

The Not Proven Verdict and Related Reforms: Consultation

December 2021

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Ministerial Foreword



Juries have played a crucial role in the Scottish criminal justice system for hundreds of years, and I am grateful to all those who have carried out this important public duty by serving on them.

The Scottish legal system has evolved substantially over the centuries and it is vital that we ensure that the justice system itself develops in response to new evidence and in line with the values of the people of Scotland.

That is why it is important that we reflect on the findings of the independent jury research published in 2019 - the largest, most realistic of its kind ever undertaken in the UK - which considered the unique Scottish jury system with 15 jurors, three verdicts (including not proven) and the simple majority. The research highlighted inconsistent views on the meaning and effect of the not proven verdict and how it differs from not guilty.

It is also vital that we involve the public and stakeholders in these discussions. That is why after the report's publication we held events across the country with legal professionals, third sector and survivors, where concerns were raised regarding the not proven verdict - such as lack of understanding, perceived stigma and the trauma this verdict can cause.

However, these are complex issues and many participants felt that the third verdict should be retained or highlighted the interconnectedness of the system, emphasising that the three verdicts, simple majority required for conviction and the size of the jury are so interrelated that it would not be possible to meaningfully assess these factors separately from one another. Others felt that the corroboration rule - requiring that there is more than a single source of evidence - should also be part of this consideration.

Therefore, it is right that in our Programme for Government in September, we committed to launching a public consultation on the three verdict system, and it is appropriate that the remit of this consultation should seek views on these interrelated areas.

In the 21st century, it is vital that our justice system is person-centred, transparent, accessible and fair to all, satisfying public confidence by reflecting the needs and views of those who directly participate in it, and whose lives are impacted by it most.

Jurors must have an appropriate understanding of their role; victims, families, and the accused should be able to comprehend the rationale for verdicts received; legal professionals have a duty to clearly explain matters to those they represent; and the overall system must remain balanced so that it is fair to both complainers and those accused of crimes.

Although many of us value the distinctive features of the existing Scottish criminal justice system, that should not prevent us from asking questions or seeking new perspectives to drive further improvements, particularly from those with direct experience of the criminal justice system to ensure the system remains relevant and contemporary in the 21st century.

The incredible efforts of justice partners, third sector organisations, the judiciary and defence community, during the COVID-19 pandemic has made clear that there is still tremendous potential for the justice system to benefit from collaboration, innovation, and new ways of working. We will continue working together to renew our public services, build on the lessons we have learnt to date, and act to ensure progress in securing a faster, fairer, more effective justice system.

I trust that many of these stakeholders will contribute their thoughtful and considered opinions here also, and I look forward to considering the full range of views received.

This Government has no settled view on the best approach to take and I want to listen to what consultees tell us before we weigh all the evidence and reach a decision.

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

A handwritten signature in black ink, appearing to read 'Keith Brown', with a stylized flourish at the end.

Keith Brown
Cabinet Secretary for Justice and Veterans
December 2021

Part 1: Introduction

The criminal law is used to hold people to account for their actions where certain conduct is undertaken. The conduct in question – ranging from, for example, theft and minor assault to sexual offending and murder – is criminal because society has taken a view such conduct should not feature as part of a civilised and safe society and action by the state should be capable of being taken in response.

The criminal justice system is used to ensure that a fair process can follow where the criminal law may have been breached and justice is able to be carried out. A critical part of this process is the role of the criminal courts, and juries in particular. This involves the considerable responsibility of making decisions that impact the lives of people accused of criminal offences, the victims of these alleged offences and their families, as well as having an impact across wider society.

The Scottish criminal jury system differs from that in most other countries in three main ways:

1. There are three verdicts: guilty, not guilty and not proven (most major English language jurisdictions only have two verdicts: guilty and not guilty). If either a not proven or not guilty verdict is returned, the effect is the same in that the accused is acquitted and generally cannot be tried again.¹
2. Each jury has 15 members (rather than the typical 12).
3. Verdicts are returned by a simple majority (eight out of 15 jurors, rather than requiring juries to reach unanimity or near unanimity).

Each of these aspects has been in place for hundreds of years, and have periodically been subject to calls for reform. In recent times, however, the most debated aspect of the jury system is the not proven verdict which a range of people, from victims of sexual crimes to members of the judiciary, have argued should be abolished. The main reasons for abolishing or keeping Scotland's third verdict are set out in part 2, as well as questions seeking views on this issue, and the consequences that may come from any move to two verdicts.

Scottish Ministers have been clear that since the Scottish jury system is a complex, inter-related system, verdicts must be considered alongside the other key aspects of jury size and majority. This is not to say that one aspect cannot be reformed without corresponding changes to the others, but rather to make sure that before any such reform, there is a wider consideration of potential impacts throughout the system. For this reason, parts 3 and 4 set out the issues around jury size and majority, and seek views on possible changes in these areas that could accompany any move to two verdicts.

Potential reforms have been discussed numerous times over the decades, and throughout this consultation paper, previous considerations are referenced where appropriate to inform discussions and highlight arguments that continue to be relevant or have evolved over time. It is right that we revisit these issues in the

¹ Except under the very limited circumstances provided for in the Double Jeopardy (Scotland) Act 2011.

modern context, in which the people of Scotland expect person-centred, transparent, accessible, user-centred services which meet the needs of our society. The fact that these issues have been previously examined should not prevent further deliberation, or indeed different outcomes.

This is the first examination of these issues since the publication of the Scottish jury research and subsequent engagement programme. For the first time, these provided strong evidence of the impact of the unique features of the Scottish jury system on jury reasoning and decision making, as well as jurors' understandings of the not proven verdict, and why they may choose this verdict over another.

