The Open University
SCOTLAND

Submission by
The Open University in Scotland

The not proven verdict and other reforms

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The not proven verdict and related reforms

Part 2: The Not Proven Verdict

Question 1 Which of the following best reflects your view on how many verdicts should be available in criminal trials in Scotland?

- Scotland should change to a two verdict system

Please give reasons for your answer:

Independent research conducted by Ipsos Mori and research we have undertaken as part of our employment at the Open University underpins our response to this question and consultation. The former has been highlighted in the section on background, so our response focuses on the findings of our research. That research took several different forms.

First, the results of a survey we conducted on the views of legal professionals towards the Scottish jury system. This survey found that these individuals favoured a binary system of proven and not proven verdicts (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 rather than the not proven verdict itself and/or due to the lack of legal education provided to jurors.

Second, in a separate study we asked members of the public who fulfilled the criteria for 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 123 participants ticked combinations which were incorrect options, and 104 participants ticked combinations which were correct options. The study identified that knowledge of the current three-verdict system in Scotland amongst members of the public is limited. This lack of knowledge could lead to misunderstandings and instances of injustice. However, it should be noted that a large percentage of participants in the study also gave incorrect responses in relation to jury size and verdict majority size. The results of the study suggest that some form of basic legal education for jury members and members of the public eligible for jury service may be an important factor to consider when evaluating potential reforms.

Third, experimental research shows that the perception of guilt associated with making a not proven verdict is significantly higher than the perception of guilt associated with reaching a not guilty verdict. This may highlight that the three-verdict system may suggest to jurors that defence lawyers need to prove innocence to get a not guilty verdict. This is not, in fact, the how the three-verdict system operates. The not proven verdict, within a three-verdict system, may also be misinterpreted by laypeople who may assume from the verdict that the accused was guilty, despite an acquittal verdict being given (Curley et al., 2021b). This has the potential to be a breach of Article 6 of the European Convention of Human Rights and Fundamental Freedoms (Curley, MacLean, Murray, Pollock, & Laybourn, 2019). We should note that these points highlight possible issues with a three-verdict system rather than with the not proven verdict itself.

Question 2 If Scotland changes to a two verdict system, which of the following should the two verdicts be?

- Proven and not proven

Please give reasons for your answer. If you have selected "other" please state what you think the two verdicts should be called:

Our justifications for our choice of proven and not proven come from the evidence we have gathered through our empirical investigations.

First, when surveyed, 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. 64 (82.05%) participants defined the proven verdict "as reflecting a situation where a crime had been proven beyond reasonable doubt" (Curley et al., 2021a). 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', concepts of morality and emotion. These do not coincide with a jurors actual role of using the evidence provided in the case to establish whether or not 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) and promote more cold and rational decision-making processes (Curley et al., 2022).

Second, 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 made by the Modern Studies Association, in collaboration with the Faculty of Advocates and Bloody Scotland. However, both the proven and not proven verdict system and the guilty, not guilty and not proven verdict system lead 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 and moralistic decision making that distracts jurors from their true role of focussing on the evidence provided to establish whether or not the Crown has proven their case. Likewise, a not guilty and guilty verdict system may create anxiety, as it may suggest to the jurors as the decision makers that they have to make assertions beyond the evidence presented to them (which may in turn promote emotional decision-making processes). Any promotion of emotive decision making is likely to lead to intuitive decision processes, which have been shown to increase the likelihood of a guilty verdict (Curley et al., 2019). This is not to say that all guilty verdicts are reached through an emotive manner, rather that emotive decision making is likely to lead to a guilty verdict. Phrases such as proven and not proven may help to attenuate this.

Furthermore, a proven and not proven system would lead to a conviction rate similar to that of the current three-verdict system, whilst removing the confusing aspects of the current three-verdict system (having two acquittal verdicts where only one is defined), and protect Scottish jurors from the punitive effect that terms such as 'guilty' and 'not guilty' may have on their decision making.

Third, 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.

However, the proven and not proven verdicts inability to increase conviction rates may be seen as disappointing to complainers of sexual assault and associated organisations and charities. We would urge for commissioned, independent research, which investigates their opinions of any change.

It may be helpful to note that the independent study conducted by Ormston et al. (2019) did not highlight a significant change in conviction rate in a rape trial when comparing the Scottish three-verdict system with the Anglo-American two-verdict system. The effect was only significant for the physical assault trial. 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, both north and south of the border (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 utility of such initiatives would need to be piloted and tested.

The Open University in Scotland has successfully worked with partners to develop free online resources and upskill individuals and would be happy to assist with this work. Examples of the work achieved in partnership include, the 'Carer Aware at University' and 'Caring Counts: a self-reflection and planning course for carers' developed with the Carers Trust Scotland and carers themselves.

Question 3 If Scotland keeps its three verdict system, how could the not proven verdict be defined, in order to help all people including jurors, complainers, accused and the public to better understand it?

Based on the research we conducted in 2021 (Curley et al., 2021a), the majority of legal professionals believed that jurors would perceive the verdict to mean "innocent in law but not community". Any definition will need to be accessible, specific and short.

