proven verdict. My father, who was a reasonably educated man despite being an ex-miner, understood that verdict to mean something. He thought that the accused could be charged again—that it was like double jeopardy. It is not double jeopardy. It does not mean a thing. It means exactly the same as not guilty. Definition is therefore paramount, as is explanation.

The easiest way to explain my position is to say that the not proven verdict is not needed, so it should just be removed. Doing that is long overdue. You can define the verdict until you are blue in the face, but if you explain to people in a jury room that there are two verdicts that mean exactly the same thing, all you are doing is leading to more confusion about which one they should give, and, regardless of which one they go for, the person will walk out of there. Yes, you could define it for them, but I would prefer that you removed it.

The Convener: Thank you. I now invite other members to ask their questions, starting with Fulton MacGregor.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Good morning. I have a follow-up question to the convener's line of questioning. Joe Duffy, as you said, the two verdicts mean virtually the same thing: not proven—

Joe Duffy: Not guilty.

Fulton MacGregor: Yes, not guilty.

Joe Duffy: That is exactly what I am talking about.

Fulton MacGregor: I know that this will be hard to say definitively but, based on your experience of working with people in and around the courts, do you think that, if the verdict is removed, it will lead to a higher number of convictions for these sorts of offences?

Joe Duffy: I have no idea. All that I know is that the verdict is an anomaly that should not be in the legal system. Based on the verdicts that juries have returned in the past, I could not say whether there will be more convictions, and I am not saying

that there should be more convictions. I am not linking the two things. I have never said that there will be more or fewer convictions if the verdict was removed. What I am saying is that it is universally accepted that there are two verdicts in this world: guilty and not guilty. The verdict of not proven is not one of them.

From a personal viewpoint, given the people we support, I would be delighted if the removal of the not proven verdict resulted in more people being convicted of the crimes that they had committed, but I cannot say that that would be the case. I do not know. That would be down to the jury.

Sandy Brindley: For rape cases, it is possible that there could be more convictions, but I do not think that there would be a significant rise in the number. We have seen some absolutely terrible cases in which there has been a not proven verdict—terrible in the sense that, to me, the evidence seemed absolutely overwhelming, including cases in which there has been significant physical injury—and the jury's decision has been inexplicable. In a small number of such cases, it is possible that the removal of the not proven verdict would have an impact on the conviction rate, in the sense that, if it is currently contributing to wrongful acquittals in rape cases, removing it might rectify that to a degree. However, as I say, I think that the impact would be minimal, as it would have an effect in only a handful of cases. It is the right thing to do, but it will not have a huge impact on conviction rates.

Katy Clark (West Scotland) (Lab): My question is similar to Fulton MacGregor's, as I want to pick up on what Sandy Brindley said earlier about wrongful acquittals. The Scottish Government is proposing to offset any impact on conviction rates that might be caused by the abolition of the not proven verdict. That is, it would address the balance between convictions and acquittals by changing jury size. Do you accept that that would have the result that there is likely to be no change, given that you have just said that only a handful of cases would be affected? Would the change in jury size offset the abolition of the verdict in the way that the Scottish Government suggests?

Sandy Brindley: The Government's position makes no sense to me at all. If you accept that the not proven verdict might be contributing to wrongful acquittals and that it serves no purpose and should, therefore, be removed, it makes no sense to compensate for addressing the potential for wrongful acquittals by making it harder to get a conviction. I do not understand the Government's rationale.

I have heard a number of lawyers arguing that, in having a requirement for a simple majority on a jury, Scotland is an anomaly, but that is a separate discussion and I do not understand the link between that and the not proven verdict.

I saw the response from the senators of the College of Justice, in which they say that they think that the balancing exercise is based on a false premise, and I agree. What it means is that the overall impact of the bill could be to reduce the number of convictions, which is surely the last thing that any of us wants.

10:15

Katy Clark: I will follow up on that. You referred to the mock jury study, but we have been trying to look at the evidence for what the Scottish Government is proposing. One of our initial questions many months ago was about the data. We wanted to get an understanding of what kind of jury results we get at the moment. To what extent are they unanimous? To what extent are they very narrow results in favour of conviction or acquittal? Do you have any data or impressions about how clear outcomes are on juries? What data—either hard data or impressions—do you have?