Jury Research

Lord Bonomy was appointed to head the independent Post-Corroboration Safeguards Review to consider what additional safeguards might be necessary to support the removal of the corroboration requirement (further details set out in part 5). When the review reported in mid-2015 it recommended a wide range of criminal justice reforms including that jury research should be undertaken to better understand the dynamics of decision-making in Scotland's jury system.²

This independent research was commissioned by the Scottish Government and conducted by a team of research and legal experts from Ipsos MORI, as well as Professors James Chalmers and Fiona Leverick from the University of Glasgow and Professor Vanessa Munro from the University of Warwick. The study was the largest and most realistic of its kind ever undertaken in the UK and was the first mock jury research project to consider the unique nature of the Scottish jury system with 15 jurors, three verdicts and a simple majority.

Undertaken over two years with nearly 900 mock jurors, the research used high-quality filmed trials produced by a Scottish film company using professional actors, as well as the former High Court Judge, Lord Bonomy.³ Each jury watched a video of either a mock rape trial or a mock assault trial - deliberately finely balanced in order to encourage discussion of the not proven verdict - lasting approximately one hour. To ensure their realism, the scripts for these trials were reviewed by Scottish legal practitioners and the [Research Advisory Group](#), made up of a range of experts including a High Court Judge, a sheriff and a QC.

Jurors were recruited to be broadly representative of the Scottish population aged 18-75 in terms of gender, age, education and working status. Jurors completed a short questionnaire recording their initial views on what the verdict should be, before deliberating as a group for up to 90 minutes and returning a verdict (if the jury had been able to arrive at one). After returning their verdict, jurors completed a final questionnaire covering their beliefs about the not proven verdict and views about the deliberation process, as well as their final views on the verdict.

In order to assess the effect of the Scottish jury system's unique features on decision-making, juries varied in terms of the number of verdicts available to them

² [The Post-corroboration Safeguards Review: Final Report](#), April 2015.

³ Extracts are available to view online at - [Assault trial](#); [Rape trial](#); [Judge's opening and closing directions](#).

(two or three), jury size (12 or 15) and the size of majority they were required to reach (simple majority or unanimity).

When this work was commissioned, Scottish Government analysts considered whether it would be most effective to carry out the research with mock jurors or real jurors. There are advantages and disadvantages to both approaches but it was considered that there are benefits to using mock jurors which could not be replicated in research with real juries. For example:

- Mock juries allowed the deliberations of the jury to be recorded and analysed in a way that is not possible with real jurors, due to the constraints imposed by the Contempt of Court Act 1981⁴ which limit the scope for researchers to interview actual jurors about their experience of real criminal trials.
- Mock trials enabled researchers to hold factors constant within the trial scenario so that the impact of particular aspects such as jury size, majority or verdicts, could be systematically investigated across different scenarios.
- Using mock trials enabled analysts to increase the likelihood that issues of specific interest such as the not proven verdict were discussed by the jurors.
- By showing a large number of participants the same scenario, researchers were also able to reflect with higher levels of confidence on participants' views than would be possible by any reliance on views which arose from a range of different types of real trials.

Although this research was significantly larger and more realistic than many previous mock jury studies, it had limitations such as sample size, findings which are based on jurors' responses to only two specific types of trial, and the impact it may have had on jurors to know that they were not participating in real trials. Therefore, as with any mock jury study, caution must be taken when generalising results to real juries.

Jury Research: Findings

The [final report](#), published in October 2019, outlined a series of findings that help demonstrate the impact of the Scottish jury's unique features, while providing important evidence for any potential future reform of the criminal justice system in Scotland.⁵

The overarching finding of the research was that that juror verdicts were affected by how the jury system was constructed. The research found that the number of jurors, the number of verdicts available, and the size of majority required do have an effect on verdict choice. In other words, jurors' verdict preferences, in finely balanced trials, are not simply a reflection of their assessment of the evidence presented, but can also be affected by features of the jury system within which this evidence is considered. For example:

⁴ Section 8 of the Contempt of Court Act 1981 provides that in Scotland it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings.

⁵ A summary of the research findings is available at [Scottish jury research - mock jury study: summary of findings](#).

- reducing jury size from 15 to 12 might lead to more individual jurors switching their position towards the majority view;
- asking juries to reach a unanimous or near unanimous verdict might tilt more jurors in favour of acquittal; and
- removing the not proven verdict might incline more jurors towards a guilty verdict in finely balanced trials.

The study also found there were inconsistent views on the meaning and effect of the not proven verdict and how it differs from not guilty. Additionally, some jurors misunderstood important legal concepts. For example, there was a belief that the accused needs to prove their innocence, a belief that the accused can be retried following a not proven verdict, and misunderstanding of the fact that self-defence is a legitimate defence to an assault charge, even when the fact that the accused inflicted the injury is not in dispute.

The findings on each element of the Scottish criminal jury system are covered in more detail in the following parts.

A note on the findings

It is important to note that this research does not tell us anything about individual real-life cases, verdicts people may have received in the past, or the reasoning that specific juries used to come to their decision. There was no “right” or “wrong” answer in the two cases the research was based on, which were deliberately pitched as finely balanced, and there is nothing in the findings that should undermine our confidence in individual verdicts.

However, it is important that we are aware of the effects that the unique features of the Scottish jury system have on jury reasoning and decision making, and remain open to ways of improving the system. That is why, following the publication of the report, the former Cabinet Secretary for Justice committed to further discussions on the findings, including the possibility of moving to a two verdict system, while noting that he had an open mind on whether further changes may be required and would not prejudge the outcome of those conversations.