The not proven verdict could be defined to mean: "that the evidence has not been enough to prove 'beyond reasonable doubt' that the accused person committed the crime." If such a definition was incorporated within a proven and not proven verdict system, emotive terms such as innocent and guilty could be removed. It would also help remove any ambiguity that currently exists regarding the existence of two acquittal verdicts.

In the current system, we do not know if a person charged and found guilty following trial, is truly guilty. A guilty verdict in the current system is given when a jury or judge believes that enough evidence (beyond reasonable doubt) has been provided by the Crown to prove their case. Similarity, we do not know if someone who received a not guilty verdict is truly innocent, we just know the Crown has not proven their case (beyond reasonable doubt). This highlights that semantically, the proven and not proven verdict system is more fit for purpose (Jackson, 1998). Interestingly, legal professionals defined a potential proven verdict as "reflecting a situation where a crime had been proven beyond reasonable doubt" (Curley et al., 2021). This definition received more consensus than the existing guilty, not guilty and not proven verdicts. As a definition it is also clear and accessible.

Question 4 Below are some situations where it has been suggested a jury might return a not proven verdict. How appropriate or inappropriate do you feel it is to return a not proven verdict for each of these reasons?

Please select one option: - The jury returns a not proven verdict because they believe the person is guilty, but the evidence did not prove this beyond a reasonable doubt.:

1 – Appropriate

Please select one option: - The jury returns a not proven verdict because they believe the case has not been proven beyond reasonable doubt, but they wish to publicly note some doubt or misgiving about the accused person.:

2 – Inappropriate

Please select one option: - The jury returns a not proven verdict because they believe the case has not been proven beyond reasonable doubt, but they wish to indicate to complainers and/or witnesses that they believe their testimony.:

2 – Inappropriate

Please select one option: - The jury returns a not proven verdict as a compromise, in order to reach agreement between jurors who think the right verdict should be guilty and others who think it should be not guilty.:

1 – Appropriate

Question 5 Do you believe that the not proven verdict acts as a safeguard that reduces the risk of wrongful conviction?

Yes.

Please give reasons for your answer and explain how you think it does or does not operate to prevent wrongful convictions::

A considerable amount of research shows that the availability of the not proven verdict reduces convictions in homicide (Curley et al., 2021b; Curley et al., 2022) and physical assault (Hope et al., 2008; Ormston et al., 2019) trials that are finely balanced. Some have argued that this reduction in convictions may highlight that a three-verdict system may act as a safeguard from wrongful convictions (Hope et al., 2008), others have argued that this may have led to truly guilty individuals being incarcerated.

The truth is we do not know whether the not proven verdict acts as a safeguard against wrongful convictions, which relates back to our main argument. The accuracy of the decisions made by jurors is not known, so terms such as 'guilty' and 'not guilty' are a legal fallacy, and terms such as proven and not proven may be more fruitful, as we can establish whether or not a trial has been proven (Curley et al., 2021a).

As the proven and not proven verdict system was found to lead to a similar conviction rate as the current three-verdict, then it could be argued that said system might also favour the defence and thus, similarly, ensure innocent people are not convicted. However, if the availability of the not proven verdict in sexual assault cases and rape trials caused a significant increase in acquittals relative to a guilty and not guilty system, we would argue with the position set out above. Sexual assault and rape trials are one of the least convicted trial types in Scotland and England and Wales, (Richardson & Gardiner, 2021; Scottish Government, 2019; Topping & Barr, 2020) and we do think it is the responsibility of policy makers and academics to try and rebalance the scales here and increase conviction rates in said trial types. Complainers of sexual assault have been consistently failed by the legal system over many years. The question that needs to be addressed is, how much does the availability of the not proven verdict decrease conviction rates in rape and sexual assault trials?

Two pieces of academic research have been conducted on this (none of which our own). The first was a small-scale experimental study conducted by Hope et al. (2008) which investigated the impact of the not proven verdict in sexual assault trials. The research found that the availability of the not proven verdict significantly decreased the amount of not guilty verdicts but did not have a significant impact on the frequency by which guilty verdicts are given. The second was the independent research conducted by Ormston et al. (2019), the largest and most ecologically valid jury study that has ever been conducted in the United Kingdom. The results found that the availability of the not proven verdict significantly reduced the number of guilty verdicts given in physical assault trials, but not in sexual assault trials. Therefore, currently, there is no experimental evidence to suggest that the not proven verdict reduces conviction rates in rape and/or sexual assault trials.

There are two main explanations of the findings above. First, the not proven verdict does not influence conviction rates. Second, the impact of the not proven verdict on conviction rates in sexual assault trials is masked in experimental trials by other factors that influence juror decision making to a larger extent. Such factors may include, corroboration, rape myths and/or a lack of legal education in jurors in relation to legal concepts (Curley et al., 2022). Regardless of which explanation is more fitting, more experimental research is needed before we fully understand the impact that the not proven verdict, within a three-verdict system, is likely to have on juror and jury decisions in rape and/or sexual assault trials.

