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Criminal Justice Committee

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Victims, Witnesses, and Justice Reform (Scotland) Bill: analysis of the call for views (part 4)

Introduction

The Criminal Justice Committee launched its call for views on the Victims, Witnesses, and Justice Reform (Scotland) Bill on 19 June 2023. It closed on 8 September.

The call for views covered all six parts of the Bill. **Due to the Committee's decision to take a phased approach to the consideration of the Bill this paper only discusses the responses to Part 4 of the Bill.** A paper discussing the responses to parts 1 to 3 of the Bill has already been shared with the Committee. Responses to parts 5 and 6 of the Bill will be summarised in a future paper.

The intention of this paper is not to be exhaustive, rather it is to provide an overview of the main issues raised in the submissions. The submissions are published online.

Responses

The Committee received over 250 submissions to the call for views. Of these submissions, around a quarter were from organisations, with the rest from individuals.

Broadly speaking, responders to the call for views had more to say regarding Parts 4 to 6 of the Bill than they did about the initial three Parts. Part 4 generated a significant number of comments.

Part 4: Criminal Juries and Verdicts

The call for views asked respondents two questions relating to Part 4 of the Bill. The first asked for opinions on the removal of the not proven verdict, and the second asked about jury size and the majority needed for a guilty verdict. A summary of the responses to each of these questions is provided below.

Verdicts

The organisations that responded to the call for views were generally in favour of removing the not proven verdict, although there were exceptions to this. While bodies representing victims were more likely to support the removal of the not proven verdict, responses from the legal professions, including the Law Society of Scotland and the Faculty of Advocates were more likely to be against the proposed changes. The respondents representing the courts and the judiciary did not tend to provide an opinion on this policy change.

The responses from individuals were mainly more negative, with a general concern raised regarding a perceived loss of Scotland's unique judicial history.

Clarity

An improvement in clarity brought to the system by moving to a two-verdict option was cited by many respondents as the reason they supported these sections of the Bill. The British Psychological Society submission reflected many of these opinions, stating that:

> "Removal of the not proven verdict should bring about a clearer system for jurors, accused and for the public in general."

Some respondents highlighted the fact that there is no generally accepted legal definition of the not proven verdict, or a clear difference between it and the verdict of not guilty. One respondent noted that:

> "the 'not proven' verdict is unclear, there is no specific definition for when it is to be used… and this is mirrored in jurors' beliefs around when and how the 'not proven' verdict should be used." (Equally Safe Edinburgh Committee)

Organisations who work directly with victims of crime also said that removing not proven as a potential verdict would bring improved clarity. Victim Support Scotland said:

> "Feedback from victims tells us they find the third option of a not proven verdict to be confusing, disappointing and at times re-traumatising. Finality and certainty are crucial elements of an effective criminal justice system and support people's recovery journeys after a crime. As such, not proven verdicts often leave people affected by crime without the conclusive answer they were looking for from the justice system."

Complainers’ perceptions of not proven verdicts

The Victim Support Scotland comment above, about victims looking for finality, also links to a theme in the responses regarding the perception of not proven verdicts by complainers.

The submission from Victim Support Scotland reflects the view of a number of organisations that complainers whose case ends in a not proven verdict are left with a negative experience of the judicial process. However, not all responses agreed with this position. For example, Edinburgh Rape Crisis Centre said that:

> “it is important to acknowledge that not every survivor has the same experience of receiving a not proven verdict in their case. We have supported a number of survivors for whom receiving a not proven verdict felt more satisfactory than receiving a not guilty verdict - ‘not proven’ made them feel believed by the jury, despite the absence of proof beyond all reasonable doubt.”

Conviction rate in sexual offences cases

Many of the submissions that provided an opinion on verdicts focussed on the impact of the not proven verdict on conviction rates in sexual offences cases. The points made in the following submission from Rape Crisis Scotland was also brought up by other respondents:

> “The Not Proven verdict is used disproportionately in rape cases. In 2019/20, only 43.48% of rape and attempted rape cases resulted in convictions, the lowest rate for any type of crime. Not Proven made up 44% of rape and attempted rape acquittals, compared with 20% for all crimes and offences... There are real worries that the existence of the Not Proven verdict gives juries in rape trials an easy out and contributes to guilty people walking free.”

