



# The Modern Scottish Jury in Criminal Trials

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## Ministerial Foreword



Jury service lies at the core of the Scottish criminal justice system. The principle that the guilt or innocence of the accused is determined by fellow citizens, drawn from across classes, cultures and occupations, is fundamental to our sense of justice. This Government seeks to uphold this principle: it is deeply entrenched in our tradition and values.

At the same time, the jury *system* – the demands we place on jurors, the way we support and recompense them, and the way we administer the service – can and should be open to review.

It is now many years since we had such a review. The Thomson Committee examined certain aspects of the jury system in 1975; and the then Scottish Office examined other features in 1994, focusing on jury verdicts. Following each of these exercises, certain reforms were made.

But with the passage of time have come new pressures on the jury system. In recent years there has been an increase in the number of criminal trials requiring juries. At the same time, people in all walks of life are increasingly mobile and hard to reach for jury service. Within a small jurisdiction such as ours the pressure on the available juror 'pool' can be severe.

Against this background, I want to take your views on options for changes to the jury system within criminal justice. The system works well enough, but could it work better? Is it as effective, and cost-effective, as it could be? Do the rules around jury service make for representative juries in today's world? Is the burden of jury duty distributed fairly? Is it time to reconsider some of the fundamentals, including the size of the Scottish jury?

This paper presents some firm proposals for change but also explores a number of issues on which this Government has at present no settled view. We want to listen to what consultees tell us before we weigh all the evidence and reach a decision. In some cases, changes would require primary legislation to take effect; in others, reforms would be purely administrative.

I cherish many of the distinctive features of our criminal justice system and believe that changes should be made with care and only when backed by compelling evidence. But that should not stop us asking questions and striving to improve what is already good.

I encourage you to respond to this paper and to the questions it poses.

A handwritten signature in black ink that reads "Kenny MacAskill". The signature is written in a cursive, slightly slanted style.

**KENNY MACASKILL MSP**  
Cabinet Secretary for Justice

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## Introduction: how to respond to this consultation

This consultation is intended to help the Government formulate proposals for improvements to the operation of juries in Scottish criminal trials.

The consultation will run from 18 September to 11 December 2008. Annex C to this consultation contains the respondent information form that you should return with your response. Please send your responses to:

The Modern Scottish Jury in Criminal Trials  
Criminal Procedure Division  
Criminal Justice Directorate  
Room GW.14  
Scottish Government  
Regent Road  
Edinburgh, EH1 3DG

Tel: 0131 244 2103  
Fax: 0131 244 2623  
Email: [jurorconsultation08@scotland.gsi.gov.uk](mailto:jurorconsultation08@scotland.gsi.gov.uk)

We are happy to receive replies by email or in hard copy.

For additional hard copies of the consultation paper and response proforma please contact us at the above address. Electronic copies of these documents are also available at:

<http://www.scotland.gov.uk/consultations>

All responses, other than those where the respondent specifically asks for confidentiality, will be available for public inspection. Respondents are asked to clarify on their response form whether or not they wish their response to remain confidential. An independent analysis of responses will be commissioned and the report of that analysis will also be published on the Scottish Government website.



# 1. Executive Summary

1.1 The jury in Scottish criminal trials is a long standing and valuable feature of the Scottish criminal justice system. In some respects it is also unique, distinguished from jury systems elsewhere in the world by its size – we use a panel of 15 – and by its mandate to return verdicts by simple majority. Building on the constructive work done by previous Administrations to reform High Court procedure and to overhaul the system of summary justice in Scotland, the Scottish Government welcomes the opportunity to consult on a number of proposals relating to criminal juries in Scotland.

## Age limit for jury duty

1.2 The Government proposes to enable Scots aged 65-70 to serve on criminal juries. This would require legislative amendment to revise the current upper age limit of 65. The Government believes this change is now overdue and would reinforce its wider drive to harness the contribution that older people can make across the spectrum of public life. The Government intends to bring forward legislation to achieve this.

## Eligibility and Excusal

1.3 The paper reviews the current rules on eligibility and excusal and the arguments underpinning these. The paper considers whether these rules remain apt and workable; and invites views both on matters of principle and detail. The Government believes that the objectivity and impartiality of jurors should not be compromised and invites views on whether this goal is best met by setting some occupational category exclusions to eligibility (and if so, what those categories should be) or by removing all occupational tests and instead relying on individual declarations to identify conflicts of interest. On excusal, the paper explores the costs and benefits of abolishing the current list of occupations benefiting from excusal as of right and asks whether the list should be annulled or modified. Comments are sought on the benefits to the jury system of operating with or without routine excusals and on the implications for bureaucracy. The Government inclines to the view that it is in the wider public interest, and administratively efficient, to grant routine excusal to members of occupations which provide essential public services. It would welcome views on whether the selection of occupations currently benefiting from excusal as of right is well justified.

## Exemption periods

1.4 In the interests of widening the pool of available jurors without increasing burdens on those who have already served on a jury, the Government proposes to reduce, from 5 years to 2 years, the exemption period for individuals who attend court but are not subsequently balloted to sit on a jury. The Government intends to bring forward legislation to implement this. It does not propose to change the exemption period of 5 years routinely granted to those who actually serve on a jury.

## Compensation for jury service

1.5 Whilst the system of allowances currently in place compares not unfavourably with comparable compensation available in many other jurisdictions, the Government is keenly aware of the hardship that jury duty – particularly over a long period – can impose on members of the public. The paper draws attention to other jurisdictions which have moved away from an allowance-based approach; and invites comments on these. It sets out various possible options for changes to the scope and operation of juror allowances, aimed at minimising hardship whilst recognising overall constraints on public expenditure. The Government has an open mind on this aspect and would welcome views. Changes to the allowances regime would be a matter for administrative rather than legislative reform.

## Jury size

1.6 Drawing on comparative material on other jurisdictions, the paper invites views on whether, in principle, the size of the Scottish criminal jury should remain at 15 or be reduced. It explores a number of possible advantages and drawbacks attaching to any reduction in jury size. It canvasses views on the implications of any reduction in size for the rules on verdicts. The Government has no firm proposals in this area: it seeks to raise the issue in order to test the adequacy of the arguments for retaining the current size of jury in Scotland. The chapter concludes with a reference to the appeal case of *Brown v HMA 2006*, which raised issues indirectly connected with jury size. The Government proposes to defer action to specify, in legislation, the minimum number from which a jury can be balloted, until the wider question of jury size (to which that number is inextricably linked) is resolved.

## Trial without a jury

1.7 The Government believes that it is length of trial, rather than the complexity of evidence presented during trial that poses the hardest challenges to jurors - whose lives and livelihoods can be severely disrupted by the requirement in certain cases to sit for weeks on end. This chapter considers judicial comment on this point and looks at possible options to jury trial, including conducting proceedings by a tribunal of judges. It points to capacity and cost problems associated with this option. It explores the use of substitute jurors, particularly for long cases where juror attrition may be a problem and where the risk of trial discontinuity needs to be mitigated. It invites comments on various questions associated with substitute jurors. It links to an issue discussed in chapter 7 around the court's discretion to allow a trial to continue even if the quorum is breached and invites views on whether that discretion would have particular value in the context of long trials and how it might be exercised.

## Conclusion

1.8 This consultation paper is the first time since the Thomson Committee that the operation and management of the jury in Scottish criminal trials has been examined in any detail. The jury is an integral part of our criminal justice system and jurors undertake an important civic duty. The Government would therefore welcome your views on the firm proposals and ideas that are contained within this consultation paper.

## 2. Introduction

2.1 The jury is a long standing feature of the Scottish criminal justice system. Its origins are unclear, but we know that around the fifteenth century a distinction began to emerge between jurors and witnesses. Baron Hume at the beginning of the 19<sup>th</sup> century was able to state that jurors in criminal cases had long sat solely in a judicial capacity. The notion of jury *service* - that it is a civic duty which citizens should engage in – is deeply embedded. The Scottish Government upholds this principle and seeks to develop it in ways that reflect contemporary society. The jury system that has evolved through legislation and administrative practice in Scotland fulfils its purpose well: it is not a system in disarray. But as with all systems that have developed over time there are some aspects that would benefit from modernisation. It is those aspects that are the focus of this consultation.

2.2 The more serious criminal cases – those heard under ‘solemn’ procedure in the High Court and the Sheriff Court - culminate in trial by jury. Juries feature most prominently in solemn cases heard in the Sheriff Court where a Sheriff sits with a jury. Approximately 575 sheriff and jury cases take place each year in the Sheriff Court; and some 460 jury cases a year in the High Court. (A small number of civil trials with a jury take place each year in the Court of Session; but such juries are not the subject of this consultation.) The composition of the Scottish criminal jury is very different to that of juries in England and Wales and indeed most of our European Union partners. This is explored further in Chapter 7.

2.3 The sentencing powers of the High Court are unlimited for common law offences, except where statute sets a maximum sentence for a particular offence. The sentencing powers of the Sheriff Court in solemn trials are limited by statute: the Sheriff can impose a maximum term of imprisonment of 5 years following a jury trial. In Scotland the accused has no right to determine whether they are tried by jury. It is the responsibility of the Lord Advocate or the procurator fiscal to decide whether to prosecute under solemn or summary procedure, although certain offences can only be tried in solemn or summary courts.

2.4 In Scotland the responsibility for organising juries falls to the Scottish Court Service which is an executive agency of the Scottish Government and is responsible for the administration of courts in Scotland. Running the jury system costs some £4 million a year, based on the latest published figures for financial year 2006/2007. In order to select a jury the Sheriff Clerk obtains a list of names drawn randomly from the electoral register, and sends each of them a revision notice requesting certain details necessary to confirm the current address and to establish an individual’s eligibility. A List of Assize containing enough names to supply a court sitting is then selected randomly from those eligible and the clerk of court then cites those jurors to court for the relevant dates. The clerk of court deals with any requests for excusal prior to the date of the trial and the final part of the jigsaw is that a ballot is conducted from those who attend on the day of trial to select 15 jurors for each trial.

2.5 Those who work in the justice system in Scotland are statutorily barred from jury service. They include members of the judiciary, solicitors, police, prison officers, procurator fiscals and court staff. All individuals over the age of 65 are at present ineligible to serve. In addition certain other individuals are disqualified from jury

service. They include those who have been sentenced to a period of imprisonment for 5 years or more, those who have served any part of a sentence of imprisonment of 3 months or more or who have been sentenced to probation, community service, or a drug treatment and testing order and who are not deemed rehabilitated in terms of legislation, and any persons who are on bail in connection with criminal proceedings in any part of the United Kingdom and any persons subject to a Restriction of Liberty Order (RLO) in Scotland (or the English, Welsh or Northern Irish equivalents). Separately there are occupations whose members are entitled under legislation to “excusal as of right” (i.e. the right to opt out of jury service, although some individuals choose not to exercise this right). These occupations include members of the armed forces, MPs, MSPs, doctors, dentists, nurses, midwives, pharmacists, vets and the clergy.