We note the response of Justice Scotland to the Scottish Jury Research Findings issued in May 2020. This welcomed the insight provided into the 'three unique elements of the Scottish jury system' but expressed caution in basing reform on one research study, concerns over the lack of a clear aim in the proposed reforms and whether the safeguards currently provided would be lost. They also noted 'It is important to note that in the two verdict system in England and Wales, the conviction rate is comparable to Scotland (36% in 2017). It should also be noted that the conviction rate for rape and attempted rape in Scotland has increased significantly, perhaps as a result of other reforms already instituted in this area (the number of convictions for rape and attempted rape increased by 43% from 2017-18 to 2018- 19)'.

Question 6 Do you believe that there is more stigma for those who are acquitted with a not proven verdict compared to those acquitted with a not guilty verdict?

Yes.

Please give reasons for your answer::

Several pieces of research show that either more stigma or a higher perception of guilt is associated with juror perceptions of the not proven verdict when compared to the not guilty verdict (Curley et al., 2019; Curley et al., 2021a, Hope et al., 2008; Ormston et al., 2019). However, this stigma may be due to the existence of two acquittal verdicts rather than because of the not proven verdict itself. In other words, the presence of a three-verdict system causes one acquittal verdict to be associated with innocence and another to be associated with doubt regarding that innocence.

However, Jackson (1998) shows that stigma may still be attached to not guilty verdicts in Anglo-American criminal trials. Further, Jackson highlights that the availability of the not proven verdict removes ambiguity from what the jury meant, with a not proven verdict suggesting a jury thought there was a lack of proof and a not guilty verdict suggesting the jury thought there was both a lack of proof and that the person was innocent. In the current Anglo-American verdict system, the meaning of not guilty can be quite ambiguous to legal laypersons and the media (Jackson, 1998). Legal professionals would interpret a not guilty verdict to mean that the Crown did not provide enough

evidence to convict. But legal novices who may not be as apt in the law can perceive a not guilty verdict in a binary verdict system to mean either a person was innocent, or that they were guilty and that the case lacked the evidence. Put simply, in a binary system of guilty and not guilty, it is likely that some acquitted individuals will still be faced with stigma. This is due to the dissonance between the meaning attached to legal terms by legal professionals and policy makers and how legal novices, who serve as jurors, interpret these terms (Jackson, 1998). As long as terms such as guilt and not guilty exist, it is likely that the general public and media will continue to interpret decisions from a jury using a moralistic and emotional lens. And, as long as this moralistic and emotional lens exits, it is likely that stigma will be attached to accused individuals, regardless of the outcome.

One way to remove stigma to acquitted accused individuals may be to reform to a binary system of proven and not proven. By removing terms such as guilty and not guilty and focussing more on proof, the general public and media may not interpret verdicts given by jurors through such a moralistic or emotional lens. Instead, they may simply interpret the decision in line within the remit of the jury, that is, was the Crown's case proven or not (beyond reasonable doubt).

The Scottish Government, in our opinion, should be focussing their efforts on public legal education in Scotland. This education should be provided in schools, to the general public and prospective jurors. It should be focussed on what legal terms mean, on the justice system and on issues and perceptions that may plague a jury (rape myths and unconscious biases). Otherwise, issues relating to the acquitted facing stigma or the shamefully low conviction rates in rape and sexual assault trials will not improve.

Question 7 Do you believe that the not proven verdict can cause particular trauma to victims of crime and their families?

Yes

Please give reasons for your answer::

The most interesting part of the research conducted by Ormston et al. (2019) was the qualitative research conducted with survivors of sexual assault and rape. Their words highlighted that the not proven verdict was not always explained to them due to the lack of a definition. In addition, the negative impact that the not proven verdict had on them, as they perceived it as being close to getting a conviction, was powerful. We feel and empathise with anyone who has experienced trauma in relation to the not proven verdict.

Going forward, there are several research investigations we believe should be conducted to expand on the work highlighted above. First, how do survivors of sexual assault feel if the accused has received a not guilty verdict? Can this be traumatising as it suggests the jury found the accused innocent. Second, does the availability of the not proven verdict in a three-verdict system exacerbate this trauma? In a three-verdict system, the not proven verdict may feel so close to getting a conviction, whereas the disappointment may be lessened in a binary system of proven and not proven. These are questions that can only be answered by more research. The debate should not be rushed, as it creates a real opportunity for the Scottish Government to evaluate the current system and make a difference. More research and education could greatly improve the equity and fairness of the Scottish jury and trial system.

As highlighted in previous research, the availability of the not proven verdict has not been shown to significantly decrease convictions in rape and sexual assault trials (Hope et al., 2008; Ormston et al., 2019), suggesting that any change is unlikely to improve conviction rates. However, as the

availability of the not proven verdict does cause distress to victims of sexual assault, we do think there is a case to consider removing the verdict on those grounds alone. Nevertheless, the research we have suggested above is needed, as we currently do not know if the distress is caused by having a three-verdict system or if it is down to the not proven verdict in particular. We also do not know how a not proven verdict would be perceived by complainers of sexual assault in a binary system of proven and not proven.