Jury Research: engagement sessions

Over the course of 2019-2020, the Scottish Government arranged events involving stakeholders across the country from sectors including legal professionals (defence, prosecution and members of the judiciary), third sector organisations, academics, and officials from various public bodies. Sessions were held in Aberdeen, Ayr, Dundee, Edinburgh, Glasgow and Inverness, as well as an online discussion, and a number of meetings with people with experience of the criminal justice system.

The sessions generally involved interactive table discussions (facilitated by Scottish Government officials) to hear participants’ views on the implications of the jury research findings, if these reflected their own experiences of the criminal justice system and whether they were in favour of potential criminal justice reforms.

A [summary of discussions](#) was published in December 2020 and highlighted the complexity of the issues and the lack of agreement about next steps. The views raised on each element of the Scottish criminal jury system are covered in more detail in the following parts.

Overall, it was clear that some felt there are real issues with the not proven verdict such as lack of understanding amongst jurors, perceived stigma for those acquitted with the verdict, as well as concerns around the fairness of the verdict and the specific trauma it can cause. However, others felt strongly that Scotland's third verdict has a role to play as a safeguard against wrongful conviction, for signalling to complainers that they have been believed, and for the jury to use when the Crown's case is not quite strong enough to prove guilt beyond reasonable doubt but they think the accused is probably guilty.

Others highlighted the importance of further research or emphasised the interconnectedness of the system, recommending a holistic approach that considers all aspects of the jury system together. As a result of these differing views and the complexity of these issues, it was clear that a consultation would provide an appropriate opportunity for stakeholders to set out their detailed views on these matters.

The corroboration rule

As noted earlier, the jury research was a recommendation from Lord Bonyhady's post-corroboration safeguards review, and at the jury research engagement events, the opportunity was taken to ask participants for their views on related reforms such as the corroboration rule.

Although the possibility of abolishing or reforming the corroboration rule was not supported by the substantial majority of those who participated in the engagement sessions, as a Government we take very seriously the concerns some stakeholders have with how the corroboration rule can affect access to justice for survivors of crimes committed in private. We believe that for such an important and complex matter, it is important to provide the opportunity for stakeholders to set out their views in detail to help to develop a shared understanding of the evolving legal position and the implications and potential unintended consequences of reform, including in relation to sexual crimes. Therefore, there are questions on this matter contained within this consultation.

The Lord Justice Clerk's review on improving the management of sexual offence cases

It is also important that we consider potential reforms resulting from this consultation against the landscape of wider work including the recommendations of the [Lord Justice Clerk's review on the management of sexual offence cases](#), published in March 2021.

The review was commissioned by the Lord President in March 2019 to develop proposals for the management of serious sexual offence cases which, in recent years, have made up most solemn proceedings in the Courts. The review has

generated wide-ranging proposals to modernise court and judicial structures, procedure and practice.

We are giving the report and its recommendations careful consideration, and will engage further with stakeholders and partners to help deliver a justice system in which the survivors of sexual abuse can have confidence. Any future legislative changes arising from the report - including on anonymity of complainers in sexual offence cases - will be subject to a separate formal consultation and approval by Parliament.





It is important that we take a holistic approach to these potential reforms, recognising their potential interconnectedness with the issues within this consultation and across the system as a whole.

The consultation

This consultation seeks views on the three verdict system in Scottish criminal trials and if the not proven verdict were to be abolished, whether any accompanying reforms would be necessary to other aspects of the criminal justice system including jury size, majority required for verdict and the corroboration rule. The views gathered will inform what, if any, reforms will be taken forward.

This consultation is intended to be as accessible as possible so that readers from a non-legal background are able to understand the issues and respond with their views, since these are the people that make up most juries, as well as attending court as victims, witnesses and the accused. The key terms section in part 7 sets out definitions of legal terms readers may be unfamiliar with and offers explanation of some terminology used.

The infographic below provides a simplified overview of the range of options this consultation seeks views on. These are interlinked issues and therefore questions at the end of each part may reference a topic which is covered in detail in a later part. We advise that respondents read all of parts 1 to 6 before beginning to answer the questions.

Jury size	Verdicts	Majority	Corroboration
			
<p><i>How many people on the jury?</i></p>	<p><i>How many verdicts do they choose between?</i></p>	<p><i>How many of them must agree to the verdict?</i></p>	<p><i>Do they apply the corroboration rule?</i></p>
<p>15</p> <p>12</p> <p>Another number?</p>	<p>3</p> <p>2</p>	<p>Simple majority (half plus one)</p> <p>Two thirds</p> <p>A different proportion?</p>	<p>YES (in present form)</p> <p>YES (but reformed)</p> <p>No</p>

In each category, the current approach is listed first, followed by options that would be a change from the current system. We are seeking your views on the options you most prefer, any ways your preference depends on what is decided in other categories, and any additional changes that might be needed. We recognise that this is a complex system with many possible combinations so it may help you keep the broader overview in mind as you go through.

If you have experience of jury duty and this has contributed to forming your views on these issues, please avoid giving any specific details of anything that took place on the juries you served on. This is because according to section 8(1) of the Contempt of Court Act 1981, “it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings”.

You are encouraged to set out your views on these important issues and we recognise that your personal experience on a jury may have contributed to shaping those views. However, we recommend that you answer these consultation questions in general terms and do not disclose any details of the cases you decided or anything else specific that took place in any juries you have served on.

Part 2: The Not Proven Verdict

Background

In Scottish criminal trials there are three verdicts available: guilty, not guilty and not proven. If a guilty verdict is returned the accused is convicted of the crime. If either a not proven or not guilty verdict is returned, the effect is the same in that the accused is acquitted and generally cannot be tried again.⁶

There is no statutory, case law or generally accepted definition of the not proven verdict, nor of the difference between the not proven and not guilty verdicts. There have been occasions where judges have attempted to explain the significance of the two acquittals, but this has resulted in appeals on the grounds of misdirection.

