School of Law
University of Glasgow
5-9 Stair Building
The Square
Glasgow
G12 8QQ

2 October 2012

Michael McMahon MSP
Room M1.09
Scottish Parliament
Edinburgh EH99 1SP
By email to michael.mcmahon.msp@scottish.parliament.uk

Dear Mr McMahon,

Reform of Criminal Verdicts (Scotland) Bill

Please find enclosed a response to the above consultation.

Yours sincerely,

Professor James Chalmers
james.chalmers@glasgow.ac.uk

Dr Fiona Leverick
fiona.leverick@glasgow.ac.uk

Q1: Do you support the general case set out above for moving to a two-verdict system? Please give reasons for your choice.

We support a two verdict system. There is, quite simply, no merit in having two different verdicts of acquittal, when each verdict has exactly the same practical consequence and the distinction between them is not well understood. We can see no defensible case for the current system. In particular, we support the argument that it is wrong for a verdict of acquittal to carry any implication of stigma.

Q2: If there is to be a two-verdict system, should these be (a) "proven" and "not proven", (b) "guilty" and "not guilty", or (c) some alternative system (such as the Yes/No approach outlined)? Please give reasons for your choice.

We believe that the two verdicts should be "guilty" and "not guilty". There is a certain logic to "proven" and "not proven", but in our view the presumption of innocence requires that where an accused person's guilt cannot be proven beyond a reasonable doubt, he or she should be entitled to be declared not guilty in the eyes of the law.

Q3: Do you agree that moving to a two-verdict system makes it necessary to increase the majority required for a conviction? If so, please explain your reasons.

We believe that the majority required for a conviction should be increased regardless of whether there is a move to a two verdict system, particularly given the Government's stated intention to abolish the requirement of corroboration. We have made an extensive submission on this matter in response to the Government's consultation on the Carloway Review, in the following terms:

Question 32
If the requirement for corroboration is removed, do you think additional changes should be made to the criminal justice system?
o *If you think additional changes should be made, what specific changes would you suggest and why? For example, if altering the size of jury majority required or verdicts what would a new system require or include?*
o *What evidence do you have to support your position?*

If the requirement of corroboration is removed, we would argue that a weighted majority should be required in order for a jury to return a verdict of guilty. We would tentatively suggest that this should be 12:3. In other words, a majority of 12 votes (of 15) should be required for a conviction.

Contrary to what was suggested in the Carloway Report, such a system need not result in "hung juries" and retrials. We would suggest that if the requisite majority of the jury does not support a verdict of guilty, this means that the prosecution has failed to prove its case satisfactorily and that the accused should be acquitted. This is consistent with the recommendation of the Thomson Committee, which (in part because of the requirement of corroboration) did not support weighted majority verdicts, but accepted that if they were introduced there should be no question of a retrial were the required majority not attained (*Criminal Procedure in Scotland (Second Report)* (Cmnd 6218: 1975) para 51.12). On our proposals, if fewer than 12 jurors were to vote for conviction, an acquittal should be entered. The Scottish courts applied the same principle when the size of the criminal jury was reduced during wartime and a weighted majority was required (Administration of Justice (Emergency Powers) Act 1939 s 3; *Mackay v HM Advocate* 1944 JC 153).

We would also support the abolition of the not proven verdict, the continued existence of which serves no useful purpose, regardless of the abolition of corroboration.

In the remainder of this section, we set out three reasons for recommending that simple majority verdicts be abolished, along with supporting evidence. These are: (1) the Scottish simple majority verdict is inconsistent with jury systems worldwide; (2) the Scottish simple majority verdict has consistently been justified on the basis that corroboration provides an alternative safeguard against wrongful conviction and (3) a weighted majority would not significantly reduce the number of convictions, but would operate as a safeguard against miscarriages of justice.

