Victims, Witnesses and Justice Reform (Scotland Bill)

Criminal Justice Committee
Call for views

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The Open University
Scotland

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Call for views

What are your views on the proposal in Part 4 of the Bill to abolish the not proven verdict and move to either a guilty or not guilty verdict?

This submission is based on research conducted by a team of academics within the Open University and does not necessarily represent the formal view of the institution.

Since 2015, Dr Lee John Curley has worked with researchers at the OU and elsewhere investigating the usage of the not proven verdict in Scottish criminal trials. Full details of the published academic papers can be provided to the committee if required.

In 2021 we surveyed the views of legal professionals towards the Scottish jury system. We found that most legal professionals favoured a binary verdict-system of proven and not proven (Curley, Munro, Frumkin, & Turner, 2021a). Further, some legal professionals suggested that juror understandings of the not proven verdict might be poor (Curley et al., 2021a). This may be due to the

three-verdict system (i.e., that two acquittal verdicts exist) rather than the not proven verdict itself.

In a separate study we asked members of the public who fulfilled the criteria for Scottish jury service to select from a list of real and fictitious verdicts (guilty, not guilty, not proven, proven, undecided and hung) which could be used by Scottish juries (Curley, Munro, Turner, Frumkin, Jackson & Lages, 2022). In this study, the majority of participants ticked incorrect combinations of verdicts. The study identified that knowledge of the current three-verdict system in Scotland amongst members of the public is limited. This highlights a need for either reform to a two-verdict system or education in relation to the current three-verdict system.

In addition, the not proven verdict, within a three-verdict system, may also be misinterpreted by laypeople. This is because members of the public may assume from the not proven verdict that the accused was guilty, despite an acquittal verdict being given (Curley et al., 2021b). This has the potential to breach Article 6 of the European Convention of Human Rights and Fundamental Freedoms (Curley et al., 2019). We emphasise that these points highlight

possible issues with a three-verdict system rather than with the not proven verdict itself.

Based on the research by Dr Curley and co, we recommend that the three-verdict system should be scrapped and replaced with a two-verdict system. The precise binary system should be decided based on discussion, debate, and evidence.

We believe however there has not been enough debate on what form a binary verdict system should take. An alternative verdict system to guilty and not guilty could be a verdict system made up of proven and not proven verdicts, with proven being the conviction verdict and not proven being the acquittal verdict. As mentioned earlier, legal professionals highlighted a preference for a binary verdict system of proven and not proven over either the guilty and not guilty or guilty, not guilty or not proven verdict systems. As these individuals have the most direct and lived experience of the jury system in Scotland, we urge the Scottish Government to consider their opinions.

One reasoning for their preference of proven / not proven was that terminology such as guilty and not guilty are linked with ideas of punitive action, notions of 'truth', and concepts of morality. These do not coincide with a juror's actual role

of using the evidence provided in the case to establish whether the Crown's case has been proven. A move to focus on proof, rather on guilt, may help direct jurors to their true role in a nuanced way (Curley et al., 2021a).

Likewise, research from Curley et al. (2022) found that conviction rates were similar for a proven and not proven verdict system when compared to the current guilty, not guilty and not proven verdict system in a finely tuned homicide trial. However, both the proven and not proven verdict system and the guilty, not guilty and not proven verdict system led to significantly fewer convictions than a guilty and not guilty verdict system. This, again, suggests that terms like 'guilty' and 'not guilty' may promote punitive decision making that distracts jurors from their true role.

Our research found no preference with regards to which acquittal (not proven or not guilty) verdict mock jurors preferred, showing that jurors would be unlikely to be confused with a change from not guilty to not proven (Curley et al., 2022). The lack of terminology preference from jury-eligible members of the public in regards to an acquittal verdict also suggests that stigma attached to the not proven verdict in the current Scottish system is unlikely to endure in a binary system of proven and not proven.

The proven and not proven verdicts inability to increase conviction rates may be seen as disappointing to complainers of sexual assault and associated organisations/charities. It may be helpful to note, however, that the independent study conducted by Ormston et al. (2019) did not highlight a significant change in conviction rate in a sexual assault trial (both at the juror and jury level) when comparing the Scottish three-verdict system with the guilty and not guilty verdict system; likely due to rape myths influencing decisions in both verdict systems. It is therefore unlikely that reform towards a guilty and not guilty verdict system would lead to a significantly increased conviction rate in rape and sexual assault trials when compared to the current Scottish three-verdict system or the proven and not proven system.

Instead, educating jurors about rape myths, promotional campaigns that target against rape myth, and funded research targeted at attenuating the impact of rape myths on jurors is needed (Richardson & Gardiner, 2021; Scottish Government, 2019; Topping & Barr, 2020) to increase the current conviction rates in rape and sexual assault trials. Such education programmes can take the form of knowledge exchange activities (both at schools and in the wider community) and juror education initiatives (the Open University has conducted

such initiatives in the past). The utility of such initiatives would need to be piloted and tested.

In summary, we propose a change from the current three-verdict system to a binary verdict system. However, there needs to be more discussion, debate, and evidence before it is decided upon what binary verdict-system Scotland should reform to, as alternatives do exist to the traditional guilty and not guilty system.