Accordingly, the Appeal Court has instructed judges not to attempt to describe the difference in verdicts to juries and commented that “in our view it is highly dangerous to endeavour to explain what the not proven verdict is in relation to the not guilty verdict”.⁷ The High Court has since successfully worked to discourage judges from expressing views about the appropriateness of the not proven verdict or what it might mean.

Jurors therefore receive no instruction from a judge on the meaning of the verdict and how it differs from not guilty. It is thought to be good practice to simply inform the jury that there are two verdicts of acquittal and that the accused cannot be tried again for the same offence.⁸

It is important to note that the third verdict is also used by sheriffs and justices of the peace in summary cases⁹ so any move to a two verdict system would affect all criminal cases. However, many of the arguments in favour of the verdict’s retention or abolition are equally relevant, regardless of whether the verdict is to be determined by juries or judges.

Arguments for and against the not proven verdict

The suitability of Scotland’s three verdict system has long been debated and the case against the not proven verdict has historically been a combination of the following arguments¹⁰:

- the existence of two verdicts of acquittal, where the difference between the two cannot properly be explained, is illogical in principle;
- the verdict is incompatible with the presumption of innocence and may lead to an acquitted accused being stigmatised; and

⁶ Except under the very limited circumstances provided for in the Double Jeopardy (Scotland) Act 2011.

⁷ *MacDonald v HM Advocate* 1996 SLT 723.

⁸ Judicial Institute for Scotland, *Jury Manual*, page 109.1, last updated 1 July 2020.

⁹ 2019/20 statistics showed that on average 1% of people proceeded against in summary courts received a not proven acquittal, although this was higher for particular offences such as sexual assault where 12% received this acquittal.

¹⁰ Chalmers J, Leverick F and Munro VE. *A modern history of the not proven verdict*, Edinburgh Law Review, 2021; 25(2): 151-172.

- the verdict allows jurors to compromise and ‘sit on the fence’.

The arguments for keeping the not proven verdict have typically been:

- that the not proven verdict is an important safeguard that reduces the risk of wrongful conviction; and
- the current system works well and there is no evidence that it requires to be changed.

Many other common law systems operate successfully with two verdicts without any obvious negative impact on the delivery of fair and effective justice. Therefore, some believe that the third verdict could be removed without further changes to the system.

However, others see the three verdicts as linked to other elements of the Scottish criminal justice system (including the majority required for conviction, the size of the jury and the requirement for corroboration) and so argue that changes to one aspect would require wider reform to maintain the balance of fairness in the system overall. These potential accompanying reforms are considered in the following parts.

The not proven verdict in rape and attempted rape cases

More recently, the third verdict has also been criticised due to the higher rates of not proven acquittals for rape and attempted rape cases. It is important to note that these cases have the highest “total acquittal rate” of any crime. This results from the fact that they have the highest rate of both not proven and not guilty acquittals. Looking specifically at not proven acquittals, in 2019-20, the proportion of not proven acquittals for people proceeded against in court for all crimes and offences was 1% (or 5% if summary cases not heard by juries are excluded since rape trials are heard before a jury). For rape and attempted rape the proportion of not proven acquittals was 25%.¹¹

Some campaigners have suggested that the existence of the third verdict may contribute to the acquittal of defendants who committed the offence, and causes particular trauma to victims. More details of survivors’ views on these issues are set out below in the jury research: engagement sessions section.

The driver for any move to two verdicts, would not be a deliberate attempt on the part of the Government to increase convictions in these cases. In fact, logically it would be expected that in a two verdict system most not proven verdicts would become not guilty verdicts, although as outlined earlier, the jury research suggests that there may be some circumstances where removing the not proven verdict might incline more jurors towards a guilty verdict, particularly in finely balanced trials, although caution must be taken when generalising results to real juries.

¹¹ Of those acquitted for rape and attempted rape, a higher proportion were acquitted not proven compared to other crimes (44% of acquittals were not proven compared to 20% across all crimes and offences). In other words, when someone is acquitted for rape, the not proven verdict is more likely to be the acquittal verdict used compared to other crimes.

However, it is a fact that rape and attempted rape cases are particularly impacted by not proven acquittals, and it is right that the trauma and injustice that survivors have reported feeling is part of any considerations.

Previous considerations

Scotland's three verdict system has been subject to parliamentary consideration at various times over the years.

As part of the 2012 consultation "[Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration](#)" the Scottish Government sought views on whether a change to the three verdict system was required. Although a majority of consultees supported removal of the not proven verdict, on the basis that it was suggested to be difficult to explain, illogical and incompatible with the presumption of innocence, the Senators of the College of Justice recommended that consideration of the not proven verdict be delayed until after the reforms contained in the Criminal Justice (Scotland) Bill 2013 had bedded down.¹²

Accordingly, in November 2013 when Michael McMahon MSP introduced the Criminal Verdicts (Scotland) Bill, which sought to abolish the not proven verdict and increase the jury majority in consequence, the Scottish Government did not support this proposal. As there was an overlap between this Bill and the Criminal Justice (Scotland) Bill in relation to the reform of jury majorities, the Justice Committee's stage 1 scrutiny of the Bill was postponed whilst the Criminal Justice (Scotland) Bill completed its passage through the Parliament.

Lord Bonomy's Review reported in April 2015 and recommended that jury research be carried out so that changes to the unique aspects of the Scottish jury system were only made on a fully informed basis. When the Justice Committee restarted consideration of the Criminal Verdicts (Scotland) Bill in 2016 they supported abolition of the not proven verdict but not the accompanying provision to increase the jury majority. The Committee was also of the view that the jury majority ought to be considered alongside Lord Bonomy's recommendations in his Post-Corroboration Safeguards Review including the recommendation to undertake jury research. The Bill fell after a majority of MSPs voted against its general principles.