Sandy Brindley: Undoubtedly, there is a need for far better data on justice responses to sexual offences. We do not even have the most basic data to show how many reported rapes lead to a conviction, because there are two separate datasets that are not comparable. That raises a legitimate question about undertaking significant radical law reform, which I absolutely support, but without the data to underpin it or to make the case. For years, I have been raising with the Government the need to improve the justice data on sexual offences.

The data that we really need is the conviction rate in single-complainer rape cases. We know that the overall conviction rate for rape is about 51 per cent, which is far lower than the overall conviction rate, which is in the low 90s. Anecdotally, I have heard that the conviction rate for single-complainer cases is far lower. In the judges' testimony in Lady Dorrian's report on the review of sexual offences, judges talk about a not proven verdict being used at times when the situation is inexplicable in the face of the evidence, and that is often in single-complainer rape cases. We need much richer data to underpin the discussions and, in particular, we need the figure for the conviction rate in single-complainer cases, because that is what the judge-led pilot will focus on. We need the data and we need the evidence.

John Swinney (Perthshire North) (SNP): I will try to draw some points out from what Mr Duffy has already said. The experience that you recounted about your participation as a jury member is insightful and brings further weight to

the long-term argument that you, your wife and your family have pursued with such vigour and distinction.

However, it strikes me that your argument is, essentially, that the not proven verdict is a product or symptom of a lack of clarity in the judicial system. Is that a fair summary? You made a powerful plea for us not to bother defining it but, in a sense, because it cannot be defined, it can mean almost anything.

Joe Duffy: It is a terrible thing to say, but somebody said that the lack of clarity gives it a bit of mystique, and that there must be something different about it that makes it beneficial, which is, to me, a piece of nonsense.

If you have to describe an alternative verdict, why do you have it? The judge should be able to say to jury members, "You have two verdicts open to you and you have heard all the evidence. Is the person guilty or not guilty?" Why are you offering them a middle ground? Why do you say that there is a middle ground? There is not a middle ground, because the not proven verdict means the same as one of the other verdicts. It is a symptom of the lack of data capture that we have been talking about. What level of information comes out of murder trials and rape cases? Was the verdict unanimous? Was it a majority verdict? If it was a majority verdict, how big was the majority? We do not know. Also, a jury has 15 jurors. Was it a majority of eight to seven? Did one juror send somebody home or to prison? How many times does that happen? You are asking to define and explain the not proven verdict but, if you are going to do that and expect it to remain, you have to use better levels of data across the board to justify it. I keep going back to the same analogy every time—if you have a third verdict that constantly needs definition, and the legal process refuses to define it and tell juries exactly what it means, why do you have it?

John Swinney: You used the term "middle ground", and that might be the best way of explaining people's view of the verdict. Whether we like it or not, there is an encouragement to believe that the not proven verdict is a middle ground, but it is not: it is on one side of the line, because it is essentially equivalent to being found not guilty. That has the potential to create confusion in the jury room about what people are feeling and about the conclusion that they come to.

Joe Duffy: If you listen to the defence counsel at any trial, they will labour one word throughout all the evidence. They do not ask whether the person is guilty or not guilty or whether they have convinced the jury; they will continually use the word "proven". Then they will say that if the case has not been proven, the verdict must be not proven. They do not say "guilty" or "not guilty".

You can go through court transcripts. Particularly in major cases, and in a lot of rape cases, the language will be laboured. If you sit through a trial and share my point of view, it becomes quite annoying to hear the number of times the word is used, because that is not what the trial is for. The choice is not between proven and not proven; the verdicts are guilty, not guilty or not proven, but counsel will labour the point about the case being not proven. In the words of my darling brother, all they do is muddy the waters to move people to the middle ground where they do not have to make a decision but can leave it to someone else.

John Swinney: That opens up a link to the questions that Katy Clark pursued a moment ago. The way that you articulated that final argument is incredibly powerful. From the defence perspective, there is an advantage in labouring the term "proven" in the way that you have just described.

Katy Clark put the question whether, if we get rid of the not proven verdict, there would be a need for some rebalancing in the system. That is the Government's proposition in the bill. That raises the question in my mind of where the appropriate balance of fairness is in the process, because, whatever comes from the changes that we make here, there must be fairness on all sides. There must be fairness for the accused and for the Crown in pursuing its arguments.