2.6 Many of those who are called for jury service each year are not selected for service. Of the 150,000 individuals who are cited for jury service each year, only around 10% of these are selected by ballot to serve on a jury. This is in some part due to the uncertainty of criminal trials proceeding, as the accused has the right to plead guilty at any time, but also a necessary consequence of the requirement to ensure that a jury is fairly and randomly selected from a broadly representative group of citizens. However it also means that many people attend as potential jurors – at some personal inconvenience – only to discover that they are not required.

2.7 Over recent years, and as the number of jury trials proceeding has increased it has become increasingly difficult to ensure a sufficiently large group of potential jurors. Some of those cited do not turn up and cannot be easily traced (reflecting an increasingly mobile population); and many of those who do respond to citation may have pressing personal reasons for seeking to be excused – caring responsibilities, ill-health, long-standing family commitments, bereavement. In certain urban areas in particular, the Scottish Court Service finds it increasingly challenging to maintain a sufficient juror ‘pool’. The need to address these difficulties underlies several of the proposals in this paper. It is also important to note that the juror ‘pool’ itself is drawn from the electoral register, on whose completeness and accuracy the Scottish Court Service depends. This raises a wider issue of electoral representation and the need to minimise the number of those who forego the right to vote and who are alienated from the rights and duties of citizenship. These matters are however beyond the scope of this paper – and action on them is reserved to the UK Government.

2.8 At the same time, the Government recognises that a balance has to be struck between burdens and benefits and between individual privacy and social responsibility: the demands made on individuals to serve on juries have to be matched by, and justified by, the benefits derived for society as a whole in securing a fair trial by peers. A further and compelling consideration for Government inevitably concerns resources. This Government’s overriding purpose is to focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish through increasing sustainable economic growth. Public expenditure, financed by the taxpayer, has to yield outcomes that contribute to this goal. Resources for the jury system are, and will continue to be, limited. It will be vital to ensure that the resources at present in the system are working as hard and effectively as they can to achieve high standards of service and to minimise the loss of individuals’ economic contribution.

2.9 This consultation paper distinguishes between firm proposals for change, where the Government are clear they would like to see specific reforms implemented in early course, and broader issues on which the Government has not yet formed a settled view and on which it invites views in order to explore arguments and test opinions. The proposal to raise the upper age limit for jury service is an example of the first; questions around the size of the Scottish jury fall into the second category.

2.10 This consultation will consider:

- the upper age limit for jurors;
- the lists of occupations whose members are excused jury service as of right or who are ineligible for jury service;
- the period of entitlement to excusal as of right following jury citation;
- juror compensation;
- jury size;
- trial without a jury.

Depending on the outcome of this consultation the Scottish Government may decide to legislate on some these measures.

### 3. Age limit for jury duty

3.1 In Scotland, individuals over the age of 65 are not eligible for jury duty. The age limit for jurors was last reviewed in 1975 by the Thomson Committee whose report recommended an extension of the (then) age limit from 60 to 65 years of age. The age limit has not since been reconsidered. In recent years, many have asked why the age limit for jury duty remains capped at 65.

3.2 Across every strand of public policy, there is a growing recognition of the contribution that the over 65 age group can make to society. *All our Futures: Planning for a Scotland with an Ageing Population (2007)* stimulated debate on this issue. For the individuals concerned, opportunities to remain engaged in community and public affairs make for a more varied, healthier and rewarding life. The Scottish Children's Reporter Administration has recently removed its upper age limit for children's panel members and the General Teaching Council of Scotland has removed the mandatory leaving age of 70. Judges (including lay justices) serve until age 70. Against this background, the question naturally arises why those aged 65 to 70 are not entitled to serve on juries.

3.3 Recent academic research (Goteborg Studies in Sweden, Swedish Twin Study and Schaie's Seattle Longitudinal Study) reveal that today's 70 year olds are comparable to 65 year olds who lived 30 years ago. Research also tells us that in developed countries most people maintain their level of everyday intelligence or mental achievement until around age 70. Public attitudes and expectations have moved on: the reservations expressed in the Thomson Committee about the ability of senior citizens to cope with 'mentally strenuous court proceedings' do not find much, if any, support today.

3.4 The age limit for jurors in England, Wales and Northern Ireland is 70. Raising the age limit for Scottish jurors to 70 would achieve a common age limit for jurors throughout the UK. In addition, the change would ensure that, as the demographic profile of Scotland changes, juries are drawn from a wider age range. It would also bring operational benefits to the jury system, enlarging the pool of potential jurors by around 200,000. Jurors in the 65-70 age range who draw state or occupational pensions would not experience any change in their financial position as a result of jury service: their income would be unaffected. To the extent that jurors over 65 displace younger jurors in employment or self-employed, the proposed reform will produce some modest savings estimated at around £250,000 a year in the budget for juror allowances – savings which can be usefully recycled within the jury system for the benefit of the whole juror pool.

3.5 It would be open to those in the 65 to 70 age range – as to individuals of any age - to apply for excusal from jury duty on compassionate grounds. This would be considered sympathetically and with common sense by the Court.

3.6 The Government recognises that, for some, this proposal may be seen as bringing more burdens than benefits. It is however clear that the present age limit fails to recognise the valuable contribution that many over 65s can make to jury deliberations and the Government believes it would be wrong to continue to exclude them. For this reason it makes a firm proposal to raise the age limit for jury service

from 65 to up to 70 and would intend to effect this change through legislation at an early suitable opportunity. It would welcome views.

- **Do you agree that persons aged 65-70 should no longer be debarred from jury service on grounds of age?**

## 4. Eligibility and Excusal

4.1 There are two categories of person who are exempt from the requirement to serve on juries. Those who are *ineligible* (i.e. barred from serving on a jury); and those who possess '*excusal as of right*'. This chapter examines the scope of these exemptions and explores their operational implications; asks whether they continue to be justified; and sets out possible options for alternative approaches. The Government has no firm proposals to advance on this particular area but is keen to hear views. Reforms would involve changes to primary legislation. None of what follows affects those categories of person who are *disqualified* from jury service – including those who have been sentenced to a period of imprisonment for 5 years or more, those who have served any part of a sentence of imprisonment of 3 months or more or who have been sentenced to probation, community service, or a drug treatment and testing order and who are not deemed rehabilitated in terms of legislation, and any persons who are on bail in connection with criminal proceedings in any part of the United Kingdom and any persons subject to a Restriction of Liberty Order (RLO) (or the English, Welsh or Northern Ireland equivalents). The Government sees no need to amend this list and has no proposals in relation to it.

4.2 The full list of those who are currently ineligible to serve on a jury is at Annex A. The largest exclusion concerns those employed in the justice system and includes members of the judiciary, solicitors, police, prison officers, procurator fiscals and court staff. The rationale for the exclusion of those working within the justice system is that these people could have knowledge of the case or those involved in bringing or defending the case, or access to systems such as computerised records about cases or individuals, which could interfere with their impartiality. No member of a jury should have privileged access to information of any kind that bears upon the case. In a relatively small jurisdiction such as Scotland, the risk of conflicts of interest is real and should be minimised. The wholesale exclusion of those working in the criminal justice system is a response to this. Such individuals have been categorised as *ineligible*, rather than merely *excused*, in order to override any personal inclination to serve.

4.3 Separately, there are occupations whose members are eligible to serve on a jury but who are entitled to *excusal as of right*. This means they have the right to opt out of jury service, though it is open to the individuals affected to forego this right and to serve on a jury if they wish to do so. These professions include members of the armed forces, MPs, MSPs, doctors, dentists, nurses, midwives, pharmacists, vets and the clergy. Those who have attended at court following their citation for jury service are also entitled to excusal as of right for a fixed period and this category is dealt with separately in Chapter 5 below. The full list of those who have a right to be excused is at Annex B. The rationale for this list lies in the need for the jury system to avoid undue interference in the provision of public services. As so often, two public goods have to be balanced: the desirability of fully representative juries and the importance of continuity in provision of defence, health and other important services to the public at large. The list has grown over the years, with the addition from time to time of further occupations where it was felt there was a particularly strong case to excuse practitioners routinely from jury service.

4.4 But the judgments that underpinned decisions on excusal and eligibility some years ago may not be the ones we would reach now. Perceptions about the risk of conflict of interest may have changed, or become more subtle as probability and seriousness are weighed; and it's also likely that views on the occupations which should not be disturbed by jury service requirements have moved on. The occupations which are currently listed for excusal might be considered "traditional" occupations which do not fully reflect society's current priorities.

### The England and Wales Model

4.5 There is an argument that no-one should be automatically ineligible or excused from jury duty simply because he or she is a member of a certain profession or holds a particular office or job. Lord Justice Auld<sup>1</sup>, in his review of the English Criminal Courts in 2001, held that any individual, whatever their occupation or salary, could potentially find jury service costly and burdensome. He argued that no distinctions should be drawn amongst professions or occupations, or between the employed and self-employed, or between the salaried and waged. Lord Justice Auld proposed that *everyone* should be eligible for jury service, except for the mentally ill and those, such as convicted offenders, who should remain disqualified from serving.

4.6 Lord Justice Auld's recommendations were implemented in full in England and Wales by the Criminal Justice Act 2003. The summoning of jurors in England and Wales is done centrally by the Juror Central Summoning Bureau (JCSB) in London. It is down to individuals who receive a summons to make application for excusal if they believe it would not be in the public interest for them to serve. In practical terms, excusals in England and Wales are reserved for those who cannot perform jury service at the time they are summoned or at any time during the following 12 months. A common sense approach is adopted by the JCSB to each case on its own merits. For example, an application for excusal by a hospital consultant who cannot be replaced would be viewed sympathetically. Eligibility for jury service has also been broadened with justice system employees now routinely called to jury service in England and Wales, though in all cases individuals are asked to disclose any conflict of interest that may make it improper for them to serve on a particular case.

### The United States Model

4.7 Lord Justice Auld's recommendations were the first UK expression of developments within American jurisdictions. The concept of open eligibility for jury service was introduced in New York in the mid 1990s, reflecting a desire to ensure that juries were fully representative of the communities from which they were drawn. The New York Jury Project abolished all statutory occupational exclusions and exemptions, including age limits. Excusals thereafter were permitted only on grounds of mental or physical ill-health or undue hardship.