Jury Research

The independent jury research commissioned by the Scottish Government considered:

- if the number of verdicts available has any impact on the verdicts favoured by individual jurors; and
- how jurors understand the not proven verdict.

Overall, the research findings suggest that removing the not proven verdict:

¹² [Response by the Judges of the High Court of Justiciary to the Scottish Government Consultation paper: Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal for Corroboration, 2012.](#)

- Might lead to more jurors favouring a guilty verdict in finely balanced trials, which might, therefore, lead to more guilty verdicts over a larger number of trials.
- May not have much impact on other key aspects of the jury decision-making process, such as deliberation length or juror participation.
- May be associated with a slight increase in juror dissatisfaction.

The research also found evidence of some inconsistency in jurors' understanding of what the not proven verdict means, along with some confusion over the consequences of not proven for the accused. Findings included:

- Some jurors were unsure if, and how, the not proven verdict was different to a not guilty verdict.
- Jurors tended to give different reasons for choosing either not proven or not guilty verdicts. Those who chose the not proven verdict often based this on a belief that the evidence did not prove guilt beyond reasonable doubt, or on the difficulty of choosing between two competing accounts. Whereas jurors choosing the not guilty verdict (in the trials where not proven was also an option), often based this on a belief in the accused's innocence or that the complainer's or witness' account was not truthful.
- The idea that the not proven verdict should be used when jurors think that the accused is probably guilty but that this has not been proven to the necessary standard came up frequently in deliberations.
- Related to this, jurors also expressed the view that there would be a lingering stigma attached to receiving a verdict of not proven.
- When asked which verdict should be used 'when the jurors need to compromise to decide on a verdict' nearly a third of jurors selected not proven.

As stated above, the not proven verdict does not have a specific definition other than being a verdict of acquittal. Therefore, despite the variations in interpretation, jurors did not often express definitively incorrect beliefs about the verdict. However, some mock jurors did believe that a not proven verdict would allow for a retrial but a guilty verdict did not, which is incorrect.

Jury Research: engagement sessions

Participants in the subsequent jury research engagement sessions were asked, "Based on the research findings and your own experience, do you consider that any reforms are needed to jury verdicts? If so, what and why?"

The discussions highlighted the complexity of the issues and the lack of consensus about next steps. The substantial majority of participants from the defence and judiciary argued that Scotland should keep its three verdict system. However, in the discussions that had more diverse representation, with individuals from the third sector, academia, the public sector and prosecutors, participants generally supported moving to two verdicts, although these groups were quite small samples.

The main reasons suggested for abolishing the three verdict system were:

- **Lack of understanding** - In many of the engagement sessions, participants from all sectors expressed views that there is a lack of understanding of the third verdict. Some referred to this in the context of jurors, highlighting that they could not be blamed for failing to understand as there is no definitive meaning and, in some participants' view, no rational explanation of the verdict. Others focused on the lack of understanding on the part of victims and families. This included survivors with direct experience of the verdict who described how confused they had been about its meaning and implications, that they were unaware of, or unprepared for the possibility that a not proven verdict might be returned in their case and that criminal justice officials were not able to satisfactorily explain the verdict to them.
- **Stigma** - Some highlighted that not proven can cause stigma within families and small communities - particularly for sexual offences - and gave specific examples of a not proven verdict causing difficulties with disclosure checks and licensing applications. It was suggested that stigma may not be immediately obvious to the legal professionals who dispute its existence, as it may occur over time, potentially long after the person has been acquitted.
- **Concerns around fairness and trauma** - Survivors gave powerful examples about the trauma the verdict had caused them. They criticised the apparent use of the not proven verdict when jurors need to compromise on a verdict, considering this to be a 'cop out' and questioned the appropriateness of two acquittal verdicts and of allowing jurors to 'sit on the fence'.¹³

The main reasons suggested for keeping the three verdict system were:

- **There are appropriate uses of the verdict** - The not proven verdict should be used when the Crown's case is not quite strong enough to prove guilt beyond reasonable doubt but the jury think the accused is "probably guilty". It was also suggested that the not proven verdict better reflects jurors' uncertainty.
- **Signalling** - The not proven verdict allows jurors to signal their belief in the complainant's evidence, or to the accused that they didn't agree with his/her behaviour, although the standard of proof had not been met for a conviction. However, the jury research suggests there is no consistent meaning of not proven and it is likely to vary from case to case so it is unclear how any specific message could be correctly received and understood.

Survivors and their representative organisations disputed the benefits of jurors signalling to complainants that they were believed while at the same time opting to acquit. They argued that the not proven verdict felt no better than the not guilty verdict and furthermore, had specific trauma associated with the uncertainty of such a verdict.

- **Safeguard against wrongful conviction** - It was suggested that the not proven verdict is a safeguard against wrongful conviction of the accused and that one feature of the complex and interlinked jury system cannot be amended or removed without considering the rest of the system. This point is considered in more detail in the following part on the jury majority.

¹³ Munro, V. [Piecing together puzzles: complainants' experiences of the not proven verdict](#), 2020.

- **Insufficient evidence for change** - Some questioned the methodology of the jury research or argued it is not sufficient evidence to justify reforming the system.

There were also opposing views on what, in a two verdict system, the two verdicts should be. Most participants from the legal profession thought that if Scotland moves to a two verdict system, those verdicts should be proven and not proven, setting out their view that it is not the role of the jury to determine a person's guilt or innocence, but rather to assess whether the Crown has proven the charge. Many people also expressed concern around what they considered to be the moral and emotive language around guilty and not guilty.

