



The Convener
Criminal Justice Committee
Scottish Parliament

Tel: 0300 020 3000
Text Relay prefix: 18001

Your ref:

Our ref:

29 February 2024

Dear Convener,

During the appearance of the Lord Advocate at the Criminal Justice Committee on 31 January 2024, the Lord Advocate undertook to provide the Committee with some further written information on the following areas-

- The views of COPFS on the benefits of having a degree of formalisation put in place to clarify the reassurances received by COFPS that the role of the Victims and Witnesses Commissioner as envisioned in the Bill does not represent a threat to the independence of the Lord Advocate. For example, by way of a memorandum of understanding or the like;
- A further written submission on the case law which has developed in England and Wales where the Crown, in that jurisdiction, has sought a retrial in various cases, where such an application was believed to be in the public interest to do so.

Victims Commissioner

COPFS officials have met with the relevant Scottish Government officials to explore the possibilities for a formalisation of the role of the Commissioner in relation to the independence of the Lord Advocate.

As the Commissioner would be independent of both the Scottish Government and the Parliament it was determined that it would be appropriate for any such formalisation to be undertaken between the Commissioner and the Lord Advocate directly.

It has been identified that the existing Bill provisions at sections 6 and 7 would enable the Lord Advocate and the Commissioner to agree the terms under which the Commissioner exercises their functions relative to the Lord Advocate's



independence and it is considered that these provisions would provide the opportunity for the required formalisation to be achieved.

Retrial Provisions in England and Wales

In England and Wales, a unanimous verdict, or a majority verdict of 10 out of 12 jurors, is required to return a verdict of Guilty or Not Guilty in any jury trial. Where a jury cannot return a verdict under these conditions the jury is discharged, and no verdict is recorded in relation to that charge.

Consequently, as no verdict has been returned there is no legal bar on the accused facing a retrial in relation to that matter, historical caselaw recognising that the only bar to a trial was a previous conviction or acquittal on the charge.

The Court does not grant the right for a retrial but rather the prosecution intimates to the court when it intends to retry an accused in relation to a charge on which no verdict has been returned.

An accused is able to submit to the court that a retrial would be oppressive and an abuse of process and upon such a motion being made the court would consider a number of factors that would include an informed and dispassionate assessment of how the interests of justice in the widest sense are best served. This would take account of the accused's interests as well as the public interest in convicting the guilty, deterring violent crime and maintaining confidence in the efficacy of the criminal justice system.

In relation to the processes that are undertaken by the Crown Prosecution Service (CPS) in considering whether a retrial should take place, guidance is provided on the CPS website.¹

This guidance confirms that there is a presumption that the prosecution will seek a re-trial where a jury fails to agree on a verdict at the first trial and that the following factors should be taken into account when considering a re-trial in these circumstances.

- The merits of the case;
- Likely reasons for the jury's failure to reach a verdict;
- The public interest in seeking a verdict
- The interests and views of the victim(s);
- Any views expressed by the trial judge;
- Prosecuting Advocate's opinion; and
- The views of the police.

The guidance confirms that where two juries fail to reach a verdict, the presumption is that the prosecution will not seek a third trial unless there are exceptional circumstances.

¹ [Retrials | The Crown Prosecution Service \(cps.gov.uk\)](https://www.cps.gov.uk/retrials)



The guidance confirms that it is in the interests of justice that a decision to seek a re-trial should be taken as soon as possible and be communicated promptly to the court, the defendant and the police and sets out that a decision should be made no later than within 7 days if the accused is remanded in custody and 14 days if the accused is on bail.

Furthermore, any decision to seek a retrial has to be referred to the relevant Unit Head or Head of Division and any decision to seek a second retrial must be referred to the Chief Crown Prosecutor.

I trust that the above information is of assistance to the Committee.

Yours Faithfully,

Laura Buchan

Procurator Fiscal Policy and Engagement