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<sup>1</sup> Review of the Criminal Courts of England and Wales, by the Rt Hon Lord Justice Auld, October 2001, ISBN 0-11-702547-X

## Options for change

4.8 The strong principle of equal liability to jury service, irrespective of occupation or any other social distinction, is consistent with the goal of securing representative juries. But the experience of those jurisdictions which have adopted this as the basis of their juror selection systems is worth considering in some detail. Drawbacks as well as advantages have been encountered.

4.9 In England and Wales, the inclusion in the list for citation of those working in the criminal justice system has presented some challenges. Not surprisingly, the biggest difficulty has arisen around the identification of conflicts of interest. Individuals working in the court service, the police or the prosecution service may have heard details about a case that would make it difficult for them to consider it objectively; or they may have knowledge of an accused's previous convictions or background. It can be difficult for those called to serve to know if they have an interest, since at that early stage they will not know what case they will be involved in or the identity of the accused. On the other hand, the new arrangements have permitted certain individuals within the justice system (for example, lawyers working in fields remote from *criminal* justice) to contribute to juries. Every addition to the juror pool eases the pressure on others within the pool.

4.10 The Government is clear that the objectivity and impartiality of jurors should not be compromised. It will welcome views on whether this goal is best met by setting some occupational category exclusions to eligibility (and if so, what those categories should be) or whether it would be preferable to consider possible conflicts of interests on a case by case basis. If the second, it would also be helpful to have views on how best to minimise the administrative costs arising from the processing of applications for excusal close to the trial date (since conflicts may only become apparent when the name of the parties involved in a trial allocated to proceed on a particular date are known often only on the morning of the trial).

4.11 The implications of abolition (or restriction) of the categories of excusal as of right also need careful consideration. There would inevitably be new burdens – for employers and for individuals. Employers of jurors previously enjoying excusal as of right would incur agency fees to hire temporary staff in any case where excusal was not granted. This burden would probably fall most heavily on the public sector where employers have traditionally continued to pay their employees whilst on jury duty. Individuals would also be affected: all those who had previously relied on excusal as of right would have to make a reasoned case for exemption by applying to the relevant clerk of court.

4.12 A further consideration is that (as with applications for exemption on grounds of conflict of interest), the administration of juror selection would become more bureaucratic. People in many walks of life whose work impinges on others (and particularly those whose work affects vulnerable groups and children) might claim excusal on grounds that the harm done to others by their absence outweighs any advantage derived from their inclusion in the juror pool. There would need to be clear criteria for admitting and assessing all such applications for excusal. And hard cases, falling outwith the rules, would still need to be considered on their merits.

The Scottish Court Service would need capacity to evaluate and process a larger number of applications than at present.

4.13 This raises a further issue about the actual scale of benefit that could be expected from a move to restrict or abolish excusal as of right. The putative gains lie in enlarging the juror pool and securing more representative juries. But it is interesting to note that, in England and Wales, the pattern of the previous excusals as of right has to some extent, been replicated, at least in relation to some of the more obviously public service-focused occupations in healthcare such as hospital consultants and doctors. Spreading the liability to jury service would at first sight appear to contribute significantly to enlarging the pool of jurors. But that benefit will evaporate if applications for excusal are made, and granted, at roughly the same rate and across largely the same occupations as at present. Indeed, removing the restrictions applying to certain occupations and placing all on the same footing might *increase* demands for excusal: whereas under the current system many of those who do not benefit from excusal as of right consider themselves absolutely duty bound, they may in the absence of those categories feel free to seek excusal. If the impact of change were simply to further reduce the juror pool, little would have been achieved.

4.14 An alternative to the total removal of excusal as of right for some occupations would be reform of the categories of excused occupation. If there were consensus as to which occupations should routinely be relieved of the burden of service (whilst leaving it open to individuals so covered to serve if they can and wish), then it would be possible to modernise rather than abolish the list. Part of the purpose of this consultation is to discover whether any such consensus exists around occupations which should be insulated from the impact of jury service. It is interesting to note that the Northern Ireland Office are consulting on changes to the systems of eligibility and excusal. The Northern Ireland Court Service are seeking views on whether the time is now right in Northern Ireland to bring forward changes to the eligibility criteria for jurors. The changes that they are consulting on include considering whether police officers and civilian employees of the Police Service of Northern Ireland should be eligible for jury service, whether the occupations currently ineligible for jury service should be included within the jury pool, whether members of the judiciary should be eligible for jury service and whether the upper age limit of 70 should be extended. In addition the consultation considers whether those occupations currently eligible for excusal as of right in Northern Ireland should remain so.

4.15 It is important to link this issue with the discussion later in this paper on dispensing with juries in long or very long trials and with the proposals in chapter 6 on juror compensation. The risk of financial loss arising from service on very long trials is a powerful disincentive to service; and this risk will also impact on the assessment of applications for excusal (for example, it might be thought right to insist that a GP serve on a jury for a few days, but wrong to insist that he or she be liable for 18 weeks' service). If greater clarity could be given to potential jurors about the likely duration of their service, and if the system of compensation were reformed to recognise the particular burdens on long-serving jurors, prospective jurors might be less inclined to seek excusal. That in turn might make operation of a system of

excusal by application (i.e. all excusals to be made by individuals at their own initiative and assessed by the relevant clerk of court) more manageable.

4.16 We would welcome your views on the following questions.

- **What restrictions, if any, should there be on eligibility to serve on a jury; and how should these restrictions be administered?**
- **Should persons in any particular occupations routinely be excused jury service *in virtue of that occupation*?**
- **If so, which occupations should enjoy this concession?**
- **If not, what should be the criteria for determining applications by individuals for excusal from jury service?**

***Note:** the focus in this section is on occupation-related excusal. Sheriff Clerks have discretion to excuse those cited for service on compassionate grounds such as ill-health, pressing carer responsibilities, or bereavement. The Government does not propose to alter or in any way restrict the exercise of this discretion.*

## 5. Exemption periods

5.1 Once an individual has attended court as a juror in answer to their jury citation they are entitled to be excused as of right from jury duty for up to 5 years. This takes them out of the available juror pool for a substantial length of time therefore lowering the pool of available jurors which the court service may draw on.

5.2 It is important to note that this entitlement has a cumulative effect. Currently some 400,000 people per year are entitled to be excused as of right by virtue of having arrived at court in response to a citation. In tandem with this, the Scottish Court Service is increasing the numbers cited each year in response to the growth in indictments and in cases where evidence is led – both of which are indicative of growth in demand for jurors. These factors taken together mean that the search for jurors is taking place against a backdrop of increasing numbers who are unavailable. When those not registered on the electoral register are taken into account, along with those on invalidity benefit and those too elderly to serve – and with those currently on 5 year entitlement to excusal as of right – the overall proportion of the population that is effectively exempt from service is estimated at being over 10%, and rising. In England and Wales, jurors are entitled to be excused for 2 years following any citation.

5.3 The current system makes no distinction between those jurors who attend at court as required but do not then get picked from the ballot to serve, and those who attend and are selected by ballot to form part of a jury in a case. Those jurors who do not ultimately serve on a jury receive the same 5 year entitlement to excusal as of right from service as those who are selected to serve.

5.4 To relieve the pressures on the juror pool in parts of Scotland, the Scottish Government proposes to reduce the period of entitlement to excusal as of right from 5 years to 2 years for those jurors who attend at court but who are not selected by ballot to sit on a jury. It is not the intention that this would be a retrospective change; rather it would apply from an agreed date once appropriate legislative change was in place. The Scottish Court Service calculates that this change would add back some 195,000 individuals into the juror pool. This change would be effected by primary legislation.

5.5 For those individuals who do sit on a jury, the current 5 year entitlement to excusal as of right would remain in place. Of course, not everyone takes up their excusal entitlement and some are happy to be cited again in less than 5 years. It should also be noted that a judge has the power, for example following particularly long or difficult trials, to direct that jurors be excused from service for any period, up to and including excusal for life. That power would also remain unaffected by any change.

## Juror Selection

5.6 Citations of jurors for the Sheriff Court in Scotland is covered by section 84(4) of the Criminal Procedure (Scotland) Act 1995 which Act allows potential jurors to be cited only from the Sheriff Court district in which a trial is to be held. Jury trials do not take place in every Sheriff Court district, however, particularly where the Crown Office and Procurator Fiscal Service and/or Scottish Court Service take the decision that jury trials from a particular district should take place in another district within the same Sheriffdom<sup>2</sup>. The effect of section 84(4) is that individuals who live in districts where Sheriff Court jury trials are no longer held are precluded from undertaking jury service. There are good reasons, such as security concerns and pressure of other business, as to why jury trials may be moved from one court to another. However, an unfortunate outcome of the way the legislation is currently framed is that there are members of the population who are precluded from undertaking what is an important civic duty.

5.7 The Scottish Government is of the view that there is a need to legislate to prevent individuals being precluded from undertaking jury service by virtue only of their residing in a particular Sheriff Court district. If Section 84(4) of the Criminal Procedure (Scotland) Act 1995 were amended to allow for the pool of jurors to be selected from those either within the Sheriff Court district or the Sheriffdom as a whole the issue of individuals being precluded from undertaking jury service by virtue of where they live would be removed. **The Scottish Government would welcome your views on this.**

5.8 There would also require to be a complementary provision to confer on the Sheriff Principal the same authority as that which the Lord Justice General has in respect of citations for jury service in the High Court of Justiciary. This would allow the Sheriff Principal to create a citation list of prospective jurors which would be drawn from both the district in which the jury trials are held and, also, other districts within his Sheriffdom, if he so wishes. This would only happen in circumstances as outlined above where individuals are precluded from undertaking jury service due to operational changes resulting in jury trial no longer being held in their local Sheriff Court district. Any list drafted by the Sheriff Principal would need to be adaptable and capable of being changed year-on-year to adapt to changes in circumstances and meet local needs.

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<sup>2</sup> For legal purposes Scotland is split into six regions called Sheriffdoms. Each Sheriffdom has a Sheriff Principal who in addition to hearing appeals in civil matters has responsibility for the conduct of the courts. Within these Sheriffdoms there are a total of forty-nine Sheriff Courts varying in size and design.

- Do you agree with the proposal to reduce the period of entitlement to excusal as of right from 5 to 2 years for those individuals who, following citation, attend at court but are not selected by ballot to serve on a jury?
- Do you agree that Section 84(4) of the Criminal Procedure (Scotland) Act 1995 be amended to allow for the pool of jurors to be selected from those either within the Sheriff Court district or the Sheriffdom as a whole?