This was not well supported in groups with fewer legal professionals, where there was more support for the two verdicts being guilty and not guilty. These were considered to be verdicts that juries understand, and there was also recognition that proven/not proven may be too "lawyerly" a distinction that may not be satisfactory to the public, and could perpetuate existing stigma and confusion. A minority favoured alternatives such as "has the Crown proved the charge beyond reasonable doubt? yes/no".

Discussion

As outlined above, it has long been suggested that jurors may not have a full understanding of the not proven verdict, and that there may be a stigma associated with this acquittal that is hard to square with the presumption of innocence.

The independent jury research provided evidence of the existence of both lack of understanding and stigma, and the subsequent engagement programme gave further examples from legal professionals, third sector, and those with direct experience of the system.

Furthermore, the discussion with a small group of survivors highlighted their view that there is particular trauma associated with the not proven verdict, while also undermining the suggested benefit of jurors signalling to complainers that they were believed while opting to acquit.

This Government does not think it appropriate that we should continue to have a verdict that people directly affected by the trial do not understand or find unnecessarily traumatic, and equally it is not appropriate for there to be a stigma for those who have been acquitted in a Scottish court. For these reasons we have recognised that a strong case can be made for abolition of the not proven verdict and it is right to re-examine the issue in the contemporary context set out in this paper.

However, there have been two verdicts of acquittal in Scotland for hundreds of years. We recognise that there are many who have principled and informed objections to the abolition of the not proven verdict or highlight the complex impact that a move to two verdicts could have on the wider Scottish criminal justice system.

That is why we are seeking further views on these important matters.

Questions

Having considered the views expressed throughout previous considerations of the three verdict system, the evidence from the recent jury research and views gathered at the subsequent engagement sessions, the Scottish Government is seeking views on the following questions.

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

- Scotland should keep all three verdicts currently available
- Scotland should change to a two verdict system

Please give reasons for your answer:

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

- Guilty and not guilty
- Proven and not proven
- Other

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

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?

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?

- 1 – Appropriate
- 2 – Inappropriate
- 3 – Don't know

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

Question 5: Do you believe that the not proven verdict acts as a safeguard that reduces the risk of wrongful conviction?
Yes/No/Unsure

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

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/No/Unsure

Please give reasons for your answer:

Question 7: Do you believe that the not proven verdict can cause particular trauma to victims of crime and their families?
Yes/No

Please give reasons for your answer:

Part 3: Jury Size

Background

In Scotland the jury in criminal trials is made up of 15 people. Although there was no set number of jurors in the early days of jury trials in Scotland, they were nearly always made up of 15 jurors by the close of the sixteenth century.¹⁴ This number of jurors is generally higher than in other jurisdictions where juries of 12 or 9 are far more common.

Previous considerations

The size of the Scottish criminal jury was considered in the 2008 Scottish Government consultation "[The Modern Scottish Jury in Criminal Trials](#)". At that time, the Government was not proposing reform of the number of jurors but was looking to stimulate debate on the issue to test the case for change on a range of matters including juror numbers, and the number required for a conviction.

Less than half of all the respondents addressed the question of jury size and a slight majority of those were in favour of retaining a jury of 15, pointing out advantages including¹⁵:

- it allows for majority verdicts;
- it is less likely that a trial will collapse due to low numbers of jurors;
- there is less likely to be juror intimidation;
- juries of 15 have the confidence of public and the courts;
- a larger jury is less likely to be imbalanced by individual prejudices; and
- it is more likely to include a mix of gender, ethnicity, experience and social awareness.

The question of what is the most effective jury size has been the subject of great debate internationally and the focus of some cases before courts in other jurisdictions.¹⁶ In particular, it has been suggested that a smaller number of jurors would be less representative of the population and may lead to an increased chance of a "hung jury" where they have been unable to reach a verdict.

Amongst those favouring a reduction in jury size, it was argued that 15 jurors makes for an unwieldy discussion, and a smaller size of jury would relieve some of the pressure on the jury pool and bring Scotland in line with other jurisdictions.

After considering responses to the consultation, the Scottish Government decided not to legislate to reduce the size of the jury in Scottish criminal trials.¹⁷

¹⁴ Duff P. *The Scottish Criminal Jury: A Very Peculiar Institution*, Law and Contemporary Problems, 1999; 62(2): 173-201.

¹⁵ Scottish Government, [The Modern Scottish Jury in Criminal Trials: Analysis of Written Consultation Responses](#), 2009.

¹⁶ For example, US Supreme Court specifically considered the question of jury size in *Claude D. Ballew, Petitioner v State of Georgia* 435 U.S. 223 and 98 S. Ct. 1029.

¹⁷ Scottish Government, [The Modern Scottish Jury in Criminal Trials – Next Steps](#), 2009.

The above advantages were also amongst those taken into account when considering whether a 12 person jury should be adopted in Scotland in the later 2012 Scottish Government consultation “Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration”. It was again concluded that the size of the jury in criminal trials should remain at 15.

Jury size was also considered as part of Lord Bonomy’s Post-Corroboration Safeguards Review which recommended that research should be undertaken to ensure any reforms made to the Scottish jury system, including to the size of the jury, were made on an informed basis.

Jury Research

Prior to the independent jury research commissioned by the Scottish Government, there had been no research that directly assessed the impact of having 15 jurors on a criminal jury.

The key findings in relation to the size of the jury were:

- Jurors in 15-person juries were less likely to change their minds on the verdict than people in 12-person juries.
- 15-person juries were associated with somewhat lower levels of juror participation than 12-person juries across a number of measures.
- Reducing the number of jurors on Scottish juries from 15 to 12 might lead to more jurors participating more fully in the deliberations.
- Reducing the number of jurors on Scottish juries would be unlikely to have much impact on deliberation length or the range of evidential or legal issues discussed.