As previously noted, further research needs to be conducted. We commend the work of Ormston et al. (2019). This genuinely is some of the best jury research to have been conducted in the UK. However, policy issues cannot be based on one research study alone. One research study alone cannot cover every aspect of proposed reforms. Potential limitations, such lack of generalisability beyond the crime types included in that study cannot be rectified or addressed within a single study. To thoroughly test proposed reforms a coordinated programme of research, which focusses on different aspects of the proposed reforms is required (control vs realism). Each research study should utilise different materials and collect data with different samples and methods. Only through such a programme can the utility of the not proven verdict be fully assessed (Krauss & Lieberman, 2017), without such a research programme any policy changes are based on limited and biased knowledge.

Krauss and Lieberman (2017) suggest that experimental jury research should start in a small way, with a focus on control, so as to establish causation within a controlled environment (i.e. what variables are causing what effects). Building on this, with each new research study, Krauss and Lieberman (2017) suggest that researchers can increase the realism (e.g. include jury deliberations) of the study and compare the findings with the research study before, establishing whether or not the findings of the research hold in a complex environment. They also suggest that experimental jury research be conducted alongside investigating similar topics through different angles, such as archival analysis, interviews and surveying relevant stakeholders. This is because mock jury research will also have limitations (e.g., it is shorter than a real trial and lacks consequences) and valid conclusions can only be made when other methods, that do not have said limitations, are used in conjunction with mock jury research.

Bearing these points in mind, the work of Ormston et al. (2019) is great, but should be seen as a starting point, not the end of the debate. If the not proven verdict, within a three-verdict system, is removed based on their findings in two mock trials (with the sexual assault trial leading to non-significant findings), it is likely that the future jury system will not increase the low conviction rates in rape and sexual assault trials. In turn, this may lead to critique of the Scottish Government and the utility of experimental mock jury trials in general. Therefore, we would urge further research before policy changes are made to ensure this does not happen and that no unintended consequences arise.

We would like to end our discussion of this question topic with one final point. More investment in the legal system is required. To ensure a fair, just and equal system with citizen and community participation this investment needs to go beyond the running of courts and include public legal education and research. Whilst we accept that there are constraints on budgets following the pandemic, the Scottish Government needs to invest more money into the legal system. Scottish Government ambitions in relation to human rights, to new policies, in meeting European and international requirements and in strengthening responses to violence against women require both research and investment. Our research (Curley et al., 2022) shows that the jury eligible members of

the public do not understand legal issues relating to verdicts, jury sizes and/or verdict majority numbers. In addition, a plethora of research shows that jurors do not understand terms like reasonable doubt or forensic evidence. The issues are not necessarily any verdict or jury system, rather it is the accessibility of legal language, terminology, process, and procedure. Jurors as "masters of fact" do not necessarily find the facts or the law accessible and are not always being guided or educated sufficiently to fulfil their role. Note: we do not support the abolishment of juries rather we suggest that they are supported and educated more about the role and use of legal terminology, process, and procedure. Insufficient legal and sex education within Scotland, and the UK, (both at school and for prospective jurors) may also play a role in why rape myths are believed, and why the conviction rate is so woefully low for rape both north and south of the border. The removal of the not proven verdict is not a magic wand and will not remove impact of rape myths and as the Ormston et al. (2019) study showed it is unlikely to increase conviction rates significantly. Therefore, the Scottish Government should be prepared to invest in combatting the systemic impact that rape myths and misogyny play in the legal process.

In relation to education for prospective jurors and public legal education more widely, the Open University in Scotland, would be happy to work with the Scottish Courts and Tribunals Service, the civil service, the Scottish Government, the Faculty of Advocates, Law Society of Scotland, and any other relevant bodies in relation to producing materials. As an institution, we have academics across a broad range of expertise (criminology, law, statistics, biology, history, technology, sociology, and psychology) that could create small, online courses for prospective jurors aimed at educating them about legal terminology, process and procedure, expert evidence, and biases (such as rape myths) that may influence their decision making.

For example, the Open University in Scotland has produced the following materials as part of their Young Applicants in Schools Scheme which may be helpful: https://www.open.edu/openlearn/scotland-colleges/boc-options-yass-students. These have also been made more widely available to the public on the university's OpenLearn platform.

For example, the Open University, in partnership with specialist advisors, has produced a free online course to introduce UK immigration law and advice for anyone with an interest in the area and anyone considering becoming an immigration adviser. https://www.open.edu/openlearn/society-politics-law/introduction-uk-immigration-law-and-becoming-immigration-advisor/content-section-overview?active-tab=d

Part 3: Jury Size

Question 8 Which of the following best reflects your view on jury size in Scotland?

If Scotland changes to a two verdict system:

- Jury size should stay at 15 jurors

If you selected "some other size", please state how many people you think this should be: :

Please give reasons for your answer including any other changes you feel would be required, such as to the majority required for conviction or the minimum number of jurors required for the trial to continue::

We have chosen the 15-jury size option based on our research with legal professionals, who preferred this system (Curley et al., 2021). Although, in our research study this was the factor they seemed to rate as a lower priority. However, the jury size number very much depends on what binary system is utilised and what the goal of reform is.