## 6 Compensation for jury service

6.1 Some £4 million a year is currently devoted to the recompense of jurors in Scotland. Jurors are entitled to apply for financial compensation for loss of earnings and benefits as well as meal and travel allowances during their period of jury service. It is important to make clear that these compensation payments are made *in respect of losses incurred* as a result of jury service. They are not an entitlement or any kind of fee: they are paid to jurors to make up for losses that they can prove they sustain whilst on jury service. In addition, any additional receipted expenses not detailed elsewhere, which are incurred as a result of jury duty, such as costs for employing a carer for an elderly relative or hiring a dog walker, may be submitted for consideration and authorisation by the Sheriff Clerk. This section examines the basis for the current system of recompense and uses some international comparisons to set it in context. It considers the impact of the current system, acknowledging the problem of juror hardship. It considers radical alternatives, such as have been adopted in other jurisdictions. It also invites comments on options for improving the scope and coverage of the present system of recompense.

6.2 This is an issue on which the Government is keen to hear views before it comes forward with detailed proposals. Changes to existing compensation rates and their payment could be made administratively; but radical changes to move away from a compensation-based system would require primary and secondary legislation. In the Government's view, the challenge is to make the existing taxpayer resource tied up in juror recompense work more effectively for the benefit of jurors. It believes that, with some creativity and flexibility, the very real problems of hardship for some jurors can be alleviated without diverting resource from other parts of the justice system into allowances.

6.3 Jurors currently receive compensation for loss of earnings/ benefits at a daily rate of £61.28 for the first 10 days of jury service and then at the higher daily rate of £122.57 for the remainder of their service. They are entitled to allowances for travel to and from the court, meals on a daily basis, and certain other payments such as allowances for childcare. These payments are based on standard rates and determined by the time spent on jury duty. They were introduced in order to minimise the risk of jurors facing severe financial hardship as a result of jury service. But they are not, and never have been, directly related to the individual juror's actual earnings; nor are they intended to reimburse all jurors fully for loss of earnings. The level of compensation and allowances is revised annually. The last increase, in line with the consumer price index, was on 2 June 2008. Scottish allowances are on a par with those in England and Wales.

6.4 The compensation that jurors receive for loss of earnings is not subject to income tax or national insurance deductions. The same applies to the allowances that jurors may claim. If the basic rate of tax is added back in to show the rates' gross income value to the juror, the daily compensation rates stand at £73.54 and £147.08 (the latter rate applying to service after the tenth day). Median daily rates

of pay for full-time employees in the UK at April 2007<sup>3</sup> stood at £91.40 over a 5 day week.

### Comparisons with other jurisdictions

6.5 It is useful to set these rates in an international context. Rates payable to jurors in several other jurisdictions lie well below the rates payable in the UK. The table below sets out the levels of juror allowances payable in criminal justice systems of **New Zealand, Australia, Canada and Hong Kong** – *all of which use juries in criminal proceedings in a similar way to the UK*. It would seem that other jurisdictions apply even tighter restraints on the levels of recompense payable – in some cases paying less than half of the entitlement available to jurors in Scotland. At the same time, the Government accepts that the full impact of these rates will depend on the extent to which jurors are used in the criminal justice system: the less frequently they are called on to serve, the less impact the rates may have. The Government plans to commission a consultancy study to look in more detail at juror compensation rates in other countries, within and beyond the EU, and to take account of differences in the way jurors are used in their respective systems.

<b>Country</b>	<b>Daily allowance for jury duty</b>
Scotland	£61.28 for the first 10 days; £122.57 for every subsequent day
New Zealand	£25*
Australia	£9.40* plus up to a maximum of £49.19* per day for financial loss
Canada	£25.40*
Hong Kong	£18.12*

\*These figures were obtained from the official court websites of the country in question and are approximate comparisons based on the exchange rates prevailing in early 2008

6.6 The jury system in the USA varies from state to state; and so does juror recompense – indeed it can vary within states from county to county. Some states recompense individuals from the state budget; others rely on local county budgets to ‘top-up’ the levels as they see fit. Some states have employer compensation schemes. Some states pay nothing to jurors for the first few days and then pay an increment for each additional day. Arizona has a system which pays a higher level of allowance to jurors in lengthy trials of 10 days or more.

6.7 One of the results of such geographic variation in juror recompense in the USA is an increasing focus by policy makers on the public perception of juries and the value placed on them in society. The traditional assumption that jury service is a valuable civic duty is being challenged. Some argue that its value should be reflected monetarily in the payments made to jurors. Others point to the risk that confusion over juror compensation may lead to jury *service* being seen as jury *employment* - with jurors less willing to serve if their rates of pay, so to speak, are not pitched favourably. This is a situation that the Scottish Government is keen to avoid.

<sup>3</sup> Source –www.statistics.gov.uk. Annual survey of wages and earnings (ASHE)

## Juror hardship

6.8 International comparisons may suggest that the compensation payable in Scotland is not ungenerous; but they do not invalidate complaints from individual jurors that they suffer real hardship as a result of jury service. It is important to focus on those most affected; and the circumstances in which hardship arises. Generally speaking, people employed in the public sector continue to receive their full wage or salary whilst serving on a jury: there is no financial loss at the individual level. But people who are self-employed or who work in the private sector, particularly shift workers, may not receive their full income when they serve on a jury. The self-employed lose out because they are not available for work; and there are not infrequent reports of employers summarily dismissing contract staff who cannot report for work - leaving the juror at a financial disadvantage whilst serving *and* facing the vagaries of the job market once the case is over.

6.9 Nor are employers, particularly those running small businesses, insulated from hardship: backfilling for absent employees adds to the salary bill and such extra burdens, unwelcome at the best of times, become seriously difficult to manage when the general economic backdrop is adverse. The Government recognises too that many cases of juror hardship will impact also on family members; and that the cost to some families – in terms of financial loss and employment uncertainty – can be very high indeed. These difficulties are compounded during long or very long trials. In extreme cases the fundamentals of personal and family finances can be at risk. Whilst these cases are not numerous (long or very long trials are relatively infrequent, as chapter 8 shows), they have a big impact on the individuals involved in them.

## A radical alternative - Ireland

6.10 Some jurisdictions have decided to break away entirely from a recompense-based approach to juror service. In the republic of **Ireland** jurors receive no recompense for their jury service at all, nor do they receive any assistance towards their travel expenses to and from court. Jurors are simply provided with their lunch at court and get a certificate of attendance to present to their employer to prove they have completed their service. Under Irish law employers must pay their employees for the time spent on jury duty. Employees are also protected in law to ensure they do not lose any other employment rights through undertaking jury service. Under the same legislation the Juries Act 1976, the self-employed are entitled to apply for excusal from jury service if they can show that serving would prevent them from earning a living.

6.11 The Irish model clearly has an impact on private sector businesses; and it would be important to assess these carefully before building any comparable proposals for Scotland. In addition, the impact of the concession towards the self-employed would need closer examination and modelling in the Scottish context before its costs and benefits – for individuals but also for the justice system as a whole – could be assessed. It is also important to recognise that, whatever the model for compensating jurors, its costs do eventually filter through into the general economy and into taxpayers. A key question about the Irish arrangements is

whether, taking full account of its impact on businesses (which feeds through into the price of products and services), and reckoning also with the costs of administering excusals to the self-employed, this system is more effective – and cost-effective – than an allowance-based model.

6.12 The Government would welcome views from consultees on the approach adopted in Ireland. Views on this model are particularly welcome from employers.

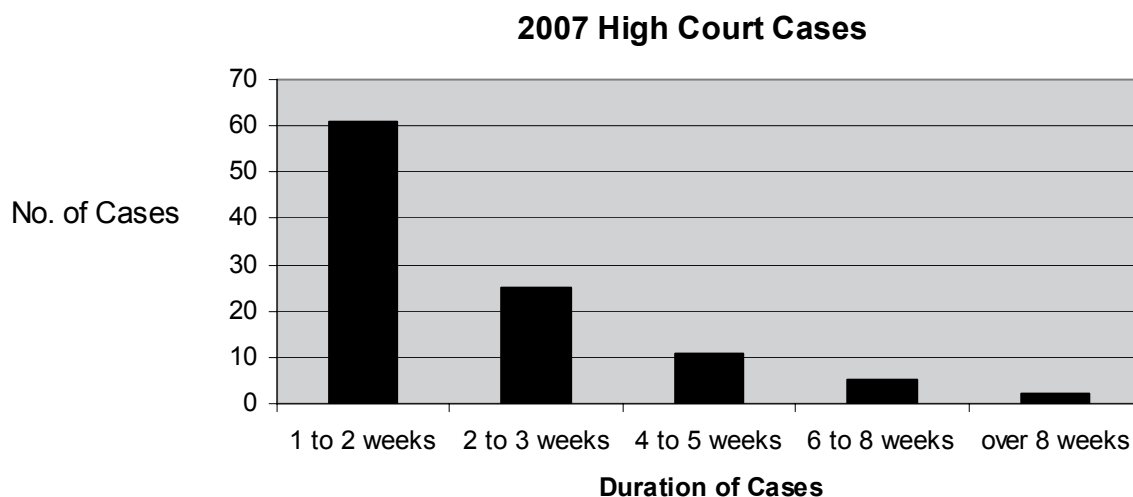
### Options for improvement

6.13 Moves towards a radically new model of jury service, such as the Irish, could not be made without further detailed analysis and impact assessment, coupled with wide consultation. Even if there were a consensus in favour of it and a scheme on these lines were assessed as affordable, it would not be a quick solution. And those are big ‘ifs’. The Scottish Government is keen meantime to make affordable administrative improvements to the current system, in order to ensure fair recompense and to alleviate juror hardship.

6.14 Within the existing envelope of resources and taking into account the likely impact of the firm proposals made earlier in this paper, the Government sees four broad options for improving the operation of the compensation scheme. Detailed modelling will be required to establish the optimal mix of adjustments that would yield the greatest benefit to the greatest number of jurors whilst remaining affordable. The improvements relate to:

- accelerating access to the higher daily rate for longer trials
- raising the value of that higher rate for longer trials
- introducing graduated or tiered rates geared to the length of trial
- extending the scope of allowances – in particular, to introduce an adult dependant carer allowance.

In 2007 the average jury trial in Scotland lasted only 2 days in the Sheriff Courts and around 5 days in the High Court. **Figures suggest that in cases, which lasted over 12 weeks, the total number of jury days was approximately 40% less than those lasting half that duration. The graph below illustrates the number and duration of cases in the High Court in 2007.**



6.15 At present the higher rate for long trials is payable from day 10 in long trials. Informal feedback from Sheriff Court clerks is that juror hardship, when it arises, is most likely to be felt ahead of this, and often as early as the beginning of the second week of trial. To apply the higher compensation rate of £122 to all juror days spent on trials lasting in excess of 5 days would cost approximately an additional £72,000, based on data from trials in 2007-08. The higher rate, as mentioned earlier, is payable without liability to tax or national insurance.