We note the Scottish Government's stress on "evidence" being required in response to this question, and would make two observations:

> First, we note with interest that the consultation paper has on some occasions expressly invited consultees to consider whether the Government should weaken the protection for suspects and accused questions proposed by Lord Carloway (see Q6 and Q8 in particular) but has not felt it necessary to specifically request that evidence be provided for such proposals.
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> Secondly, if the requirement of corroboration were to be abolished without alternative safeguards being put in place, this could leave the level of protection available against wrongful conviction in Scotland at a dangerously weak level. No evidence has been offered to suggest that such a system would be effective at avoiding miscarriages of justice. Such evidence cannot be found in historical practice (as corroboration has always been required in Scottish cases), nor from experience in other jurisdictions, which have never chosen to run the risk of permitting conviction by a simple majority on uncorroborated evidence. We would invite the Scottish Government to consider specifically what evidence it has available to support the view that the proposals in the Carloway Report would not leave the level of protection against wrongful conviction for serious crime in Scotland at a dangerously low level. We are not aware of any evidence which would support this view. We turn later in this section to some of the problems which may follow from the absence of such evidence.

All this is without prejudice to our comments in answer to question 33, where we explain why the abolition of corroboration should require that the Government implements the recommendation of the Scottish Law Commission that a trial judge should have the power to uphold a no case to answer submission on the basis that no reasonable jury could convict on the evidence led.

As noted above, abolishing corroboration while retaining simple majority verdicts would, to the best of our knowledge, leave Scotland with a level of protection against wrongful conviction for serious criminal offences which would be embarrassingly and dangerously low in comparison to most other countries. We question whether such a system could command public confidence and would ask the Scottish Government to give careful consideration to two matters:

(a) First, is the Government confident that this level of protection against wrongful conviction could survive a human rights challenge, particularly given that the case law of the European Court of Human Rights regarding jury trial appears still to be at an evolutionary state? In *Judge v United Kingdom,* app no 35863/10, 8 February 2011, the European Court concluded that the Scottish system of jury trial was compatible with article 6, but stressed the need for "sufficient safeguards [being] in place to avoid the risk of arbitrariness" and the importance of the no case to answer submission. It might be doubted whether a system which allows a simple majority verdict in the absence of a corroboration requirement sufficiently avoids

"the risk of arbitrariness", particularly when combined with the potential weakening of the no case to answer submission (cf Q 33 below).

(b) Secondly, is the Government confident that jurisdictions which regard unanimity or near-unanimity as core to a fair jury trial will remain willing to extradite fugitive suspects sought for trial in Scotland? Previously, any claim by a fugitive suspect that the simple majority verdict meant they could not receive a fair trial in Scotland would be neatly met by the response that Scottish criminal justice had simply chosen to safeguard the presumption of innocence through the alternative of the corroboration requirement. That argument will no longer be available, and it is possible that the courts in certain jurisdictions might conclude that extradition to Scotland would place a fugitive suspect at a real risk of an unfair trial, so that extradition would be impermissible under that country's domestic law.

We should stress that we do not endorse either of these two arguments and do not expect that either type of challenge would succeed. We would not, however, be prepared to make that claim with a high degree of confidence, and the damage which would result from a successful challenge of either sort – particularly type (a) – would be significant. We question whether it is appropriate for the Scottish Government to run the risk involved and whether it would be prepared to defend its decision to do so should a challenge of either type prove successful at a future date.

We turn now to the evidence requested.

(1) The simple majority verdict is inconsistent with jury systems worldwide.

Few other criminal justice systems accept that it would be legitimate to convict and punish an individual on the basis of a simple majority verdict. Unanimity has been described by the Supreme Court of Canada as one of the "fundamental characteristics of criminal jury trials" (*R v Bain* [1992] 1 SCR 91). The High Court of Australia has said that the unanimity requirement "constitutes one of the hallmarks of the common law institution of trial by jury", explaining that:

> "...there is a significant difference in nature between a deliberative process in which a verdict can be returned only if consensus or agreement is reached by all jurors and a process in which a specified number of jurors can override any dissent and return a majority verdict. The requirement of a unanimous verdict ensures that the representative character and the collective nature of the jury are carried forward into any ultimate verdict. A majority verdict, on the other hand, is analogous to an electoral process in that jurors cast their votes relying on their individual convictions... The necessity of a consensus of all jurors, which flows from the requirement of unanimity, promotes deliberation and provides some insurance that the opinions of each of the jurors will be heard and discussed. Thereby, it reduces the danger of "hasty and unjust verdicts". In contrast, and though a minimum time might be required to have elapsed before a majority verdict may be returned, such a verdict dispenses with consensus and involves the overriding of the views of the dissenting minority." (*Cheatle v R* (1993) 177 CLR 541 at para 7, references omitted)