If the verdict system is changed to a proven and not proven system, then it would make sense to keep the current 15-person jury size. Ormston et al. (2019) found that juries were more likely to convict in 15-person juries when compared to 12-person juries. Therefore, the decrease in convictions caused by a proven and not proven system, when compared to a guilty and not guilty system, would be balanced by the increase in convictions that would be caused by a 15-person jury system, relative to a 12-person. This decision to keep the 15-person jury system could be further justified as it would continue to allow a more representative jury to be built.

If the verdict system is changed to a guilty and not guilty verdict system, then it might make sense to change the current jury size to 12. This is because the increase in convictions from a guilty and not guilty verdict system, relative to other systems, would be balanced out by the decrease in convictions caused by a change from a 15-person jury to a 12-person jury (Ormston et al., 2019).

How each of the varying factors (majority size, jury size and verdict systems) interact in relation to conviction rates is also an important issue to consider. If the Scottish Government opt for a verdict system of guilty and not guilty, with a 15-person jury, and a simple majority verdict system, it is likely that any increase in conviction rates will be correlated with increases in instances of injustice. If the Scottish Government opt for a three-verdict system, with a 12-person jury, and a unanimous decision rule this may decrease conviction rates to a drastically low level (Ormston et al., 2019) and call into question the purpose of trial by judge and jury. However, if the purpose of this consultation is to simply permutate the current jury system into something different, yet keep a similar conviction rate through carefully balancing each of the factors based on the work of Ormston et al. (2019), it does make the purpose of any policy change, potentially, futile. Any policy change requires further research and, to be worthwhile, needs to make the legal system in Scotland more fit for purpose, not simply be a political exercise.

Conviction rates are useful measures, they do highlight how certain factors (such as race, ethnicity, pre-trial publicity) can decrease the equality, fairness and equality of the legal system. However, in the case of verdict systems, what the appropriate result is (i.e. an increase or a decrease in convictions rates) is difficult to tell, as we do not know how this improves or attenuates juror and jury accuracy rates. Alternative measures might be more fruitful (i.e. perception of guilt and participation in deliberation) here. If the focus of the policy change is not on conviction rates, but on juror participation in a jury, it would be sensible to recommend a 12-person jury based on the findings from Ormston et al. (2019). However, basing a policy change on one study alone without further research could have unintended consequences. If the goal is to increase representativeness, public participation in the legal system, and create a heterogenous jury in relation to their biases, which has been shown to attenuate the role that biases play in jury outcomes (Curley, Munro, & Dror, 2022; De La Fuente, De La Fuente, Garcia, 2003), then a slightly larger jury size of 15 could be favourable.

Nevertheless, just because the numbers 12 and 15 have been used traditionally in Scotland and south of the border respectively, this does not mean that other jury sizes might be more fruitful. Again, continued research which might pilot different verdict systems could be a good starting point for policy reform. For example, during WW2, the Administration of Justice (Emergency Provisions) (Scotland) Act 1939 allowed for a jury of 7 members, except for trials for treason or murder, future research could investigate the utility of such a size.

Part 4: Jury Majority

Question 9 Which of the following best reflects your view on the majority required for a jury to return a verdict in Scotland?

If Scotland changes to a two verdict system:

- We should change to require a "qualified majority" in which at least two thirds of jurors must agree (this would be 10 in a 15 person jury, or 8 in a jury of 12).

If you selected "some other majority requirement", please state what proportion of the jury you feel should have to agree to the decision::

Please give reasons for your answer including any other changes you consider would be required such as to the minimum number of jurors required for the trial to continue: :

We agree that the jury majority size cannot sensibly be considered in isolation from corroboration, the Scottish three verdict system, and the size of the Scottish jury. In Curley et al., (2021a) we surveyed the views of legal professionals in Scotland on aspects of the Scottish legal system. Many responses noted that if any element is changed in isolation, their preferences for other parts of the system might also change.

In Curley et al., (2021a) the unanimous verdict option was least preferred by a considerable distance, and the existing simple majority was second compared to a preferred qualified majority (in the study this was noted as either 10/12 or 12/15 to include the possibility of a 12-person jury). 49% of our sample preferred a qualified majority. However, when asked how the sample would decide a legal system "from scratch", most of our sample reported combinations of factors that included the simple majority (55%). This finding may suggest a contentment with simple majority if other changes were made, but a preference for a qualified majority if it was the only change made to the current Scottish legal system.

Further, the top three preferences in our survey of legal professionals are as follows:

1. 15-person jury, simple majority system, proven and not proven verdict system

2. 15-person jury, simple majority system, guilty, not guilty and not proven verdict system

3. 15-person jury, qualified majority system, proven and not proven verdict system.

The least preferred system, with no support from any of the legal professionals, was a 12-person jury, with a unanimous system, and a guilty and not guilty verdict system.

Our legal professional sample perceived the qualified majority system to favour the defence whereas the simple majority system favoured neither side. No experimental jury research has been conducted on this though and research would be needed before any policy implications can be drawn.