6.16 A second option would be to raise the value of the higher rate for long trials from its present level of £122. Even though this already comfortably exceeds the median rate of pay for full-time employees, there are some jurors whose losses exceed this rate. The question would be how far to raise it and whether to raise it in combination with the first proposal about accelerating access to that higher rate – and both are essentially issues about affordability. The first and second options, taken together, would offer significant relief to those most inconvenienced by long trials, though they would not recognise the fact that, for some, the longer the trial, the greater the accumulated financial and other burden.

6.17 A third and possibly more beneficial way of deploying the available resource would be to introduce graduated or tiered rates for long trials. For example, the basic rate could be paid for days 1-5; an increased rate for days 6-15; and further, incrementally enhanced rates for trials lasting longer periods – with a substantially enhanced rate payable for those (rare) trials which last over 20 weeks. Initial modelling suggests that this option could be delivered within budget, if the top rate were pitched at no more than £230 per day and if access to the current higher rate were brought forward to day 6 and paid for all trials lasting up to 15 days. This option would preserve the benefit (to many jurors) of earlier access to the existing higher rate (as in the first option) and it would offer significantly enhanced compensation to those required to serve for the longest periods.

6.18 A further option for improving the current system – one which is free-standing of the other options for rate enhancement – concerns allowances. There are allowances in place for childcare as well as for travel and, of course, subsistence. Informally, Clerks of Court will admit claims for employing carer workers to look after adult dependants where a juror is himself or herself the principal carer for a spouse or partner, close relative or friend. This would remove an important barrier for some carers to taking part in jury service, although we recognise that not every carer and cared for person would feel able to use such replacement care. The Government inclines to the view that, with the proposed raising of the upper age limit for jury service, now is the time to formalise access to an adult dependant carer allowance and to integrate this into the system of juror allowances. Such a move would also help improve representation of this group on juries and should also help to increase juror availability. We will welcome views.

6.19 From time to time other proposals have been made to relieve the financial stress on jurors. In particular, suggestions have been made for a 'hardship fund' to which jurors could apply if they found themselves in exceptionally severe circumstances bordering on total loss. Such a fund would however need some 'start-up capital' to provide the necessary resource; and it is hard to see where this could come from – without paring away at compensation rates that are already

causing hardship. The overhead costs borne by SCS in running the current mainstream system of juror payments and allowances are relatively low. Any new hardship fund, whether as a replacement for the current system or as a new, additional source of recompense, would need to be administered - and those costs, given the focus on individual cases and the need for accountability and transparency, could be relatively high.

6.20 The Government acknowledges that no compensation system will perfectly recompense every juror for the burden of jury service. With long trials in particular, service demands that livelihood, commitments to family and friends, and personal and domestic plans all be put on hold. Money cannot restore the time and opportunities lost through jury service. But the Government believes that a well structured compensation system, combined with good information to jurors (including suitable forewarning of long trials), can do a good deal to alleviate burdens and reconcile individuals to the performance of this important duty. The Government will welcome your thoughts on how best it can develop the arrangements for juror compensation in order to minimise hardship, recognise the exercise of civic duty, and avoid creating disincentives to service.

- **What are the benefits and drawbacks of a system such as the one adopted in Ireland which transfers the cost of jury service to employers and lifts the burden of service from the self-employed where their livelihoods can be shown to be at risk? Is such a system likely in your view to serve the interests of the economy and of justice?**
- **If a choice had to be made, on grounds of affordability, between granting earlier access to the longer trials rate and boosting that rate, which of these – less compensation but earlier, or higher compensation but later – do you think is more important?**
- **Should those few jurors who serve on the very longest trials receive enhanced compensation for losses incurred (bearing in mind that this would inevitably depress to some extent the resources available for the generality of jurors)?**
- **Do you agree that the introduction of an adult dependant carer allowance would be a valuable addition to the suite of juror allowances? Are there any other allowances for regular expenses that you think should be considered (nb childcare expenses – both pre-school and out of school – are already reimbursed).**

## 7. Jury Size

### Background

7.1 In Scotland, legislation prescribes that the criminal trial jury comprise 15 individuals. If a juror becomes ill during a trial or is excused for some reason the trial may continue provided a minimum of 12 jurors remains. Cases where juries consisting of fewer than 15 members have deliberated and returned verdicts are not commonplace but neither are they a rarity. Before a jury can return a verdict of guilty in any case, even where jurors have been excused, at least 8 of the jurors must be satisfied that the guilt of the accused has been established beyond a reasonable doubt. This number of 15 jurors is generally higher than in other jurisdictions that use juries. Juries of 12 or 9 are far more common. Historically, in Scotland, legislation has been used to allow for a temporary reduction in the number of jurors required. For example, during the second world war, the Administration of Justice (Emergency Provisions) (Scotland) Act 1939 provided for juries in criminal cases (except treason and murder) to number 7 - but a verdict of guilty required 5 votes.

7.2 The Scottish Government would like to stimulate debate on the size of the Scottish criminal jury and what any change to the number of jurors serving on jury might mean for the number of votes required to reach a guilty verdict. It recognises that this is a complex issue which is linked to some fundamental principles of Scots law. This is not a topic on which the Government sees an urgent need for early legislation: rather, it wishes through discussion to test the case for change. Only if the case were strong and well evidenced would the Government move towards constructive change. To assist this process, the Government would welcome your views on whether it is time to review the number of citizens required to constitute a jury; if so, what that number should be; and what number of votes would be required to reach a guilty verdict in such circumstances.

7.3 We do not know why criminal juries in Scotland have 15 members. It would seem that, historically, juries of 15 became common and accepted. As an odd number it ensures that a majority verdict is always achieved. But it is not the only model. Many jurisdictions have smaller juries. We need to ask whether the distinctively large Scottish jury is a distinction based on merit – the fact that things have always been this way is not a good reason for still accepting them in today's world. Indeed, this is not the first time that such issues have been explored in Scotland<sup>4</sup> and further afield.

### A possible argument for change

7.4 This may be put simply. Juries make demands on individual citizens; they provide a public service and are supported by the taxpayer. Smaller juries would require a smaller juror 'pool'; they would make fewer demands on citizens; they would be easier to administer; and they would cost less. To illustrate: to operate a

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<sup>4</sup> See *Juries & Verdicts 1994* and *Firm and Fair, Improving the delivery of justice in Scotland*, June 1994

jury of 11 (rather than 15 – assuming for the moment that maintaining an odd number is desirable) would require 4,000 fewer balloted jurors per annum and would generate savings of around £450,000 per annum in terms of juror allowances alone. The losses to individuals and to the wider economy linked to the present system would be reduced as fewer people would be taken out of their normal employment. There would be further benefits, to individuals and to the community at large, from time and resources saved. At a time when the juror pool is under stress, it makes sense to consider these apparent benefits, to ask what impact smaller juries would have on the justice system more broadly, and to explore whether there would be any associated costs or disadvantages.

## Evidence from research & comparative studies

7.5 Some academic studies<sup>5</sup> have highlighted the need to guard against juries which are too small, citing the abilities of larger juries to counterbalance better any prejudices harboured by individual jurors and an improved level of deliberation, possibly on account of larger groups tending to have a better collective memory when it comes to recalling evidence. But these studies, mainly drawing on American experience, are generally focussed on proposals to reduce jury sizes from 12 to 8 or 6 – their starting point is already significantly below the norm in Scotland – and we do not know if the arguments would have the same force if applied to rather larger juries.

7.6 What we do know is that Scotland's requirement for a jury of 15 is the highest in Europe. In **France** jury trials, or tribunals, consist of 3 magistrates and a jury of 9. In **Spain** a jury must comprise nine jurors and two alternates. **Germany** does not have juries in the traditional sense, minor crimes being heard by a judge and serious crimes are heard by a panel of 5 (comprising 3 professional judges and 2 lay members). In **Denmark**, recent court reforms will result in a reduction of juror numbers from 12 to 9.

7.7 Numbers alone however tell us little. Most European criminal justice systems are substantially different to the Scottish adversarial system and in some cases juries do not participate until the appeal stage, if at all. In some respects, although the origins are, again, different to Scotland, it is more helpful to look at common law countries such as the United States, Canada, Australia and New Zealand.

7.8 Typically, juries in these common law jurisdictions have juries of 12, though some states in the USA have juries with as few as 6 members. What is striking about these jurisdictions, however, is the difficulty they encounter in securing verdicts. In Canada and New Zealand, verdicts must be unanimous, often leading to costly re-trials. In the USA it is also common for juries to have difficulty reaching a verdict: a 'hung' jury can lead to a mistrial requiring the case to be retried. The costs falling on other parts of the justice system arising from the operation of smaller juries clearly need to be factored into any cost/benefit analysis.

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<sup>5</sup> See *Does Jury Size Matter? A Review of the Literature*, Nicole L. Waters Ph.D. August 2004 of the National Centre for State Courts, Virginia, USA.

7.9 In England and Wales, where juries consist of 12 individuals, historically jury verdicts had to be unanimous. But in 1967 the Criminal Justice Act removed the requirement for unanimity. Initially juries will be directed by the Judge to seek a unanimous verdict. However, if at some point following two hours of deliberations no unanimous decision is reached, further instructions may be given. Under the Act, a majority of 10 to 2 may be permitted to secure either a conviction or an acquittal. Ultimately, if the jury is divided on a ratio of 9 to 3 or evenly, there will be a retrial.

### What about the majority verdict?

7.10 In order to reach a verdict in Scotland, a simple majority is all that is required: that is, a minimum of 8 jurors must agree. A further distinction in Scotland's criminal justice system is the availability of three verdicts: guilty; not guilty and not proven (though for the purposes of determining a majority, both not guilty and not proven are counted together as acquittals). **It is not the intention of this consultation paper to explore the three-verdict system in Scotland.** That topic would merit a consultation paper on its own and was considered in 1994. But in the context of reviewing the number of jurors sitting on a jury it is impossible to avoid mention of verdicts, even if only in addressing the likely effect on achieving a majority verdict.

7.11 By midway through the sixteenth century, verdict by majority had become formally established as an integral part of trial by jury in Scotland. It has been argued that consideration should be given to a system of weighted rather than simple majority verdicts as this would better reflect the principle of proof of guilt beyond reasonable doubt. A weighted majority verdict would be one where a greater number of jurors elect to find the accused guilty; in Scotland a number greater than 8 requiring, perhaps, for example, a ratio of 11:4 or 12:3 in favour of conviction. The second report of the Thomson Committee on Criminal Procedure in Scotland<sup>6</sup> also considered the merits of the majority verdict. Although Sheriff G.H. Gordon argued that an accused should not be convicted when more than one-third of the jury were not satisfied of his/her guilt, a majority of the Thomson Committee disagreed with him. The Committee argued that the introduction of a weighted majority would on the whole be more likely to enable the guilty to escape conviction than to protect the innocent accused from an undeserved conviction.