The High Court of Australia went on to observe that "the common law's insistence upon unanimity reflects a fundamental thesis of our criminal law, namely, that a person accused of a crime should be given the benefit of any reasonable doubt " (ibid para 8), reflecting the views of one of the most distinguished English judges, Sir Patrick Devlin, who acknowledged the Scottish system in his 1956 Hamlyn lectures but concluded:

> "The criminal verdict is based on the absence of reasonable doubt. If there were a dissenting

> minority of a third or a quarter, that would of itself suggest to the popular mind the existence of a reasonable doubt and might impair public confidence in the criminal verdict." (P Devlin, *Trial by Jury* (1956) 56)

Over time, concern about one or two members of the jury having undue influence over its verdict (and also concerns about it being possible to tamper with a jury verdict by intimidating a single juror) have caused various jurisdictions to accept weighted majority verdicts, such as the 10:2 verdict which has been permitted in England since the Criminal Justice Act 1967.

Such developments have never gone so far as accepting the simple majority verdict found in Scotland, while in some instances departures even from pure unanimity have been resisted. For example, the New South Wales Law Commission relatively recently examined the rule in that jurisdiction that verdicts must be unanimous, and concluded that it should be retained (New South Wales Law Reform Commission, *Majority Verdicts* (Report 111, 2005)). The New South Wales government did not accept this recommendation, but went only so far as to legislate to permit 11:1 majority verdicts.

In New Zealand, where unanimity was formerly required, the New Zealand Law Commission gave extensive consideration to the issue, and recommended that majority verdicts be permitted only to the extent of 11:1 (New Zealand Law Reform Commission, *Juries in Criminal Trials* (Report 69, 2001) ch 13). That recommendation has since been implemented by legislation.

Perhaps the only major exception (other than Scotland) to the general requirement of unanimity or near-unanimity is found in the Russian criminal jury. Russian criminal juries can return verdicts by a simple majority (seven votes from twelve jurors), but this is counterbalanced by a number of safeguards against wrongful conviction which have no parallel in the Scottish jury system. These are (a) extensive rights to question and object to potential jurors; (b) a minimum period of three hours' deliberation before a vote may take place (a unanimous verdict may be returned before this) and (c) jury verdicts are returned in the form of answers to a questionnaire, thus providing additional information regarding the basis of the jury's decision which is not available in Scotland. (See G Esakov, "The Russian criminal jury: recent developments, practice, and current problems" (2012) 60 American Journal of Comparative Law 665.)

(2) The Scottish simple majority verdict has consistently been justified on the basis that corroboration provides an alternative safeguard against wrongful conviction.

Scotland has been able to maintain a simple majority system because of the corroboration requirement. The Thomson Committee noted that the witnesses who gave evidence to it favouring retention of the simple majority verdict thought it was appropriate because of corroboration (and also the not proven verdict); the Committee itself concluded that a "weighted majority" was "unnecessary in view of the other safeguards which our system provides for the protection of the innocent" (*Criminal Procedure in Scotland (Second Report)* (Cmnd 6218: 1975) paras 51.06 and 51.12).

Corroboration has been cited by successive governments as a justification for maintaining simple majority verdicts (Scottish Office, *Firm and Fair: Improving the Delivery of Justice in Scotland* (CM 2600: 1994) paras 3.20-3.21; Scottish Government, *The Modern Scottish Jury in Criminal Trials* (2008) para 7.13). More generally, the Sutherland Committee saw corroboration as one of the "considerable strengths and distinctive features" of the Scottish criminal justice system which meant that certain safeguards against wrongful conviction which might be necessary in other jurisdictions might not be necessary in Scotland (*Criminal Appeals and Alleged Miscarriages of Justice* (Cm 3245:

1996) para 1.24 and *passim*).

The view that the simple majority verdict can be justified by reference to the requirement of corroboration has been similarly expressed by academic commentators, albeit with some doubt as to whether this justification should succeed (see P Duff, "The Scottish criminal jury: a very peculiar institution" (1999) 62 Law and Contemporary Problems 173 at 191-192; G Maher, "The verdict of the jury" in M Findlay and P Duff (eds), *The Jury Under Attack* (1988) 45).

(3) A weighted majority would not significantly reduce the number of convictions, but would operate as a safeguard against miscarriages of justice.