Jury Research: engagement sessions

Participants in the subsequent jury research engagement sessions were asked, “based on the research findings and your own experience, do you consider that any reforms are needed to jury size? If so, what and why?” It should be noted that this question sought views on changes to jury size as a standalone reform, rather than in direct consequence of a move to two verdicts.

In comparison to the other aspects of the Scottish jury system discussed, less strong opinions were expressed on the size of the jury. This was common across all the sectors in attendance and most participants were of the opinion that the size of the Scottish jury should remain 15, although did not appear to have particularly strong feelings about this. The main reasons provided largely reflected those set out above.

However there were some participants that felt the jury size should be reduced, highlighting that:

- 12 jurors works well in other jurisdictions;
- there are better ways to ensure that juries are representative of the wider population than simply having three extra jurors;
- it is harder to participate in larger groups, as highlighted in the jury research; and

- there are additional costs and practical difficulties with 15 jurors.

Discussion

As set out above, the jury research suggested there may be advantages to reducing jury size in terms of increased participation in deliberations. In addition to this, there would be cost savings due to the resulting reduction in expenses paid to jurors, as well as benefits to society in the form of fewer persons having reduced income while they are taken out of their regular employment to serve on a jury. Businesses would also benefit from greater availability of staff, and less disruption to their work which could be of particular benefit as the economy deals with the difficulties caused by the Covid-19 pandemic.

Despite these benefits, it was clear from the engagement events, and previous considerations of the issue, that stakeholders have less strong views about reforming the size of the Scottish jury (although these discussions largely took place prior to the pandemic and its impact on businesses).

During the engagement there was little appetite for changing the jury size as a standalone reform. This consultation seeks views on whether a change to the number of verdicts available or to the majority required would in turn impact on what the most appropriate jury size would be.

Questions

Having considered the views expressed throughout previous considerations of jury size, the evidence from the recent jury research and views gathered at the subsequent engagement sessions, the Scottish Government is seeking views on the following questions.

These questions focus on jury size. There are specific questions on not proven in part 2, on jury majority in part 4, and corroboration in part 5.

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
- Juries should change to 12 jurors
- Juries should change to some other size

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:

Part 4: Jury Majority

Background

In Scotland, a simple majority of jurors is required for a guilty verdict to be returned. This is unlike most other jurisdictions where unanimity or a qualified majority are needed for convictions or acquittals.

Since Scottish juries are made up of 15 people, this means that at least 8 jurors must be satisfied that the guilt of the accused has been proven beyond a reasonable doubt for an accused person to be convicted. If jurors are excused during the trial, for example due to illness, it can continue with a minimum of 12 jurors, but the support of 8 jurors is still needed for a guilty verdict; anything less is treated as an acquittal.

Some believe Scotland's simple majority is problematic in and of itself, arguing that it is difficult to square with the requirement of proof beyond reasonable doubt when 7 of the 15 jurors could opt for an acquittal verdict yet the accused can still be convicted. However, it is also commonly argued that the simple majority is balanced by, and cannot be considered in isolation from, the other safeguards of the current system including the requirement for corroboration and Scotland's three verdicts.

Although some consider that moving to two verdicts could be a standalone reform, others argue that as they regard the not proven verdict as a safeguard against wrongful conviction, if it was to be removed then the jury majority should be increased as a result to ensure the system remains balanced.

Previous considerations

In the Criminal Verdicts (Scotland) Bill introduced in November 2013, Michael McMahon MSP recommended, in consequence of his main proposal of a move to two verdicts, that the majority required to convict be increased to a qualified majority of at least two-thirds of the jury. The reasoning for this was set out in the accompanying [Policy Memorandum](#):

“If there is any possibility that more guilty verdicts will arise from the removal of the not proven verdict, it is important to ensure that such convictions are safe. In order to address any possible bias against the accused as the result of the loss of not proven, it therefore makes sense to increase the majority required to convict and to take both measures forward at the same time.”

A majority of the Justice Committee at the time supported the intention to abolish the not proven verdict but not the proposal to increase the jury majority. The Committee set out its view that the inclusion of the jury majority proposal showed that Mr McMahon was effectively acknowledging that abolishing the not proven verdict requires consideration of wider issues and that this underlined the need for research on decision making by jurors, as recommended by Lord Bonomy's Post-Corroboration Safeguards Review. The Criminal Verdicts (Scotland) Bill fell at stage 1 after a majority of MSPs voted against a motion seeking the agreement of the Parliament to its general principles.

The Criminal Justice (Scotland) Bill as introduced in June 2013, also proposed an increase to the size of the majority required for conviction. The Scottish Government did not consider that it would be justifiable for Scotland, in the absence of a requirement for corroboration, to remain the only common law jurisdiction in which an accused person could be convicted on a simple majority. However, this was linked to the removal of the requirement for corroboration, as opposed to reform of the number of verdicts available.

The Government was not persuaded at that time that requiring unanimous verdicts would be in the interests of justice due to the potential for hung juries, and evidence suggesting that several jurisdictions had moved away from strict unanimity. The best solution was considered to lie in a move to a qualified majority system requiring a minimum of 10 jurors to opt for a guilty verdict in a full jury of 15, 10 in a jury of 14, 9 in a jury of 13 and 8 in a jury of 12.

Where the required majority was not reached for a guilty verdict and there was no majority in favour of either of the acquittal verdicts, the jury would be considered to have returned a verdict of “not guilty”. This was to ensure that it remained the case that under Scots law, it is not possible for a hung jury to result in the accused person being subject to a new trial.