Ormston et al. (2019) found that the simple majority verdict system resulted in more guilty verdicts than the unanimous system. If the Scottish Government wish to increase the conviction rate keeping the simple majority system should be their preference. A word of caution though, a simple majority verdict system, with verdict options of guilty and not guilty and a 15-person jury would be likely to increase instances of injustice alongside convictions. And again, if the Scottish Government change from a simple majority to a unanimous verdict system to decrease convictions, but then change from a three-verdict system to a two-verdict system of guilty and not guilty to increase convictions, this would seem a futile policy change, both in terms of time and cost. Therefore, we would suggest that other measures are also taken into account.

Our sample believed that the simple majority system promoted discussion and speed of decision making and reduced the chance of a hung jury. Their perception was that a simple majority was better at reducing juror biases without reducing juror contributions, which goes against some of the findings from Ormston et al., where they found that unanimous verdicts led to more participation and longer deliberation by juries. On balance, a compromise is the qualified majority, which could ensure efficient deliberations, decrease the chance of hung juries and satisfy legal professionals.

Question 10 Do you agree that where the required majority was not reached for a guilty verdict the jury should be considered to have returned an acquittal?

Yes

Please give reasons for your answer::

Only if 8 out of 15 jurors vote for a guilty verdict, in the current system, should a guilty verdict be given. More guidance should be given to direct a jury about this.

Part 5: The Corroboration Rule

Question 11 Which of the following best reflects your view on what should happen with the corroboration rule in the following situations?

(a) If Scotland remains a three verdict system and keeps the simple majority:

- Scotland should keep the corroboration rule as it is currently

Please give reasons for your answer::

We note that, along with the other aspects of the Scottish legal system discussed in this consultation, changes to corroboration would not necessarily be sensible without considering changes to other elements of the legal system. For example, corroboration, the simple majority system and the not proven verdict are likely to interact in their impact on conviction rates. The effect of corroboration was not investigated in the Ormston et al. (2019) study and therefore we do not have information on how these factors interact and influence the jury when they are making a decision.

Corroboration in Scotland is of such critical importance to the function of the legal system, as the essential facts must each be established by two or more independent “streams” of evidence. We agree that corroboration becomes problematic when considered in the light of crimes committed in private, with the most pertinent example being sexual crimes.

Mutual corroboration and other developments (corroboration for the fact of reasonable belief of consent, corroboration for penetration via scientific or medical evidence, corroboration of “more serious” sexual offenses by “less serious” sexual offenses) are helpful in alleviating some of the

concerns associated with crimes taking place in private. We believe that the removal of time limitations in relation to the corroboration sexual crimes via distress caused by those crimes is an especially appropriate development reflecting improved understanding of the outcomes of sexual assault.

The concern remains that crimes taking place in private are often more difficult to corroborate due to the lack of evidence from multiple sources. Indeed, mutual corroboration relies upon an individual having committed a similar-enough crime towards two or more other individuals in a manner identifiably linked by time (though perhaps not when sexual abuse is involved), character and circumstance. The use of dockets can help in establishing these links, but there will still be circumstances where the lack of evidence would not make justice likely for victims even were the case to reach court. We would be open to more clauses in relation to sexual offences. However, we would need to see what the Scottish Government suggest, and any suggestions would need to be reviewed by legal professionals and experimentally.

Another concern, shared by critics of the 2013 bill, was that the removal of corroboration would not meaningfully improve the conviction rate for crimes taking place in private and would result in further strain to a creaking court system. Cases with 'strong evidence' are likely to be able to corroborate the essential facts, so cases that could not corroborate those essential facts are perhaps more likely to result in acquittals or, more concerningly, wrongful conviction.

One further element of consideration is whether or not jurors (and the public more generally) understand what corroboration means. In Curley et al., (2022) we asked Scottish mock jurors to answer questions about the Scottish legal system so we could establish how well or poorly understand elements of the legal system were. We did not ask about corroboration, but the vast majority of participants did not know how many members were on a Scottish jury, the majority did not know which verdict options were available to a Scottish jury, and just less than a majority did not know what majority size was required for a verdict to be reached. From this finding of a widespread lack of knowledge about the legal system in Scotland by participants, we are concerned that corroboration might be poorly understood by the general public. The inclusion of explanations of corroboration since 2020 is likely to alleviate this concern in relation to actual jurors.

In addition, in principle, corroboration may also help alleviate some concerns that are felt in many jurisdictions across the world and may help to decrease instances of injustice. For instance, the work of Itiel Dror has highlighted that forensic examiners are not objective decision makers and that their decision making can sometimes be biased by extraneous information (i.e., knowledge of a confession) (Dror et al., 2005; Dror & Hampikian, 2011; Dror, 2016). Further, experimental work has shown that forensic examiners can reach biased conclusions and make errors due to non-relevant contextual information when analysing a number of different types of forensic evidence, such as fingerprint analysis, footprint analysis and, most importantly, when analysing DNA mixtures (Dror et al., 2006; Dror & Hampikian, 2011; Dror, 2016). These effects are not limited to the laboratory, but also extend to high-profile cases, such as when the FBI wrongly arrested a man for the Madrid bombing due to an erroneous fingerprint match (Dror et al., 2006). Not all jurisdictions have rules relating to corroboration. Scotland's rules on corroboration, and the need for external, independent reports (e.g. DNA, fingerprint analysis) to be produced by two external experts, the effect that bias may have on forensic experts should be limited and consequently not passed onto the jury (see Murrie, Boccaccini, Johnson, Janke, 2008). Most importantly, the rules relating to corroboration should stop incidences of wrong arrest, as in the example of the Madrid bombing case, and/or decrease the amount of miscarriages of justice that occur.