The Government's proposition is that getting rid of the not proven verdict would mean that there is a need for some counterbalancing changes to the size or composition of juries. You said that the labouring of the term "proven" might already be creating an imbalance in the system, which might mean that getting rid of the not proven verdict would just be removing an imbalance. Do we, as a committee, have to consider some counterbalancing measure, or would that actually lead to us changing the balance again?

That is not a particularly coherent question, but you know what I am getting at.

Joe Duffy: Defence counsel are more than articulate enough to come up with a better phrase if you remove the not proven verdict. I would say that they use that expression because it is to their benefit to do so. Some of the most articulate people that I have ever heard are senior defence counsel, so I am sure that they would be able to get round not having that term.

You spoke about an imbalance. The imbalance is that I do not know any process in the world that pits one set of people against another—as happens in sport, for example—but then gives one side a two-to-one advantage over the other, but

that is exactly what is happening here. The defence has a two-to-one chance; they have two verdicts open to them, not one.

Do we need to counterbalance any change with something else? If you need to change the jury system, change it. I am not happy with a jury size of 15, anyway. First off, I think that that is too many people. I also think that the 8/7 requirement is crazy, to be frank.

As you can tell by looking at me, I am nae spring chicken, but I can tell you categorically that, in 1992, I did not know that the not proven verdict existed, and I certainly did not know that there were 15 jurors. Before the start of this process, how many people thought that there were 12 people on a jury, as there is everywhere else?

If we need to make changes to that, and there is a balance, then yes—everything comes down to balance.

John Swinney: So you can see the argument for a reduction in the size of juries, but a higher threshold for conviction.

Joe Duffy: Yes.

John Swinney: But Sandy Brindley would not share that view.

Joe Duffy: No—we agree to disagree on that.

Sandy Brindley: Yes, but we agree on the fundamental premise of removing the not proven verdict.

Your question is particularly apt. Why is there a need for rebalancing because we are removing the not proven verdict? The jury research is helpful, but it can lead us down the road of mathematical calculations. Why would we want to keep the level of convictions in rape cases exactly the same as it is just now, given that—as I think is obvious to anyone—guilty men are regularly walking free?

The difficulty of going down the road of mathematical calculations is that we are not considering whether the decisions are correct. That is the key argument. Are we enabling juries to make the correct decisions, based on the evidence and applying the correct legal tests, which they understand? To my mind, that is not happening just now. The not proven verdict plays a part in that, as does the question of jury attitudes.

There may be a separate discussion to be had about whether—as Joe Duffy referred to—we should have a simple majority or a jury of 15. However, I cannot see any basis for linking those aspects to the removal of the not proven verdict. To me, removing the not proven verdict is about removing something that, in rape cases, contributes to wrongful acquittals. Why would the Government want to rebalance the system following the removal of something that could be contributing to wrongful acquittals? As I said, that makes no sense to me.

John Swinney: Thank you for that. Last week, when we took evidence from the academics who were behind the jury research, I was struck by their argument about the interaction between jury size, the question of a majority versus supermajority within a jury and the presence or absence of the not proven verdict, and we laboured over the relationship between those three factors.

Essentially, Sandy Brindley has just put on record the question whether the correct decisions have been arrived at, as opposed to whether we are making a change here by abolishing the not proven verdict, on which Mr Duffy has made his beliefs clear.

Are we answering that question alone, or a hypothetical question about how we maintain convictions at the current level as opposed to what may be the correct level?

Sandy Brindley: Absolutely.

John Swinney: What concerns would you have about the triangle of issues——jury size, majority versus supermajority and not proven—that I just mentioned? Would you simply not put them in that framework? Would you encourage me to stop thinking about them in that way?

Sandy Brindley: Yes. It used to be—to go back to the days of Lord Bonomy's safeguard review—that the jury majority changing would be the cost of corroboration going. Now, somehow, the jury majority changing is the cost of the not proven verdict going. I am not quite sure how that has happened, to be completely honest.

John Swinney: Corroboration strikes me as a fundamentally different concept from the not proven verdict.