7.12 Whatever the requirement, the fairness of the trial and security of the verdict is paramount. The larger the jury, the more difficult it might be to achieve unanimity leading to a greater need for a majority verdict. But that should not be at the cost of upholding the presumption of innocence of every person accused of a crime. Conversely, the smaller the jury, the greater the risks of any one juror's views prevailing leading to a greater need for weighted verdicts, if not unanimity.

7.13 There are some particular safe-guards embedded in the Scottish criminal justice system. While there are three verdicts, both "not guilty" and "not proven" count as acquittals. If no majority is achieved the accused must be acquitted rather than re-tried. Finally, the Crown must always corroborate the essential facts of the case: that the crime was committed and that the accused was the perpetrator. The

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<sup>6</sup> See Second Report of the Thomson Committee on Criminal Procedure in Scotland (Cmnd. 6218 (1975), ch 51.

existence of these two factors distinguishes Scotland from other jurisdictions and indeed could potentially continue to reinforce confidence in verdicts even if the number of jurors in a criminal trial was reduced from 15.

### Managing the risk of excusals: substitute jurors

7.14 In reviewing jury size it is essential also to consider the impact that excusal of jurors has on the size of a jury and its ability to return a verdict. Clearly, if a juror is unwell he or she must be excused. But if illness strikes a smaller panel and one or more jurors has to be excused, at what point would it be impossible to continue without affecting the fairness of the trial and reliability of the verdict? This is not an unfamiliar issue. It can, and does, happen already but a panel of 15 jurors may leave more room for such eventualities without affecting the delivery of justice. If the number of jurors were reduced from 15, it might be thought necessary to have in place a number of additional, substitute jurors to replace any casualties and so ensure that the overall number of jurors did not fall below an acceptable limit. Of course, juries of 15 might be thought to benefit from such an arrangement also. But we must consider the balance of cost against benefit there. With a higher number of jurors, the risk of falling below a level at which justice can properly be dispensed is much reduced. The routine inclusion of substitute jurors would come at a very considerable financial cost which may be difficult to justify when seen against the number of cases that might benefit. And there are very severe physical constraints on the vast majority of Scottish criminal courtrooms which would make it very difficult indeed to introduce substitute jurors on top of the current 15. There may be other safeguards that could be employed to reduce that risk in long running trials, as discussed at chapter 8 below.

### Quorum

7.15 As already noted (and explored in more detail in chapter 8), jurors may be excused after the trial has commenced. The current quorum – the minimum size of jury for it to be competent – is 12. That implies a ratio of 4:5. In some parts of the United States, the ratio is very different - for example 3:4 where the quorum is 9 out of 12 jurors. That is also the position in England and Wales. Research points to the dangers inherent in small juries. But there is, arguably, an equally negative impact on the interests of justice where, on quorum breach, a trial requires to be discontinued and recommenced at a later date. Is there a case for revising the quorum, or for giving the court discretion to override any quorum and enable proceedings to continue despite quorum breach, on the present size of jury? In what circumstances might the exercise of such discretion be justified? What safeguards would need to be put in place to preserve justice for the accused? And if the size of the jury were reduced to below 15, what would be the implications for the quorum? Where should it be fixed? We look more closely at the specific issues of quorum in lengthy trials below, where it might be argued that the debate over where the interests of justice lie is brought most sharply into focus.

## Balloting of Jurors: Brown v HMA

7.16 The case of *Brown v HMA* 2006 called for legislative action to set a minimum size of pool from which jurors would be balloted for service. That case arose from concern that the original pool from which the jury was to be balloted was 22 in number. It was held that empanelling 15 jurors from a pool of 22 lacked the appearance of fairness and, accordingly, there had been a miscarriage of justice.

7.17 The Scottish Government is alive to the suggestion that a minimum number be set. Size of the ballot is, however, directly related to jury size. While questions remain unresolved as to those issues around the size of the jury, it is difficult to move on to any meaningful consideration of the implications of the decision in *Brown*. As such, we propose postponing any action to implement the decision in *Brown*, meantime, at least until the outcome of this consultation and identification of any next steps in relation to jury size.

## Conclusion

7.18 Reducing the number of jurors would help alleviate the burden of jury duty on citizens. It also has the potential to produce significant financial savings, significantly reducing the costs of juror reimbursement.

7.19 However, the Scottish jury of 15 has its advantages. Presently, the requirement of a majority verdict ensures the accused always receives a verdict. There are no ‘hung juries’ or re-trials in Scotland. Arguably this is a position we would not want to alter. Equally, we might not wish juror excusal through illness or some other eventuality to result in the abandonment of a trial and a new trial commencing, particularly if such an event took place in the latter stages. The possibility of a re-trial for any of the reasons above would be likely to significantly reduce any of the potential savings identified from jury reimbursement.

7.20 But if we have smaller juries could the interests of justice be preserved? And what might that mean for their quorum? Even if the jury of 15 is retained, it may be that the current quorum of 12 is too restrictive and should either be reduced outright or capable of being reduced at the discretion of the court, having regard to the interests of justice.

7.21 It may be that this issue is too complex to identify a clear way forward at this stage. There may be merit in the Scottish Government commissioning a short focused review by experts on the issue of the majority required for verdicts and its correlation with jury size. **We invite your views on this.**

## Questions

- **Do you think the number of jurors in criminal trials in Scotland should be reduced? Please explain why you think it should or should not.**
- **If it were reduced, to what number should it be reduced and what number of votes should be required to reach a verdict?**
- **Should there be a minimum jury quorum required, below which a trial should be discontinued? If so, what should that number be and would it be affected by a reduction in jury size?**
- **If there is a quorum, what should be the effect of the number of jurors falling below that quorum? Are there any circumstances in which the court should allow such a trial to continue, and, if so, what? How can the court satisfy itself that the interests of justice are well served?**

## 8. Trial without a jury

8.1 Jury service, particularly on long and complex trials, can be an onerous responsibility. The Government believes it right that the people of Scotland play an active role in the criminal justice system and that all eligible citizens should undertake that duty when called upon. Through reforms to the compensation system the Government hopes to remove some of the main financial disincentives to service. It recognises however that there are three sets of arguments that can be made in favour of relieving citizens of the duty to serve on certain kinds of trial. First, there is the argument from length: that the obligation to serve becomes deeply unfair in relation to trials lasting longer than a certain number of weeks or months. Secondly, there is the argument from complexity (sometimes linked with the first): that trials involving particular kinds of complex evidence are simply too taxing for the vast majority of the general public and should be heard by expert judges alone. Thirdly, there is the argument from fairness and risk to proceedings: that since excusal of jurors can lead to collapse of trials and continued stress and uncertainty for victims, witnesses and the accused, it makes sense to dispense with trials that may carry a high risk of juror attrition (this third argument is often linked to the first two).

8.2 The Government wishes to open up these issues for debate. It does not wish to advance – at least at this point – any firm proposals for dispensing with jury trials. It believes there may be a case for the use, in the very longest trials, of additional, substitute jurors; and it invites views on the principle of this and also on some of the practical implications.

### Juror burden – long trials

8.3 As we have previously mentioned in Chapter 6, in 2007 the average jury trial in Scotland lasted 2 days in the Sheriff Court and 5 days in the High Court. The majority of jurors find their service does not extend beyond a week. But some trials are much longer, including one, in recent times, running for more than 25 weeks. The obvious question is begged: how long is long? Jurors respond differently to the demands placed upon them, though it is useful to note that the Court Service regards all trials scheduled to last longer than 5 days in the Sheriff Court and 10 days in the High Court as ‘long running trials’ and forewarns those cited accordingly.

8.4 The question whether it is fair to expect members of the public to serve as jurors in very long cases is not new. It acquired some prominence in 2004 in the prosecution of Transco. There, the appellants objected to the fact that the trial, which was estimated to last between 4 and 6 months, was to be heard by a jury, citing both the complexity and the volume of evidence as factors which could detract from the ability of the jury to make a fair decision. The Appeal Court judges were not persuaded that there had been any breach of the appellant’s right to a fair trial in terms of Article 6 of the European Convention on Human Rights, as the appellants had maintained.

8.5 Lord Osborne commented that it was not reasonable to expect ordinary citizens to give up so much of their personal time to serve on a jury. He said:

*“I regard the imposition of such responsibilities on members of the public as a very severe burden upon them..... it appears to me that the time has come for serious consideration to be given to the question of whether it is reasonable for the law to impose upon members of the public the kind of heavy burdens which a trial in this case and in comparable cases would involve”.<sup>7</sup>*

Whilst there is no systematic evidence about the impact on the lives of jurors of extended service on very long trials, there is a good deal of anecdotal evidence to suggest that such involvement may indeed exact high costs from individuals in terms of time and opportunity foregone and livelihood reduced.

### Juror burden - complex trials

8.6 The argument from complexity is closely linked to the first scenario. Indeed, the same case – the Transco Appeal – drew attention to the suggestion that jurors might struggle to understand and evaluate complex evidence. Lord Osborne did not however subscribe to this view, commenting:

*“To my knowledge it has never been decided in this jurisdiction that a jury in solemn criminal proceedings would be incapable of reaching a just decision in any case, even one of the greatest complexity. If it were so decided, our system of criminal justice in solemn matters would be fundamentally undermined”.*

8.7 There have been academic debates over whether it is appropriate for juries to sit in trials involving certain sorts of complex material – fraud trials, for example. Section 43 of the Criminal Justice Act 2003, applicable in England and Wales, enables the prosecution dealing with a case of serious or complex fraud, being tried on indictment in the Crown Court, to apply to a judge for the trial to be conducted without a jury. However, Section 43 of the Criminal Justice Act has not been commenced and the UK Government has no plans to do so in the near future. Instead, other, non- legislative measures have been introduced by the courts and prosecuting authorities to try and improve the management of large criminal cases including those involving fraud.

8.8 But why restrict any definition of complexity to fraud or other financial matters? Fraud is not the only crime that could be regarded as complex. The Transco trial itself included a substantial quantity of potentially complex and expert evidence. There is no evidence however, that the jury in that case were not able to understand the evidence and reach a reasoned decision on it. Murder trials also often have forensic or other expert evidence that is complex; and the same is true of trials involving sexual offences. Moreover, in many trials jurors are expected to grapple with the application of complex and difficult legal concepts. The argument from complexity is difficult to scope. And many feel that there lies, at its core, an

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<sup>7</sup> The full judgement may be found at [www.scotcourts.gov.uk/opinions/xc392\\_03.html](http://www.scotcourts.gov.uk/opinions/xc392_03.html)

implied slur on the capabilities of the generality of jurors. The Government is keen to reduce the burdens on jurors wherever possible, but it seeks to do so without diminishing the role that jurors can and should play across a wide range of criminal cases. Rather than reaching for the conclusion that there are some cases that are too hard for juries, the way forward may be to consider how we equip and support jurors in considering the hardest cases.