A jury does not simply vote; it deliberates. In the course of that deliberation it is to be expected that a particular view of the evidence will in most cases prevail and that all or nearly all the jurors will agree on the verdict to be reached. In England and Wales in 2011, 81 per cent of convictions were reached by a unanimous jury and 19 per cent by a majority (Ministry of Justice, *Judicial and Court Statistics* 2011 (2012) 48).

It is difficult to compare directly rates of jury verdicts across different jurisdictions, not least because the necessary Scottish statistics are not readily available. In 1994, the Scottish Office's *Juries and Verdicts* paper noted (page 28 table 2) that 18% of persons proceeded against in the High Court, and 14% of persons proceeded against in the Sheriff Court, were acquitted. The most recent English statistics indicate that 18.6% of persons proceeded against in the Crown Court are acquitted (see Ministry of Justice, *Judicial and Court Statistics* 2011 (2012) 47-48: this figure has been calculated from the guilty plea rate given on page 47 and the conviction rate in not guilty cases given on page 48).

Although the English system means that no verdict is reached where the jury "hangs" – that is, where there are fewer than ten votes in favour of either conviction or acquittal – hung juries are rare in practice. In 1994, the Scottish Office noted that, were the possibility of a hung jury to be introduced into Scots law, the English experience suggested that the number of retrials which would take place annually as a result could be expected to be in single figures (*Juries and Verdicts* para 6.5).

All this suggests that requiring a weighted majority would not significantly reduce the number of convictions. It would, however, ensure that the weakest cases, where the level of dissent amongst jurors means that the accused's guilt cannot fairly be said to have been proven beyond a reasonable doubt, would not proceed to conviction.

In cases where, after deliberation, a significant minority of jurors are not persuaded of the accused's guilt, it would be perverse to allow a bare majority to convict. If the requirement of corroboration is abolished, it would follow that a person could be convicted on the word of A against B, even if 7 of 15 jurors were convinced that B was telling the truth and that it had in fact been shown beyond reasonable doubt that the accused was innocent.

It might be observed that the requirement of a weighted majority could be expected to have prevented one of the most notorious Scottish miscarriages of justice: as Lord Hunter noted, the guilty verdict returned against Patrick Meehan was understood to have been by either an 11-4 or 10-5 majority, although the size of the majority was not formally recorded. (*Report of Inquiry by the Hon Lord Hunter, VRD into the Whole Circumstances of the Murder of Mrs Rachel Ross* (HC 1981/82: 444, July 1982) paras 7.221 fn 1, 8.67 and 9.185.)

Q4: If there is to be an increased majority, how should it be defined?

In our view, assuming that the size of the jury remains at 15, 12 votes should be required for conviction and if fewer than 12 jurors vote to convict the accused should be acquitted.

Q5: Would an increased majority also require changes to (a) the size of the jury; (b) the quorum; (c) any other related factor (such as the right of jurors to abstain in any vote)?

While there may be a case for changes of this sort, we do not believe that a move to an increased majority requires them.

Q6: What is your assessment of the likely financial implications (if any) of the proposed Bill?

We do not believe that a Bill of this nature is likely to have significant financial implications, except if it created the possibility of a retrial following the 'failure' of a jury to reach a verdict. We do not believe that any such possibility should be introduced: if insufficient members of the jury are prepared to convict, an acquittal should be recorded.

Q7: How quickly could the proposed changes be brought into effect?

Changes of this nature could be brought into effect almost immediately. We would suggest that whether the jury is asked to consider the case according to the "old" or the "new" law should depend on the date of commencement of proceedings (similar to the manner in which section 86 of the Criminal Justice and Licensing (Scotland) Act 2010, abolishing the right of a person to refuse to give evidence against his or her spouse or civil partner, was implemented). As with the 2010 Act, this issue could be dealt with in the commencement order rather than in the primary legislation. If the new law were felt to be more favourable to an accused person than the current law (which may not be the case), it would be contrary to the interests of justice if there were an incentive to attempt to prolong pre-trial proceedings in order to take advantage of the change.

Q8. Is the proposed Bill likely to have any substantial positive or negative implications for equality? If it is likely to have a substantial negative implication, how might this be minimised or avoided?

None of which we are aware.

Q9. Do you have any other comments on or suggestions relevant to the proposal?
No.