Sandy Brindley: Indeed.

John Swinney: It is totally different, as recent judgments tell us.

Russell Findlay (West Scotland) (Con): Good morning. I start by picking up on Sandy Brindley's earlier point about data. I would like to know how many rapes are reported to police and how many are prosecuted; how many of those involved a single complainer or multiple complainers; and, subsequently, how many resulted in a guilty, not guilty or not proven verdict. If I have understood you correctly, we, and you, do not have that data.

10:30

Sandy Brindley: We do not have it. We have data on the number of reports to the police and on the number of prosecutions and convictions, but those two datasets cannot be compared, because one measures by offence and the other measures by persons accused, and they do not concern the same cases. We have no system of tracking cases through the system whereby we could say, for example, that there were 2,000 reported rapes, that such a proportion of those resulted in a prosecution and that such a proportion resulted in conviction. We do not even have that basic level of data, never mind data about how many of those were single-complainer cases or how many victims were male and how many were female. We do not have the most basic data.

Russell Findlay: Your organisation will have pointed that out for a long time, I guess.

Sandy Brindley: Yes, many times.

Russell Findlay: So, who has the responsibility to fix it?

Sandy Brindley: I would say that the Scottish Government has, in liaison with the justice agencies. Whenever I raise the issue, I come across the difficulty that the systems of the police, the courts service and the Crown, for example, are designed to manage cases rather than to provide data. However, that rationale can be used for only so many decades before data systems must be improved.

Russell Findlay: Indeed.

The not proven verdict is an international anomaly. I get the sense that the legal profession has almost given up the fight on it. However, it is very concerned about the proposal to not just reduce the jury size but change the required numbers for a guilty verdict to eight out of 12—which, in itself, would be another international anomaly. I will quote to you what the Faculty of Advocates has told us:

> "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."

Do you share those concerns in any way?

Sandy Brindley: With the greatest respect to the Faculty of Advocates, that sounds similar to its analogies involving North Korea in relation to the judge-led pilot. I am not sure how helpful such hyperbole is when we talk about these issues.

Changing the jury majority from a simple majority would be, in itself, a significant change. I am not sure about the Faculty's position. If it is that that would be a dramatic loss of rights for the accused, it is hard to understand how that can be the case, given that it represents a significant increase in majority rather than a decrease. If we were to move to a requirement or a preference for a unanimous verdict, there would literally never be a conviction in a rape case. It is almost unheard of to get a unanimous verdict in a rape case, even given overwhelming evidence, because some members of the public will simply not convict in a rape case, no matter what the evidence is.

Russell Findlay: However, in many other comparable jurisdictions, there is a requirement for unanimity, or one short of unanimity, which seems to work. Might that be the way forward?

Sandy Brindley: All I can say is that, in Scotland, judges almost never see unanimous verdicts in rape cases. That leads me to think that, if we had that requirement, we would see a dramatic fall in convictions.

Russell Findlay: Jurors might fall into line. However, we just do not know.

Sandy Brindley: We do not know.

Russell Findlay: Mr Duffy, I pay tribute to everything that you and your family have done during 31 long years of campaigning. You have spoken to probably every journalist in Scotland—and, no doubt, to every committee. After all that time, it seems that the scrapping of the not proven verdict is within touching distance. In all the years of hostility that you faced from the legal profession and others, did you think that this day would ever come? Perhaps another way of looking at it is, did you think that it would take so long?

Joe Duffy: Well, hope springs eternal. I think back to the days when we stood out in the street and asked people to sign a petition. Long before proper internet or anything like it, we had people standing with a pasting table and leaflets in shopping centres, for example. I pay tribute to Marks and Spencer in Hamilton, which is no longer there, and to the one in Glasgow, for giving us coffee during all the times when we stood outside, blocking their doorways.

We always hoped that the time would come, although it often seemed to get further and further away. I pay tribute to Sir Ian Lang for the way in which he completely stitched us up when he was at Westminster. He accepted our petitions and congratulated us, and told us that something could definitely be done, then, three days later, he kicked it out completely. That was at Westminster, because we did not have the Scottish Parliament at that time.

As members may remember, George Robertson MP helped greatly with the campaign. We always hoped that the end of the verdict would come about. The members of the Faculty of Advocates in particular have certainly never been our

favourite people, exactly—they have never been very nice to us about what we do and do not know and why we are doing this.