What are your views on the changes in Part 4 of the Bill to the size of criminal juries and the majority required for conviction?

This submission is based on research conducted by a team of academics within the Open University and does not necessarily represent the formal view of the institution.

As there are two policy changes to consider here (1) 15-to-12-person jury; 2) change from a simple majority rule to a qualified majority (10/12) rule), we will deal with each of them in turn.

15 person to 12 person jury

The evidence available to inform this policy change is limited. Currently, there have been only two papers in the literature discussing the potential implications of changing from a 15-person jury to a 12-person jury. First, the independent jury study by Ormston et al. (2019) found that juries were more likely to convict in 15-person juries (N = 5) when compared to 12-person juries (N = 2). However, this difference was not significant (meaning any observed difference might be random) as the study didn't have a large enough of a sample at the jury level to

draw conclusions; only 64 juries with three different factors. At the juror level, 15 versus 12 person juries did not influence conviction rates either.

Second, our survey of the perspectives of legal professionals found that “63 (85.14%) participants preferred the 15- person jury size, whereas 11 (14.86%) preferred the 12- person jury size" which is meaningful in statistical terms (Curley et al., 2021, P. 260). Legal professionals suggested that they favoured the 15-person jury size as it leads to a more representative jury to be collected and that it has more flexibility for dropouts. Therefore, based on the available research, we currently do not know how different jury sizes (12 versus 15) influence verdicts, but we do know that legal professionals favour the 15-person jury size. More evidence is needed to before reform can be justified.

Simple majority rule to a qualified majority (10/12) rule

The proposed policy change does not seem to be based on evidence. The Ormston et al (2019) study found that jurors asked to reach a simple majority were more likely to reach a guilty verdict (post-deliberation) when compared to those asked to reach a unanimous verdict. This effect was mirrored in both sexual assault and physical assault trials. However, again, due to a small sample, the difference between a simple majority rule versus a unanimous rule

was not significant/meaningful at the jury level. Likewise, the study did not investigate a qualified majority rule (e.g., 10/12) on juror or jury verdicts.

In our research, legal professionals ranked each of the different majority rule systems: 1) qualified majority rule; 2) simple majority rule; 3) unanimous rule (Curley et al., 2021). The research found that legal professionals preferred the qualified majority rule over the simple majority rule or the unanimous majority rule. Likewise, the simple majority rule was ranked higher than the unanimous majority rule.

Based on the above research, we know that the simple majority rule may increase convictions relative to a unanimous rule (at least at the juror level), that legal professionals ranked a qualified majority rule above alternatives (majority and unanimous rules), and that no research has compared a qualified majority (10/12) with alternative systems (again, the majority and unanimous rules) in a mock jury setting. Therefore, currently, the only justification for reforming to a 10/12 qualified majority rule is because legal professionals prefer it. Despite this being a positive that the views of legal professionals are being heard, this justification alone should not inform reform.

Experimental research comparing the impact of a qualified majority rule (10/12) on juror and jury verdicts with a simple majority and unanimous rules is needed.

On a side note, the proposed changes may also have an undesired effect on conviction rates in sexual assault and rape trials. For example, as already suggested, based on the Ormston et al. (2019) paper - and the Hope et al. (2008) paper – a change from a three-verdict system (guilty, not guilty and not proven) to a two-verdict system (guilty and not guilty) is unlikely to influence convictions. This is because such an effect has not been witnessed in a single paper at the juror or jury level. However, the Ormston et al (2019) paper did show that the simple majority rule leads to an increase in convictions in sexual assault trials when compared to the unanimous rule at the juror level. Therefore, any change from a simple majority rule, especially a change based on no current evidence, may lead to a lower conviction rate in rape and sexual assault trials. We urge the committee to take this point seriously.

What are your views on the proposals in Part 6 of the Bill relating to a pilot of single judge rape trials with no jury?

This submission is based on research conducted by a team of academics within the Open University and does not necessarily represent the formal view of the institution.

We have a number of concerns relating to pilot of the single judge rape trials with no jury, we will outline each of these in turn.

First, expert decision makers are no less biased than laypeople (Dror, Pascual-Leone, Ramachandran, 2011). A plethora of research has shown that expert decision makers are influenced by cognitive bias when making their decisions. For example, fingerprint experts, DNA examiners, judges, magistrates, medical professionals, and legal professionals have all been shown to be negatively influenced by cognitive bias during their decision making process (Dhami & Ayton, 2001; Dror & Hampikian, 2008; Englich, Mussweiler, & Strack, 2006; Mustard, 2001; Vidmar, 2011). The utilisation of biases by experts are usually caused by experts adapting their cognition to manage finite cognitive resources (Dror et al., 2011). Experts are not superhuman, rather they utilise different cognitive strategies (such as cognitive short-cuts) to select information and make

decisions. This usually makes experts more efficient decision makers, but also opens them up to bias and error (see Dror et al., 2011 for more information).