The impact of a not proven verdict on outcomes was viewed by several submissions as difficult to quantify. For example:

> “We are concerned that the existence of what are essentially two acquittal verdicts is unfair on victims of VAWG crimes; but we are equally concerned that the absence of a ‘not proven’ verdict might sway more jurors towards a ‘not guilty’ verdict.” (Beira's Place)

The response from the Open University in Scotland, which was based on research conducted by a team of academics within the Open University, stated that in their view removing not proven was unlikely to have any impact on the conviction rates for sexual offences:

> “the independent study conducted by Ormston et al. (2019) did not highlight a significant change in conviction rate in a sexual assault trial (both at the juror and jury level) when comparing the Scottish three-verdict system with the guilty and not guilty verdict system; likely due to rape myths influencing decisions in both verdict systems… Instead, educating jurors about rape

> myths, promotional campaigns that target against rape myth, and funded research targeted at attenuating the impact of rape myths on jurors is needed… to increase the current conviction rates in rape and sexual assault trials."

Safeguard against miscarriage of justice

The main argument against moving to a two-verdict system was the concern that the not proven verdict acts as a safeguard against miscarriages of justice. Many legal organisations discussed this concern in their submissions, with the Faculty of Advocates stating that it:

> "is concerned that, should the not proven verdict be removed, there is a potential danger of jurors wrongly convicting an accused person. Removing this verdict may force jurors who have not been convinced by what they have seen and heard into one of the two polar verdicts, where they feel uncomfortable with either but are left with no choice. To do so undermines the presumption of innocence."

The Scottish Criminal Cases Review Commission (SCCRC) referred to arguments both for and against the proposition that the third verdict helps prevent miscarriages of justice:

> "As the SCCRC outlined in the previous consultation, it is possible to draw from the jury research arguments both in support of and against the contention that the three-verdict system provides a safeguard against miscarriages of justice."

Some of those in favour of retaining the current three verdicts believe that they reflect the reality of the justice system:

> "This is unsatisfactory to many but it is an expression of an unsatisfactory truth; there are occasions when the inadequacies of the evidence allow no safe verdict. In those instances, requiring an either/or verdict will always produce an unsafe verdict. Scotland's option of the not proven verdict is a feature of the nuanced character of our system of law and one that is considerably fairer and more honest than the black and white, binary verdict system." (Bill Whyte, Emeritus Professor of Social Work Studies in Criminal and Youth Justice University of Edinburgh)

The Law Society of Scotland stated in their submission that the removal of not proven meant that other sections of the Bill would need to be changed in order to ensure that safeguards against wrongful conviction remained in place:

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

It should be noted that other provisions in the Bill, discussed below, would remove the possibility of a person being convicted on the basis of a simple majority of jurors.

There were also submissions that provided an alternative viewpoint on the risk of wrongful convictions. One example was put forward by the COPFS, whose submission notes that:

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

Another submission which argues that not proven does not necessarily act as a safeguard against wrongful convictions said that:

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

Juries

The submissions that discussed the sections of the Bill about jury size and the majority needed for a guilty verdict were very mixed, with no consensus within the opinions expressed.

Faster process

There were some submissions that welcomed the move to 12 person juries, as they felt that a smaller jury size might speed up the process of convening a trial. For example, the Scottish Community Safety Network stated:

> "SCSN are supportive of the reduction in jurors... We note that most countries operate with juries of 12 citizens… we believe the justice system needs to be just but swifter and more agile. Fewer jurors required will assist the efficiency of trials."

A concurring opinion was received from Beira's Place who said:

> "Beira's Place considers the move from a 15 to a 12-member jury to be a positive one. We expect that this will simplify the process of recruiting and selecting jurors, in turn enabling the court process to move more swiftly and effectively."

Possibility of a reduction in convictions

Some of the respondents who were against the sections on changing jury size and the majority needed for a guilty verdict, were concerned that these changes would lead to a reduction in the number of convictions. This was particularly notable in relation to sexual offence cases.

Rape Crisis Scotland was one of the organisations that brought up this concern:

> "At present, there would be 15 members on the jury and 8 of these would need to be persuaded to return a guilty verdict however under the new proposals of a jury size of 12, still 8 would need to be persuaded.
>
> If the Not Proven verdict potentially contributes to wrongful acquittals, it makes no sense to then put in place a measure which will make it more difficult to get a conviction. If this provision is implemented, it could mean that the overall impact of this bill is to lower convictions in sexual offence cases."