In conclusion, developments in the practical application of corroboration in (especially) sexual crimes alleviate many of the barriers that a more traditional approach created. Instructions to the jury in regard to corroboration are likely to significantly improve juror understanding of the topic, even if they are perhaps unlikely to have known much about it before becoming jurors. However, the current understanding of corroboration in prospective jurors should reviewed and if necessary, more instructions given, including written guidance. Finally, the current corroboration safeguard would help to stop instances of injustice caused by inaccurate expert and/or eyewitness testimony.

(b) If Scotland changes to a two verdict system and keeps the simple majority:

- Scotland should keep the corroboration rule as it is currently

Please give reasons for your answer::

Regardless of the verdict system or majority rule, the corroboration rule is an important factor that can protect against instances of injustice. It is probably one of the most important rules to been introduced into the Scottish criminal justice system and contributes towards Article 6 rights. A review on how the newly introduced instructions are helping Scottish jurors understand corroboration is necessary before any further changes are proposed. However, we would be open to more clauses in relation to sexual offences such as in reference to mutual corroboration or developments in relation to distress and consent. More clauses may lead to more complexity, however. Meaning that the impact of any changes on juror understanding would need to be evaluated.

(c) If Scotland changes to a two verdict system and increases the jury majority

- Scotland should keep the corroboration rule as it is currently

Please give reasons for your answer::

Regardless of the verdict system or majority rule, the corroboration rule is an important factor that can protect against instances of injustice. It is probably one of the most important rules that has ever been introduced into the Scottish criminal justice system. A review on how the newly introduced instructions are helping Scottish jurors understand corroboration is necessary before any further changes are proposed. However, we would be open to more clauses in relation to sexual offences as in point B.

Question 12 If the corroboration rule was to be reformed, rather than abolished, what changes do you feel would be necessary?

There is not yet enough evidence of the impact of potential reforms to corroboration for us to consider any reforms to necessarily be an improvement over the current rule. No experimental research has been conducted investigating how the current system or potential reform may shape juror and jury decision making and the verdicts they choose. More research is needed here. However, we would be open to more clauses in relation to sexual offences (as in point B) but we

would need to see what the Scottish Government suggests, and any suggestions would need to be reviewed both by legal professionals and experimentally.

Question 13 Do you feel further safeguards against wrongful conviction should be in place before any reform or abolition of the corroboration rule?

Not Answered

Please give reasons for your answer, including what other safeguards you believe would be appropriate and why: :

There is currently not enough information regarding whether or not further safeguards should be in place before any reform or abolition of the corroboration rule. No experimental research has been conducted investigating how the current system or potential reform and/or further safeguards may shape juror and jury decision making, conviction rates or instances of injustice. More research is needed here before any suggestions can be made. However, we recently wrote a review suggesting potential recommendations that may be able to attenuate the role that bias has in the courtroom. This review does not specifically address Scotland but may still be relevant as it discusses issues that plague legal systems across the world. If that work is of interest the review can be found here: https://www.researchgate.net/publication/358001463_Cognitive_and_human_factors_in_legal_lay person_decision_making_Sources_of_bias_in_juror_decision_making

Question 14 If the corroboration rule was kept or reformed, what else could be done to help people, including those involved in the justice system and the general public, to understand it better?

Field to be completed::

The accessibility of materials educating individuals on corroboration (and other aspects of the Scottish legal system) could be significantly improved. The Open University currently provide open educational resources that explain aspects of the Scottish legal system, see here:

• The Scottish Parliament and law making at

https://www.open.edu/openlearn/society-politics-law/politics/the-scottish-parliament-and-law-making/content-section-overview?active-tab=description-tab

• Scottish courts and the law at

https://www.open.edu/openlearn/society-politics-law/law/scottish-courts-and-the-law/content-section-overview?active-tab=description-tab

• Legal skills and debates in Scotland at

https://www.open.edu/openlearn/society-politics-law/law/legal-skills-and-debates-scotland/content-section-overview?active-tab=description-tab

• Law and change: Scottish legal heroes at

https://www.open.edu/openlearn/society-politics-law/law/law-and-change-scottish-legal-heroes/content-section-overview?active-tab=description-tab

As an institution, we would be happy to further develop these and focus on issues such as the corroboration rule to help educate prospective jurors and members of the public. If of interest, we would be happy to work alongside the Scottish Government and other relevant bodies.