There is no promise that a single judge trial will attenuate the role that bias plays in the courtroom, it may even exaggerate it. This is because if there is only one judge, any negative belief they may have will, ultimately, influence the final decision. However, this is not the case for jurors, even if a minority of jurors (5/12 or 7/15; depending on the future jury size in Scotland) have negative beliefs, there is a chance for other viewpoints to challenge and fight back against these beliefs in the deliberation room (De La Fuente, De La Fuente, & Garcia, 2003).

Second, judges, like laypeople, can be influenced by beliefs such as rape myths and racial biases. For example, Rachlinski et al. (2009) found that judges were as likely as other individuals to display stereotypical beliefs of black individuals on an implicit associations test and that judges gave harsher penalties when the accused is black than when they were white. Further, Tempkin and Gray (2018) found that 71.43% of judges (in an observational study) failed to use court approved illustrations when rape myths were mentioned by the defence council. The main issue regarding judges failing to challenge rape myths is that either they do not notice them or do not disagree with them. Either explanation,

however, would not make them an ideal candidate to replace jurors in rape trials.

Third, there is currently no experimental research investigating rape myth usage in judges, meaning we do not know the exact impact that rape myths may have in judge only trials. A pilot to study judge only rape trials is therefore premature. Deciding to study the effects of such a change initially in real trials - with real accused individuals and complainers - is risky. It is the equivalent of a biologist skipping experiments on cell lines and studying how a particular drug influences a real-life patient. *Note: however, research on the not proven verdict, jury sizes and majority rules may be more suitable for a pilot as it follows on from experimental research*.

We also currently do not know what real impact judge only trials may have on conviction rates in rape trials. For example, as of 2022, only 26.69% of the judiciary were female and 82.07% of the judiciary were over 50, meaning most of the judiciary were male and over 50 (Judiciary, 2022). Psychological research has shown that older individuals and males are much more likely to believe in rape myths than younger individuals and females (Beshers & DiVita, 2021; Kim & Santiago, 2020; Trottier, Benbouriche, & Bonneville, 2021). Meaning that the

demographics of judges in Scotland may make them more likely to be influenced by rape myths than a representative jury, where anyone can be a juror. Due to this, judge only trials may cause a decrease in the conviction rates of rape and sexual assault trials.

Conversely, any potential review of judicial decisions by ministers may undermine the independence of the judiciary (Summan, 2023). Further, expectations from ministers relating to an increase in convictions may potentially bias judges into reaching guilty verdicts during the pilot. This increase may be artificial, however, and decrease post-pilot when oversight is taken away.

In addition, judges are likely to be more aware of the low conviction rates in rape trials than jurors. Again, this may lead to a pressure on judges to convict due to a fear of scrutiny in the press. Therefore, juryless trials may increase convictions. However, this increase may be informed by pressure/bias rather than rational decision-making and court-based evidence.

In summary, experts (including judges) can be influenced by cognitive biases and rape myths. Judge only trials are unlikely to attenuate the role that bias and rape myths play in rape trials and may even exaggerate it (as highlighted

earlier). Finally, a pilot where the lives of real-life individuals are at stake is premature, a pilot should only ever be a second stage of research, preceded by an experimental stage.

Are there provisions which are not in the Bill which you think should be?

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There are two main provisions that should be included in the bill, which are not: 1) juror education on rape myths and cognitive bias; 2) juror selection using validated rape myth measures. Each of these will be addressed in turn.

First, more training in relation to rape and cognitive biases should be provided to prospective jurors. Research has found that education programmes can attenuate the role that rape myths play in juror decision making (Hudspith et al., 2023). For instance, Hudspith et al. (2023) found the following:

"*Intervention types that were effective in reducing RMA [rape myth acceptance] included those that presented RM [rape myth] information; those that contained an empathy component; and bystander programmes. With regards to duration and format, short interventions led to reductions in RMA, and most successful interventions were presented via videos*." (P.981).

To rectify this educational gap, the Open University have created a jury hub. This hub provided resources (such as podcasts, interactive exercises, academic articles, and blogs) in the hope of being able to provide prospective jurors, and members of the public, with the most up to date literature on juror decision making, cognitive bias and rape myths. Further details can be provided to the Committee if required.

More resources are needed if we hope to educate prospective jurors about rape myths and cognitive bias. Further, with the creation of a Sexual Offences Court, prospective jurors could be educated on rape myths in a similar manner to the participants in the Hudspith et al. (2023) paper. This would be the most effective manner of decreasing the role that rape myths play in court. More information regarding what this intervention could look like can be provided.

A second potential recommendation to attenuate rape myths in jurors is to remove problematic jurors who score highly on rape myth measures. For example, research has shown that scientific instruments such as the Illinois Rape Myth Acceptance scale can be used to predict verdicts (Hudspith et al, 2023). Instruments such as these could be used in real life trials to remove jurors who have a high likelihood of believing in rape myths. Any changes to the

current system, however, would need to follow a cycle of experimental research and piloting.

In summary, education of jurors and the removal of jurors who believe in rape myths would be an evidenced based way of increasing convictions in rape trials when compared to judge only rape trials, as no evidence currently exists to suggest that said method would have positive impact on courtroom justice.

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