I should say that I was flattered to hear that the bill has actually been passed—that is according to two taxi drivers I met recently, who congratulated me on the verdict being abolished. So, I would like youse to get moving and get it done—those guys are obviously right, because they are taxi drivers. Based on their optimism and the way in which the media seems to be relating the story, it seems that the not proven verdict might actually be abolished. I am not getting any younger, so I say, "The sooner, the better, please." My family will have a party—youse will not be invited; it will be a family party. However, to be frank, it wouldnae be a party—it would be a relief.

Russell Findlay: Over the 31 years that you have been campaigning, how many other families have you assisted?

Joe Duffy: Oh, now—that is a bit like Sandy Brindley's point about data.

I was with one organisation until 2014, and we started the Manda Centre in 2016. The other day, somebody asked me why we called it that—it was because Amanda's siblings called her Manda. We still support families. I have no idea of the figure—I could probably find it if I go back right through the records. We have supported a lot of families who have suffered the same as we have.

There was the family who originally helped us when we founded the first charity—they got in touch because they were in the exact same position as us. At the end of that trial, there was a not proven verdict, and they could not believe it.

I sat with a family in Edinburgh less than 10 years ago—my wife, who is sitting behind me just now, was there too. After the evidence that had been given, for the jury to come back with a not proven verdict was absolutely astounding.

As I have said already, that creates trauma for families, and it retraumatises them. There is no level of justice—that is how they feel about it, because somebody has just walked free.

Russell Findlay: Am I right in saying that most of those whom you have helped, who were in a similar position to you, would have had no real knowledge of the verdict, or even of its existence, until then?

Joe Duffy: That is right. As I said in my submissions, they had none. I even put in a submission from the Manda Centre—I spoke to the families there who had been affected by it. They were stunned. When they found out that there were three verdicts, they thought, "Well, it must mean something."

When families discover that it is an anomaly—as far as I am concerned—they are shocked. We have had families say, "No, you're wrong. It must mean something. They can retry them." We say, "No, that's double jeopardy." It causes trauma across the board. I know about the cases that Sandy Brindley deals with, as well as those that we deal with at the Manda Centre.

We deal with a lot of other things as well. We have more and more cases coming through that involve people who have been subject to coercive behaviour and domestic abuse, and, when the case goes to court, people walk away with a not proven verdict from a sheriff-only trial.

The trauma that is created is bad enough even before a case gets to trial. When we support people who have been affected by crime, we see that they are in limbo until they get to the trial. Everybody is waiting on the trial, because they think, "Then we'll get a verdict, and we'll get justice." They go to court, and they do not get justice, and the trauma is exacerbated.

Russell Findlay: Thank you very much for that.

The Convener: I call Pauline McNeill, and then Rona Mackay.

Pauline McNeill (Glasgow) (Lab): Good morning. I will start with Joe Duffy.

First, thank you for your evidence. You are quite convincing on the issue of whether the not proven verdict is well explained. I do not have a strong view either way on the verdict, so I am just listening to the evidence.

I turn to my first question. When the judge gives directions to the jury, they will presumably, as well as explaining the three verdicts, say, "If you've got any doubt in your mind, you shouldn't convict." Some people think that if we strip away one of the verdicts, it is more likely that we would simply get more not guilty verdicts. I wonder what you think about that.

Joe Duffy: I do not know why they would say that. The one thing that is missing throughout all the data that we talk about is proper jury research. We could have mock trials, mock juries and everything else.

I was on a jury in a trial. I cannot tell you any more than that—I cannot even tell you what the verdict was or why, or anything like that, because I would be in breach of everything that I agreed to.

There is no evidence to enable people to turn round and say that there would be more guilty or not guilty verdicts. There is nothing that shows that. You could have mock trials and mock juries until—if you will excuse the expression—you are blue in the face, but we do not know that and we

will not know that until there is a fair justice system with verdicts of guilty and not guilty.

The judge or the sheriff, even in a jury trial, will say, "If you're not sure, you shouldn't convict", but they also say that there is a third verdict, which they do not explain.