### Protecting proceedings

8.9 It can be argued that dispensing with a jury is a price worth paying in order to sustain proceedings and to avoid unfairness. As the length of trial increases, so does the risk of jurors being excused, for example on account of ill health. Although each jury begins with 15 members, excusals may bring this number down to 12. A jury cannot return a verdict if its number falls below 12. If that happens, the trial will be discontinued and begin again later, before a new jury.

8.10 Cases where juror numbers dropped below 15 have, as far as we are able to ascertain, always been able to return a verdict. But a few have come uncomfortably close to discontinuation and re-trial. Re-trial is costly, in every term. There are the public costs - both financial and in terms of court programming; and there are also pastoral considerations to take into the reckoning. Re-trial has a heavy impact on witnesses, who are required to give evidence for a second time; and it has a similar impact on any victim and on the accused, whose agony is prolonged in awaiting the outcome of their case. The question that arises is whether the costs to others that may on occasion arise from an over-stretched jury are such as to justify curtailing that service and relieving jurors of responsibility altogether.

### Other jurisdictions

8.11 It is not unusual for criminal proceedings to take place without a jury in other jurisdictions. Indeed, in mainland Europe it is more common for trials without jury to take place, with juries coming into play at the appeal stage, if at all. Of course we are not comparing like with like; the Scottish adversarial system is unique among our European neighbours. But it does suggest that it is possible to have a fair trial in serious cases without consideration by a jury.

### Options – trial by judge

8.12 At the outset of trial proceedings the prosecution and defence will provide an estimate of how long it expects the trial to take. Where the trial is anticipated to exceed two weeks in duration, the availability of jurors may be canvassed in advance. But such predictions are not, and cannot be, wholly reliable. Proceedings can be concluded earlier than expected or, as in the case of Transco, they may last much longer. Where early predictions are that the trial may be particularly lengthy, it has been suggested that a judge sitting alone, or a panel of judges, would be an alternative to members of the public sitting on a jury<sup>8</sup>. Such suggestions assume that a cut-off point – a maximum duration for trial by jury – would be set. Setting it

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<sup>8</sup> Lord Osborne in *Transco Plc v HMA*, 2004 SLT 995, 2005 JC 44

would inevitably involve a somewhat arbitrary judgment about the point at which the burdens of jury service became disproportionate. And even if such a cut-off point were in place, there might be sound reasons why a trial of extraordinary length should still go before a jury. The decision whether the trial should proceed before a jury could only be taken in each case, on its own facts and circumstances, and should be a matter for the court, after hearing from the prosecution and defence.)

8.13 A single judge sitting alone, in a lengthy trial, poses no less a risk to trial continuity than a jury: he or she is as susceptible to illness or accident and indeed the very exposure of the single judge could be said to carry even greater risks than those associated with jurors. More fundamentally, the fairness of such proceedings might be questioned, having regard to the consequences for the accused, of being convicted and sentenced to life imprisonment on the basis of one person's assessment of the evidence against him or her. While there are examples from other common law jurisdictions of trials in serious cases proceeding without a jury, they tend to arise in those countries where an accused person has a choice as to the forum in which he is prosecuted. No such choice exists in Scotland. Indeed, such a choice appears to be wholly at odds with our unique and very public system of justice and prosecution where it is the prosecutor who determines whether proceedings should be initiated and, if so, before which forum.

### A panel of judges or Tribunal

8.14 Given the factors weighing against trial by a single judge, it may be preferable for a panel of judges to preside as a tribunal. How many judges would comprise a tribunal would need further consideration. In the current system, two may be too few to achieve a satisfactory verdict: in the event of a split verdict of one acquittal and one conviction, the presumption of innocence would surely prevail (alternative bases, such as relative seniority of the judges presiding, are not only difficult, but might be regarded as unprincipled). A panel of three judges would ensure that a majority verdict could be reached.

8.15 There is only one precedent in Scotland, in recent history, for trial in solemn proceedings without a jury. In the trial which followed the 1988 bombing of Pan Am Flight 103 over Lockerbie, a panel of 3 judges presided, with a fourth judge sitting as a substitute.

8.16 To enable a tribunal to work effectively, there would need to be provision setting out what should happen in the event that one of those judges had to retire on grounds of ill health. If a panel of two judges was regarded as too narrow to secure a safe verdict it might be that the trial would have to be discontinued and re-started, afresh, before another panel.

8.17 And there are serious practical implications to consider. There is a limited pool of judges, already utilised to capacity. It is not only capacity to deal with trials that must be considered: a trial bench of 3 would require appeals before a larger bench of 5, or more. Any proposal for a tribunal would have a major impact on the wider programming of criminal (and civil) cases. Tying up a substantial amount of judicial expertise in trials by tribunal and linked appeals would inevitably create

delays elsewhere in the system. There is also the issue of cost. A panel of 3, or 4, judges would cost substantially more than a jury, however long the trial.

8.18 Undesirable as it might seem for jurors to expend many weeks of their time fulfilling their civic duty, there may not be any sustainable alternative. Rather, we may have to look at other measures, particularly those relating to excusal and recompense, to minimise juror inconvenience. In addition, we might look at a non-legislative reinforcement of the procedures that exist in citing potential jurors. At present, in cases anticipated to proceed at trial for longer than 2 weeks, potential jurors will be canvassed as to their availability for a long running trial and a wider pool of jurors will be cited. In that way, steps can be taken to ensure that for those jurors liable to be hardest hit, the inconvenience is avoided, or at least minimised.

### Substitute Jurors

8.19 If there is no affordable option to jury trials even in the longest trials, the question remains how to support trial continuity and to minimise the risk of discontinuation through juror excusal. One way forward may lie in the appointment of a substitute juror, to replace a “regular” juror who is excused during the course of the trial. This would be an entirely novel approach in Scotland, but it is a well-established feature in other jurisdictions.

8.20 One major and practical hurdle that would need to be overcome, however, relates to the physical space in courts. Courtrooms and jury accommodation are currently designed for a maximum of 15 jurors. Adapting them to accommodate more jurors would not be straightforward, though not insurmountable if only a small number of trials were liable to be affected. This and many other practical issues would need further consideration, if the principle of substitute jurors was found to have merit.

### Substitutes & length of trial

8.21 Since anecdotal evidence suggests that juror excusals tend to increase with the length of trial it would make sense to focus the use of substitutes on lengthier trials where juror well-being could be an issue. The obvious question follows: at what scheduled length of trial should substitutes be added to the jury? Our best judgment (and taking other measures to reduce excusals into account) is that the line could be drawn at trials in excess of 10 weeks. On this basis, the number of trials affected would be very small indeed and steps might be taken to accommodate substitutes in particular locations. Although no Sheriff Court trials in 2007 exceeded 10 weeks in duration, we should be alive to that possibility and consider the implications. **We would welcome views on what length of trial should qualify for the use of substitutes.**

8.22 A second question arises as to the number of substitute jurors that should be empanelled. The experience of those jurisdictions that use substitute jurors appears to be that only 2, or in some cases 3, additional jurors are empanelled. **We would welcome views on how many substitute jurors there should be,** bearing in mind the physical constraints referred to above.

8.23 The basis of substitution may require some consideration but it is suggested that the current reasons for excusal, namely death of the juror or any other reason which the court is satisfied makes it inappropriate for the juror to continue to serve<sup>9</sup>, should continue to have effect.

### Substitution during trial

8.24 A more fundamental issue is the point at which substitution is appropriate; whether it is appropriate only before deliberation by the jury or after such deliberation has begun. The experience of other jurisdictions suggests that pre-determination substitution raises no issues of any great significance. In such cases the jurors there, as in Scotland, would be instructed not to discuss the case among themselves before they retire to begin their deliberations. Once those deliberations have commenced, the question of substitution becomes more complex. Until that point the substitute juror will not have participated in the deliberations. In those jurisdictions that allow substitution at such a late stage, the court will consider whether to discontinue the trial, whether to proceed with fewer than the requisite number of jurors or whether to allow substitution.

8.25 If the main motive for substitute jurors is to reduce the risk of re-trial, never does that become more significant than at the point at which the jury retires to consider its verdict. Without further changes to jury size and quorum (see Chapter 7), the only way to address this risk would be to allow for substitution at a late stage.

### Model of substitution

8.26 Some consideration requires to be given as to the model of substitution. There can be no doubt that the substitute must be selected to serve from the outset, in order that he or she hears all of the evidence in the case. But should they know at that stage that they are a substitute? Other jurisdictions offer three models:

- (1) the substitutes are selected and specifically designated as substitutes from the outset
- (2) the substitutes are selected at the outset and their identities known to the judge and to the parties but neither they nor their fellow jurors know who is a substitute and who is an ordinary juror
- (3) the substitutes are only chosen, at random, once the jury retires.

8.27 There are advantages and drawbacks with each of these models. **We welcome your views on these, or other, models of juror substitution.**

### Quorum

8.28 Of course, even with substitutes, excusal of jurors during trials might remain an issue, particularly in exceptionally long cases. What if the substitutes are exhausted and yet still the jury falls below the minimum number to form a quorum?

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<sup>9</sup> Criminal Procedure (Scotland) Act 1995 section 90(1)

8.29 This returns us to the issue outlined in chapter 7 in the context of jury size, where we asked whether there should be provision to allow the court to determine that a trial should continue. That question is apt in this context too, since the discretion could be a useful safeguard, in isolation or complementary to provision for substitutes. **We would welcome your views on whether the court should have this discretion and what factors it might be required to take into account in reaching a view.** It would also be helpful to know if you think there should be a requirement for verdicts to be returned by no fewer than a certain number of jurors, whatever the length of case.

## Conclusion

8.30 The Scottish Government recognises that jury service can be very burdensome for some individuals where the trial is lengthy. It also acknowledges the increased risk posed to trial continuity as a result of juror excusal during long trials and the serious consequences flowing from that. There are ways in which juries could be replaced, but they carry very high costs and high opportunity costs (in terms of other investment in the justice system that would have to be foregone if resources were to be mobilised for 3-judge tribunals). The Government looks to the measures proposed elsewhere in this consultation to reduce the burden of service – particularly that arising in long trials. Substitute jurors might provide a way to manage the risks of trial discontinuity; so too might a provision to enable the court to continue a trial with a reduced quorum.