The Senators of the College of Justice stated in their submission:

> "In Scotland a jury must reach a verdict. If the jury fails to reach a guilty verdict then the accused will be acquitted. Any jury comprising a cross section of the public chosen at random could have jurors who ignore the evidence and take an unreasonable position, whatever that may be. A jury of 15 persons is much better positioned to deal with such a situation and ensure that the weight of that juror's vote is not disproportionate to the overall view of

> the jury. The evidential basis for the change is not robust and does not appear to be based on principle."

The COPFS also noted that the likelihood of an increase in acquittals given the proposed changes to juries.

> "It is observed that, when considered alongside the position that jurors who would previously have acquitted the accused through a finding of 'not proven' are unlikely to change their verdict to one of guilty[1] if the not proven verdict is removed, the requirement to prove the case beyond a reasonable doubt so as to satisfy a higher proportion of the jury that they would be entitled to find the accused guilty, will place an increased burden on the Crown in prosecuting in the public interest.
>
> While it is not possible to predict the outcome in any trial, the proposed changes to the jury system may result in an increase in the number of acquittals in cases which would previously have resulted in conviction. This will impact on complainers, the public interest and the proper operation of the criminal justice system."

The COPFS went on to suggest that a potential solution to concerns regarding an increase in acquittals would be to introduce a system for retrials. The COPFS referred to:

> "a scenario where, should a jury of 12 reach a verdict where seven jurors return a guilty verdict and 5 jurors return a not guilty verdict, the accused would be acquitted notwithstanding that 58% of the jury had returned a guilty verdict, which as identified above, is a greater majority than currently required for a conviction. In such a scenario it is suggested that there is merit in the court having the authority to consider and grant a Crown application for a retrial."

Unanimous juries

Other respondents were concerned that the changes to majority verdicts did not go far enough, and that any conviction should require a unanimous decision of the jury. The Law Society of Scotland stated:

> "While we support the removal of the simple majority verdict (currently 8 out of 15 jurors) we do not consider that the proposed move to a qualified majority verdict would strike the correct balance in safeguarding the delivery of justice and fairness for all... On the basis that we move to a 12-person jury and two available verdicts, then unanimity comparable to other common law jurisdictions should be considered."

This viewpoint was shared by the Faculty of Advocates Criminal Bar Association whose submission noted that:

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[1] It should be noted that submissions from the legal profession generally expressed the opposite viewpoint than the COPFS on this issue. See the section above regarding the not proven verdict and safeguards against miscarriage of justice.

> “No other jury system in the world allows a guilty verdict to be returned by just eight out of twelve jurors. I am indebted to Professor Fiona Leverick at Glasgow University for her help in confirming that. The other systems either require unanimity (12 of 12) or ten from twelve. 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.”

Lack of research

There were submissions from several respondents that felt that there was not currently enough information regarding the potential impact of changes to juries. The response from the Victims Organisations Collaboration Forum for Scotland stated that:

> “Brief discussion on this topic from the members involved in this collective response, revealed a common theme that there is an appetite for more information on this topic. Members highlight that there is the need for robust ongoing research, evaluation and review about how the current situation and changes impact on prosecution rates, conviction rates and decision-making within juries, and therefore ultimately have an impact on people affected by crime.”

A team of academics at the Open University in Scotland provided a response that detailed the available research on the topic of jury numbers and majority verdicts, and came to the conclusion that:

> “The evidence available to inform this policy change is limited…. Therefore, based on the available research, we currently do not know how different jury sizes (12 versus 15) influence verdicts, but we do know that legal professionals favour the 15-person jury size. More evidence is needed to before reform can be justified.”

Resourcing

The Scottish Courts and Tribunals Service used their submission to highlight the potential resource implications of the proposed changes to juries and verdicts. They noted that any changes that led to either shorter or longer trials would have an impact on staff time, scheduling and court journey times. Their submission also discussed the fact that while the financial memorandum estimates a reduction in juror costs due to smaller jury sizes:

> “we would note that the costs of sitting jurors, are not the only payments made by the SCTS. Potential jurors are usually summoned for more than one trial in a sitting of the court. Jurors summoned for potential selection, but not ultimately selected to sit on a trial, are still entitled to, and may make claims for loss of earnings etc.

> The implications for the SCTS from these proposals taken together are at this stage therefore difficult to quantify fully."

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