Pauline McNeill: Yes, I understand that, but a judge or sheriff also say, "If you've got any reasonable doubt in your mind, you shouldn't convict." Is that right?

Joe Duffy: Yes.

Pauline McNeill: You then have to decide from there. In the current system, if you have that doubt, you choose which verdict to give.

Joe Duffy: People think, "I don't think they're not guilty, but I don't think they're guilty. They're maybe a wee bit guilty, so we'll go with not proven." Really? We have a situation in which people are thinking, "You're maybe a wee bit guilty or a wee bit not guilty". Maybe it is just me, but I think that either you are guilty or you are not.

Pauline McNeill: I want to establish what happens. We are all lay people here—

Joe Duffy: So am I.

Pauline McNeill: —so we are only going by what we understand. The judge would normally direct the jury by saying, "If you've got reasonable doubt". Would you accept that?

Joe Duffy: Yes.

Pauline McNeill: I have a few questions for Sandy Brindley. Would you accept that the committee has been asked to scrutinise the issue and to make a decision in relation to all cases, not just rape cases?

Sandy Brindley: Absolutely, but the not proven verdict is used disproportionately in rape cases, and that is the source of a lot of the concern about the verdict, but—

Pauline McNeill: Yes, I have acknowledged that—

Sandy Brindley: —it is a universal verdict, and we would—

Pauline McNeill: Would you acknowledge that the committee is required to look at changes that affect all trials, including for rape, murder and everything else?

Sandy Brindley: I absolutely would.

Pauline McNeill: I note your point about the Faculty of Advocates. Last week, we heard evidence from Professor Fiona Leverick, who expressed the same concerns about removing the third verdict, or one of the verdicts. She said that she was concerned about the current proposals because they are out of step with the rest of the world. I wondered whether you had heard that.

Sandy Brindley: I think that that is a separate argument. What I do not understand is the link between the other aspects and the not proven verdict.

I do not see that the Government has made an argument for that. The policy memorandum says that the other changes have been proposed because the not proven verdict is being abolished. There should be a separate discussion about what a jury majority, and the size of a jury, should be—

Pauline McNeill: I was just asking whether you knew what Fiona Leverick had said to the committee. She is not from the Faculty of Advocates. I was just pointing out that she gave that evidence to the committee, and we have to consider it.

Sandy Brindley: Yes—sure.

Pauline McNeill: Earlier, you said:

"If you accept that the not proven verdict might be contributing to wrongful acquittals".

The Government has not said that. That might explain where it is coming from. The Government has explicitly said to the committee that it is not, through the proposals, trying to make any change to the number of acquittals.

Sandy Brindley: Yes. Most of the bill comes from Lady Dorrian's review, but that is not where the part of the bill on the removal of the not proven verdict comes from. My understanding is that the recommendations from Lady Dorrian's review address two key issues: retraumatisation and low conviction rates.

From Lady Dorrian's review, it seems that the issue of low conviction rates is very much about jury attitudes and the impact of rape myths. For me, that is inextricably linked with the not proven verdict—it is about the interaction of those two things.

Although the Government says that it wants to improve conviction rates, my position is that conviction rates are very low and that a number of factors are contributing to wrongful acquittals, and I think that that underpins some of the measures in the bill. I cannot comment on the Government's position in that regard.

Pauline McNeill: Thank you—that is a fair point.

Lastly, aside from the three verdicts, you do not see why the current system should change. Is it fair to highlight, however, that we currently have three verdicts and that that is why—as Joe Duffy said earlier—we convict on a majority of one? At present, someone can be tried and convicted of

murder or rape on the difference of one vote. That is the reason why, if we were to remove one of the verdicts, the Government would also look at the ratio of the jury. Is it fair to say that we should look at the ratio if we take away one of the verdicts?

I realise that that is not where you are coming from—you just feel that there should be more convictions. However, we must look not just at rape trials but at all trials.

Sandy Brindley: Yes, of course.

Pauline McNeill: Would it not be fair, therefore, for the Government to look at the majority issue?

10:45

Sandy Brindley: To be clearer, I do not say that there should be an arbitrary increase in conviction rates—that, somehow, there should be a target that 70 per of cases must result in a conviction, for example. I am saying that we need to be far more confident that the right verdict is being reached in rape cases, and that the question is about what role the different factors play in the right verdict not being reached. It is fair to say that a number of rape survivors would see the provisions in the bill as giving with one hand and taking away with the other.