## Questions

- **Do you agree that juries should continue to be used even in lengthy criminal trials, regardless of the type of crime?**
- **If you do not agree, what alternatives would you propose? How would those alternatives reconcile the interests of justice with the practical considerations that we have outlined?**
- **If you agree, should substitute jurors be considered and, if so, in what circumstances? How many should there be and what model should they follow?**
- **Are there any circumstances in which the court should allow a trial to continue despite the jury falling below the quorum? What are they? Should the exercise of such a discretion be linked to trials of a particular length?**
- **Moreover, how can the court satisfy itself that the interests of justice are well served?**

## **9. Conclusion**

9.1 This consultation paper is the first time since the Thomson Committee that the operation and management of the jury in Scottish criminal trials has been examined in any detail. The jury is an integral part of our criminal justice system and jurors undertake an important civic duty. The Government would therefore welcome your views on the firm proposals and ideas that are contained within this consultation paper.

**Persons ineligible for jury duty**

**Group A  
The Judiciary**

- (a) Justices of the Supreme Court or the President or Deputy President of the Court (ref Change in Constitutional Reform Act 2005);
- (b) Senators of the College of Justice;
- (c) sheriffs;
- (d) Justices of the Peace;
- (e) stipendiary magistrates;
- (f) the chairman or president, the vice-chairman or vice-president and the registrar or assistant registrar of any tribunal; and
- (g) persons who, at any time within the 10 years immediately preceding the date at which their eligibility, is being considered, have come within any description listed above in this Group.

**Group B  
Others concerned with the administration of justice**

- (a) advocates and solicitors, whether or not in actual practice as such;
- (b) advocates' clerks;
- (c) apprentices of, and legal trainees employed by, solicitors;
- (d) officers and staff of any court if their work is wholly or mainly concerned with the day-to-day administration of the court;
- (e) persons employed as shorthand writers in any court;
- (f) Clerks of the Peace and their deputies;
- (g) Inspectors of Constabulary appointed by Her Majesty;
- (h) assistant inspectors of constabulary appointed by Scottish Ministers;
- (i) constables of any police force (including constables engaged on central service within the meaning of section 38 of the Police (Scotland) Act 1967)

- (j) constables of any constabulary maintained under statute;
- (k) persons employed in any capacity by virtue of which they have the powers and privileges of police constables;
- (l) special constables;
- (m) police cadets;
- (n) persons employed under section 9 of the said Act of 1967 for the assistance of the constables of a police force;
- (o) members of staff of the Serious Organised Crime Agency;
- (p) members of the Service Authority for the National Criminal Intelligence Service and persons employed by that Authority under section 13 of the Police Act 1997;
- (q) officers of, and members of visiting committees for, prisons, remand centres, detention centres, borstal institutions and young offenders institutions;
- (r) prisoner custody officers within the meaning of section 114 (1) of the Criminal Justice and Public Order Act 1994;
- (s) procurators fiscal within the meaning of section 307 (1) of the Criminal Procedure (Scotland) Act 1995, and persons employed as clerks and assistants to such procurator fiscals;
- (t) messengers at arms and sheriff officers;
- (u) members of children's panels;
- (v) reporters appointed under Children (Scotland) Act 1995 and their staffs;
- (w) chief social work officer appointed under section 3 of the said Act of 1968 and persons employed to assist such officers in their performance of such of their functions as relate to probation schemes within the meaning of section 27 of that Act;
- (x) members of the Parole Board for Scotland;
- (y) persons who, at any time, within the 5 years immediately preceding the date at which the eligibility, in terms of section 1 of this Act, for jury service is being considered, have come within any description listed above in this Group;
- (z) members and employees of the Scottish Criminal Cases Review Commission.
- (aa) chief officers of community justice authorities established under section 3 of the Management of Offenders, etc (Scotland) Act 2005.

## **Persons Excusable as of Right**

### **Parliament**

- (a) peers and peeresses entitled to receive writs of summons to attend the House of Lords;
- (b) members of the House of Commons;
- (c) officers of the House of Lords; and
- (d) officers of the House of Commons;
- (e) members of the Scottish Parliament;
- (f) members of the Scottish Executive;
- (g) junior Scottish Ministers;
- (h) representatives to the European Parliament;
- (i) Members of the National Assembly for Wales;

### **Public Officials**

- (j) The Auditor General for Scotland

### **The Forces**

Full-time serving members of –

- (a) any of Her Majesty's naval, military or air forces;
- (b) the Woman's Royal Naval Service;
- (c) Queen Alexandra's Royal Naval Nursing Service; or
- (d) any Voluntary Aid Detachment serving with the Royal Navy.

## **Medical and similar professions**

The following, if actually practising their profession and registered (whether fully or otherwise), enrolled or certified under the enactments relating to their profession –

- (a) medical practitioners;
- (b) dentists;
- (c) nurses;
- (d) midwives;
- (e) pharmaceutical chemists; and
- (f) veterinary surgeons and veterinary practitioners.

## **Members of certain religious bodies**

In respect of jury service in any criminal proceedings, practising members of religious societies or orders the tenets or beliefs of which are incompatible with jury service.

## **Ministers of religion**

- (a) persons in holy orders;
- (b) regular ministers of any religious denomination; and
- (c) vowed members of any religious order living in a monastery, convent or other religious community.

## RESPONDENT INFORMATION FORM: THE MODERN SCOTTISH JURY IN CRIMINAL TRIALS

Please complete the details below and return it with your response. This will help ensure we handle your response appropriately. Thank you for your help.

**Name** (including name of organisation where appropriate):

### Postal Address:

1. Are you responding: (please tick one box)
- |  |                          |                         |
|--|--------------------------|-------------------------|
| (a) as an individual                         | <input type="checkbox"/> | go to Q2a/b and then Q4 |
| (b) <b>on behalf of</b> a group/organisation | <input type="checkbox"/> | go to Q3 and then Q4    |

### INDIVIDUALS

- 2a. Do you agree to your response being made available to the public (in Scottish Government library and/or on Scottish Government website)?

Yes (go to 2b below)   
 No, not at all

- 2b. **Where confidentiality is not requested**, we will make your response available to the public on the following basis (**please tick one** of the following boxes)

Yes, make my response, name and address all available   
 Yes, make my response available, but not my name or address   
 Yes, make my response and name available, but not my address

### ON BEHALF OF GROUPS OR ORGANISATIONS

- 3 The name and address of you organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government website). Are you also content for your **response** to be made available?

Yes   
 No  We will treat your response as confidential

### SHARING RESPONSES/FUTURE ENGAGEMENT

- 4 We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Government to contact you again in the future in relation to this consultation response?

Yes   
 No

## CONSULTATION QUESTIONS

### Chapter 3:

1. Do you agree that persons aged 65-70 should no longer be debarred from jury service on grounds of age?

### Chapter 4:

2. What restrictions, if any, should there be on eligibility to serve on a jury; and how should these restrictions be administered?

3. Should persons in any particular occupations routinely be excused jury service in virtue of that occupation?

4. If so, which occupations should enjoy this concession?

5. If not, what should be the criteria for determining applications by individuals for excusal from jury service?

*Note: the focus in this section is on occupation-related excusal. Sheriff Clerks have discretion to excuse those cited for service on compassionate grounds such as ill-health, pressing carer responsibilities, or bereavement. The Government does not propose to alter or in any way restrict the exercise of this discretion.*

## Chapter 5:

6. Do you agree with the proposal to reduce the period of entitlement to excusal as of right from 5 to 2 years for those individuals who, following citation, attend at court but are not selected by ballot to serve on a jury?

7. Do you agree that Section 84(4) of the Criminal Procedure (Scotland) Act 1995 be amended to allow for the pool of jurors to be selected from those either within the Sheriff Court district or the Sheriffdom as a whole?

## Chapter 6:

8. What are the benefits and drawbacks of a system such as the one adopted in Ireland which transfers the cost of jury service to employers and lifts the burden of service from the self-employed where their livelihoods can be shown to be at risk? Is such a system likely in your view to serve the interests of the economy and of justice?

9. If a choice had to be made, on grounds of affordability, between granting earlier access to the longer trials rate and boosting that rate, which of these – less compensation but earlier, or higher compensation but later – do you think is more important?

10. Should those few jurors who serve on the very longest trials receive enhanced compensation for losses incurred (bearing in mind that this would inevitably depress to some extent the resources available for the generality of jurors)?

11. Do you agree that the introduction of an adult dependant carer allowance would be a valuable addition to the suite of juror allowances? Are there any other allowances for regular expenses that you think should be considered (nb childcare expenses – both pre-school and out of school – are already reimbursed).

## Chapter 7:

12. Do you think the number of jurors in criminal trials in Scotland should be reduced? Please explain why you think it should or should not.

13. If it were reduced, to what number should it be reduced and what number of votes should be required to reach a verdict?

14. Should there be a minimum jury quorum required, below which a trial should be discontinued? If so, what should that number be and would it be affected by a reduction in jury size?

15. If there is a quorum, what should be the effect of the number of jurors falling below that quorum? Are there any circumstances in which the court should allow such a trial to continue, and, if so, what? How can the court satisfy itself that the interests of justice are well served?

## Chapter 8:

16. Do you agree that juries should continue to be used even in lengthy criminal trials, regardless of the type of crime?

17. If you do not agree, what alternatives would you propose? How would those alternatives reconcile the interests of justice with the practical considerations that we have outlined?

18. If you agree, should substitute jurors be considered and, if so, in what circumstances? How many should there be and what model should they follow?

19. Are there any circumstances in which the court should allow a trial to continue despite the jury falling below the quorum? What are they? Should the exercise of such a discretion be linked to trials of a particular length?

**20. Moreover, how can the court satisfy itself that the interests of justice are well served?**

The consultation will run from 18 September to 11 December 2008. Please send your responses to:

The Modern Scottish Jury in Criminal Trials  
Criminal Procedure Division  
Criminal Justice Directorate  
Room GW.14  
Scottish Government  
Regent Road  
Edinburgh, EH1 3DG

Tel: 0131 244 2103  
Fax: 0131 244 2623

OR email your response to us at:

Email: [jurorconsultation08@scotland.gsi.gov.uk](mailto:jurorconsultation08@scotland.gsi.gov.uk)

For additional hard copies of the consultation paper and response proforma please contact us at the above address. Electronic copies of these documents are also available at:

<http://www.scotland.gov.uk/consultations>

All responses, other than those where the respondent specifically asks for confidentiality, will be available for public inspection. Respondents are asked to clarify on their response form whether or not they wish their response to remain confidential. An independent analysis of responses will be commissioned and the report of that analysis will also be published on the Scottish Government website.

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RR Donnelley B55605 09/08