Further, we would be happy to provide similar educational resources on issues including but not limited to rape myths; how to counter cognitive biases; Scottish law; how to interpret forensic evidence; interpretation of fake news (https://www.open.edu/openlearn/society-politics-law/fake-news-wales); and what the role of a juror/jury is. Furthermore, open educational resources for the university's OpenLearn platform could be developed and made available to the public, but most especially prospective jurors, in a hope to educate them about the law and attenuate the role that bias may play in their decision making. The Open University in Wales has developed a new active citizenship hub (Active Citizenship in Wales - OpenLearn - Open University), partly funded by the Welsh Government. We could support the formation of a similar structure in Scotland.

Part 6: Equality and Human Rights, Other Impacts and Comments

Question 15 Considering the three needs of the public sector equality duty – to eliminate discrimination, advance equality of opportunity and to foster good relations – can you describe how any of the reforms considered in this paper could have a particular impact on people with one or more of the protected characteristics listed in the Equality Act 2010 (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation)?

Please provide an answer:

Jury service is regarded as a 'civic duty'. Existing barriers to jury service will be unaffected by the proposed changes. In their report 'Enabling Jury Service' in 2018 the Scottish Courts and Tribunals service made a series of recommendations to make the process of becoming, and of being, a juror more accessible. This report was informed by conversations with individual's with protected characteristics who had unsuccessfully applied for jury service.

The report noted that some of the essential requirements of a jury were to:

• 'to absorb the evidence presented to them

• to understand / comprehend / evaluate the evidence

• to discuss the evidence with their fellow jurors when directed

• to return a true verdict according to the evidence and the legal directions they are given'

Two of the three proposals touch upon these essential requirements and care will needed to ensure clarity of expectations around verdict and evidential requirements to ensure that the decision-making process is as accessible and transparent as possible. Processes around trial, evidence and jury discussion should be reviewed to assess what reasonable adjustments may be needed and if education, as we have highlighted above, is necessary and/or feasible.

The 2014 Coping with Courts and Tribunals: A Guide for People with Specific Learning Differences notes:

2The summing up by the judge before the jury retires should always be backed up by a written record – it would be even better for some people to have an audio version that can be listened to carefully on headphones in a quiet place."

Coping with Court (2014 Edition)

There should be an improved clear and defined process in relation to reasonable adjustments which is accessible to all, which covers all aspects of selection, jury service, trial, jury discussion, and decision making. This should include relevant training for staff and access to specialist support as required.

Should the numbers serving on a jury be reduced there is likely to be a reduction in diversity and experience and care will need to be taken to ensure all members of the public have equal opportunities to participate, are welcomed and that any barriers to participation are removed.

Perceptions associated with equality and accessibility can be a barrier. Whilst some perceptions may be unfounded any change to the current system has the potential to worsen the situation. Consideration should be given to improving communication. If possible, examples and experiences of former jurors could be drawn upon as part of those communications.

De Tocqueville described jury service as "a peerless teacher of citizenship" however it is not necessarily accessible to all. Research should be undertaken to establish whether, following the pandemic, juries are in fact inclusive or whether the barriers to jury service have worsened and whether the proposed changes are impacted. In light of well publicised concerns over mental health and wellbeing, access to technology and increasing depravation, all of which impact certain communities more than others, such research could underpin and assist in developing a diversity and wellbeing strategy for jurors.

We agree that by reducing jury size there is a risk of impact on diversity. Should any change take place then we recommend an evaluation of impact be undertaken with relevant organisations (legal institutions and academics). In addition, new guidance should be developed and constructed in partnership with those organisations and a transparent and accessible process for reasonable adjustments developed with processes for reasonable adjustments given in advance. This should build on the work and recommendations of the Enabling Jury Service Report of 2018.

The changes proposed, as they currently stand, are unlikely to assist in eliminating discrimination or advancing equality of opportunity.

Question 16 Are there any other issues relating to equality which you wish to raise in relation to the reforms proposed in this paper?

Please provide an answer:

The proposed changes are unlikely to have positive impact on equality with the system remaining challenging for female victims.

Question 17 Do you feel that any of the reforms considered in this paper would have an impact on human rights?

Please provide an answer:

The proposed reforms engage with Article 6 rights (and potentially Article 5). Any restriction on rights and freedoms must be either in accordance 'with' or 'prescribed by law'. Any change will need to be accessible, intelligible, clear, and predictable. It is not clear from the proposals how these objectives will be achieved. Further research is required to establish whether the not proven verdict does, in fact, act as a safeguard against wrongful conviction. The right to a fair trial by judge and jury remain a cornerstone of the criminal justice system in Scotland. The jury, drawn from the community at random, and removed from the State which is seeking a conviction is a deeply embedded feature of the legal, social, political and culture of Scotland. Earlier in our response we made suggestions in relation to public legal education and jury education. The proposed changes also impact the profession and professional training. Ensuring the legal community is fully trained and equipped for change will play a key role in ensuring rights.

Question 18 Do you feel that any of the reforms considered in this paper would have impacts on island communities, local government or the environment?

Please provide an answer:

One of the benefits of the system of trial by judge and jury is the involvement of people in the local community participating in a civic role in administering justice. Reduction in jury size may have an unintended impact not only on diversity and community participation but also on remote communities which requires further research