Pauline McNeill: I totally acknowledge that. However, it is that issue that I am questioning you on. Conviction is possible on a majority of one. Surely, without any bias in favour of one view or the other, you can see that, if one of the verdicts is taken away, it would be fair to look at the ratio of the jury, in order to create a balanced system. You might come up with a different answer—such as eight or 10—but is it not fair to look at the issue?

Sandy Brindley: Two of the verdicts are interchangeable—both mean the same thing. It is probably correct—although Joe Duffy is right to say that we will not know until it actually happens—that the vast majority of verdicts that would have been “not proven” will be “not guilty”. I therefore do not understand why moving to one verdict—not guilty—means that change is needed to the jury majority. That is the perspective of my organisation. I appreciate that others have a different view.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning. Joe, I want to pick up my colleague’s point about reasonable doubt. As I understand it, in order for a case to come to court, there must be reasonable evidence. If that evidence cannot be proved, the verdict must be “not guilty”. That is a simplification, but that is how I see it.

You also made a point about not knowing what the jury majority was in a not proven verdict. I had not even thought about that. As you put it, that muddies the waters even more. I agree with that.

I want to ask you both about not majorities but jury size. For the record, would you keep it at 15, or would you make it 12?

Joe Duffy: I would not keep it at 15. I would go to 12.

Rona Mackay: You prefer 12.

Joe Duffy: Yes, with a defined majority.

Sandy Brindley: There are convincing arguments about the quality of discussion being better with a jury size of 12—I was convinced by that point in the research—irrespective of the size of the majority within that number that is required to reach a verdict. The research evidence on jury size seems convincing.

Rona Mackay: I do not have much more to ask, but I echo my colleague Russell Findlay’s comments to you, Mr Duffy, about your campaign. It is astonishing that, even after all your work, families still do not understand what the not proven verdict is—

Joe Duffy: They do not.

Rona Mackay: —and that, after decades of campaigning, there is still confusion. That speaks volumes.

Joe Duffy: Given how much I can talk about such things, you will understand that to sit in a jury room and not say a word was not exactly easy for me—to let somebody else be the chair and try just to observe rather than berate the people in the room for not knowing.

Rona Mackay: That must have been difficult.

Joe Duffy: However, I then thought that, years before, that would have been me.

Sandy Brindley: When we started the end not proven campaign with Ms M, a rape survivor, we set up an email address to enable people with experience of the not proven verdict to contact us. We were contacted anonymously by a number of people who had sat on juries, who told us how horrified they were about the attitudes that were expressed during the deliberations in rape trials and about how “not proven” was used in those deliberations.

Sharon Dowey (South Scotland) (Con): I have a quick question on the bill’s changes—which are substantial—to jury size. Does the Scottish Government have enough evidence to justify those changes? Have we gathered enough information?

Joe Duffy: This might be a strange statement, but I hope so. If we are going to have change, change needs to come. If we are going to change

the system, we might as well introduce the whole thing and allow things to fall in line.

I have a line written down that I have not used yet. On the issue of having a different jury size to counteract the removal of the not proven verdict, I would say that the not proven verdict is an offence to natural justice, because we have a long-standing principle in this country of being innocent until proven guilty—the principle is not "not proven" or "maybe guilty". Whatever the jury size, it must work on a majority basis. It should not be the case that one person out of 15 can decide whether somebody stays or goes.

I would like to think that you have enough information. There is enough information worldwide on how juries work in that manner, so I do not think that there should be any reason why you could not implement the changes successfully.

Sharon Dowey: Sandy Brindley, do you have any thoughts on that?

Sandy Brindley: As I said, I thought that the evidence from the jury research was quite convincing, in that you are more likely to have a fuller discussion with a slightly smaller jury. However, my organisation does not have a strong opinion on that.

Sharon Dowey: That is fine. Last week, there was talk about whether we should go for unanimity in a jury or for a simple majority. What would be your preference?

Joe Duffy: A simple majority.

Sandy Brindley: Absolutely.

Sharon Dowey: The Crown Office has suggested introducing a system for retrial, should a two-thirds majority just be missed—for example, if seven out of 12 jurors think that there should be a guilty verdict. Should such a system be incorporated in the bill?

Sandy Brindley: That is a really interesting proposal. In a rape case—in fact, in any case—you would need to engage with the key witnesses. In a rape case, that would be the complainer. Their views on how to proceed would need to be determinative; they would need to decide whether they could face the prospect of going through another rape trial.

However, people feel that it is fundamentally unjust that, if they had had a different jury on a different day, their rapist might have been convicted. The proposal speaks to cases in which there is a very narrow decision in terms of the numbers. I think that there is a case for retrial, but, as I said, the decision would need to be made in consultation with the complainer. For some complainers, the thought of giving evidence in two rape trials would be unbearable, whereas other complainers might welcome that.

Joe Duffy: I would go along with that. Particularly in a murder trial, would the family want to go through the experience again with the witnesses and everything else? In order to get justice, the family probably would, in most cases, want to do that. That basic premise works in other areas, too. That option should be available, but it should be down to the complainer or the victim's family whether to continue.

Sharon Dowey: Thank you.

Katy Clark: I want to go back to the issue of evidence and data. Last week, we considered the Scottish Government's proposal that a majority in a jury should be changed to eight out of 12, but we also considered the possibility of it being 10 out of 12.

Sandy Brindley, I appreciate that we have no hard data and that there is no concrete evidence on this, but what are your impressions—anecdotally, from the women with whom Rape Crisis Scotland works—on the outcomes from juries? How often is the decision, either to convict or to acquit, unanimous, and how often is the jury split? What kind of splits are you told about? I appreciate that you might not have formally surveyed the women with whom Rape Crisis Scotland works, but what is your impression? I feel that we are working in the dark, so even anecdotal information is of interest.

Sandy Brindley: I agree that it would be helpful to have better data. Complainers in rape cases are not given that information, so I think that the judiciary is the best source of information on how often there is a unanimous verdict in rape cases.

As far as I am aware, the data on majorities is not captured anywhere. It is certainly not captured by crime type.

It seems clear to me that the higher the majority that you need, the more difficult it will be to get a conviction. The more you increase the majority, the more you will decrease the possibility of getting a conviction in rape cases. The context to that is that we know that decisions in rape cases are often not made solely on the evidence and that there can be a reluctance among jury members to convict. My concern about the increase in the jury majority is that it might make it harder to get a conviction in a context in which it is already very difficult. The more that you increase the jury majority, the more you increase the risk that the ultimate result of the bill will be fewer rape convictions.

Katy Clark: Are complainers not given the information on the majority?

Sandy Brindley: No, they are not.

Katy Clark: Is it your understanding that the Crown and the defence agents are not provided with that information either? We can obviously take up that point with them.

Sandy Brindley: They are not told it systematically. Very occasionally, a complainer might hear what the jury majority for or against conviction was in their case, but that is anecdotal. As far as I am aware—I am pretty sure that this is correct—there is no systematic recording of that information that could be provided to the committee. We are absolutely dependent on any research—for example, mock jury research—anecdotal information or a sense of what the impact might be. I appreciate that that is difficult for the committee when you are weighing up such complex and important issues.

Katy Clark: Thank you. That is helpful.

The Convener: We are coming up to our end time. Is there anything else that we have not covered in our questions that either of the witnesses would like to add before we close our meeting?

Joe Duffy: No, I have nothing to add, really, other than to say thanks very much for the opportunity to come along to talk to you and to give our evidence. Somebody commented on how long I have been talking about the matter, and there is a distinct possibility that you are fed up listening to me. I will not stop talking about it, though. I am just glad of the opportunity to come along, and I hope that it leads to some positive changes for the benefit of the people whom we support.

Sandy Brindley: I pay tribute to Joe Duffy and the many rape survivors and other victims who have campaigned tirelessly for the abolition of the not proven verdict. That is why it is in the bill, and it is really important that it is there.

The Convener: Thank you both for attending.

Our next meeting, on 13 December, will continue with evidence taking on the Victims, Witnesses, and Justice Reform (Scotland) Bill. We will hear from representatives of the legal profession and the Crown Office.

Meeting closed at 10:57.

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