However, there was no legal or parliamentary consensus at that time so the corroboration and jury majority reforms were removed from the Bill due to concerns raised that additional safeguards against wrongful conviction and changes to law and practice would be needed to the criminal justice system before any such changes could be brought forward.

Jury Research

Prior to the independent jury research commissioned by the Scottish Government and published in October 2019, there were no studies that directly considered the Scottish simple majority requirement.¹⁸

The key findings in relation to the size of the majority were:

- Asking juries to reach a unanimous or near unanimous verdict, rather than a simple majority verdict, might tilt more jurors in favour of acquittal – and might, therefore, lead to more acquittals over a larger number of finely balanced trials.
- Requiring juries to reach a unanimous or near unanimous verdict, rather than a simple majority verdict, is likely to increase the average deliberation time, and may result in jurors being more likely to feel they have had the opportunity to put their views across before a verdict is reached. However, this may not lead to any improvement in the range of evidential or legal issues discussed.

¹⁸ Ormston R et al. *Scottish Jury Research: Findings from a Large Scale Mock Jury Study*, October 2019, page 3.

Jury Research: engagement sessions

Participants in the subsequent jury research engagement sessions were asked, “Based on the research findings and your own experience, do you consider that any reforms are needed to jury majority? If so, what and why?”. It should be noted that this question sought views on changes to jury majority as a standalone reform, i.e. not in direct consequence of a move to two verdicts.

Views were very mixed on the issue of the simple majority and there was no clear preference amongst sectors who participated. The main reason given for keeping the simple majority was a general lack of desire for changing a system that participants believed worked well and should not be “tinkered” with. Some specifically stated that the simple majority was appropriate when considered alongside safeguards such as the corroboration rule or the third verdict, or raised concerns that raising this would make it harder to get convictions, particularly in rape trials.

The main reason given for increasing the jury majority was that in cases where around seven out of 15 jurors opt to acquit, this arguably shows that there is a reasonable doubt in the conviction (although there is no legal basis for this view and it is not possible to say how frequently this happens).

Others had related concerns, arguing that a jury split in this way is not a unified group coming to a decision, and increasing the majority required could increase engagement as jurors would “have to argue it out”. A small number of attendees suggested that the simple majority can be difficult for jurors to understand, particularly if the acquittals are split between not guilty and not proven.

Views were regularly expressed that any reforms should not lead to a system that allows hung juries and/or retrials. A substantial majority of those who expressed a view on this issue suggested that if the majority is increased, a failure to reach the new threshold should result in acquittal.

Despite some support for increasing the majority, there was widespread agreement that requiring unanimity would be too high a standard, as one juror with unusual views or beliefs could prevent verdicts being reached. By far the most common suggestions were:

- a) that the majority should be increased to require 10 out of 15 for a conviction - although one respondent did raise a concern that since this would be different from any other jury system in the world, there would be a lack of evidence on what the implications of such a system may be; and
- b) that Scotland should change to a system like that of England and Wales where juries must first attempt to reach a unanimous verdict, and only after deliberating for at least two hours may they deliver a verdict by a majority of 11-1 or 10-2.

When participants were asked specifically about whether there should be changes to the jury majority if there was a move to two verdicts, it was frequently highlighted that since the not proven verdict is regarded by some as a safeguard against wrongful conviction, if Scotland moves to a two verdict system, the jury majority should be

increased. The jury research provides some evidence for the suggestion that not proven is a safeguard with its finding that out of a range of different potential jury structures, the combination of features that was most strongly associated with jurors in favour of a guilty verdict after deliberating was 15-person, simple majority, two verdicts. This is what the Scottish system would become if the number of verdicts were reduced with no other accompanying changes.

Discussion

Changing the jury majority required for conviction is not being proposed as a standalone reform. However, this consultation seeks views on whether it may be appropriate as a consequence if there was a move to a two verdict system, and if that in turn impacts on the questions of jury size and the corroboration rule.

Having considered the views expressed throughout previous considerations of these issues, the evidence from the recent jury research and views gathered at the subsequent engagement sessions, it is proposed that if there is to be an increase to the jury majority in consequence of a move to a two verdict system, it should not be to a requirement for unanimity but to either:

- a) a qualified majority of two thirds, as previously proposed in the Criminal Justice (Scotland) Bill, requiring a minimum of 10 jurors to opt for a guilty verdict in a full jury of 15, 10 in a jury of 14, 9 in a jury of 13 and 8 in a jury of 12; or
- b) to reduce the number of jurors to 12, and at the same time increase the jury majority, requiring a qualified majority of 10 jurors for conviction.

At the engagement events, views were regularly expressed that any reforms should not lead to a system that allows hung juries and/or retrials, and that in any reformed system, where the required majority is not reached for a guilty verdict, the jury should be considered to have returned a verdict of “not guilty”. Question 10 below is based on this view, however it should be noted that this would be unlike many other jurisdictions where unanimity or a qualified majority are required for acquittals.

Questions

Having considered the views expressed throughout previous considerations of jury majority and size, the evidence from the recent jury research and views gathered at the subsequent engagement sessions, the Scottish Government is seeking views on the following questions.

These questions focus on jury majority. There are specific questions on not proven in part 2, on jury size in part 3, and corroboration in part 5.

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 continue to require juries to reach a “simple majority” decision (8 out of 15).
- 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).
- We should reduce the jury size to 12 and require a “qualified majority” of 10 jurors for conviction as in the system in England and Wales.
- We should change to some other majority requirement.

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:

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/No/Unsure

Please give reasons for your answer:

Part 5: The Corroboration Rule

The requirement for corroboration has been a unique feature of criminal law in Scotland for hundreds of years. The basic principle of the corroboration rule is that an accused cannot be convicted of a crime, unless the essential facts of the crime are able to be established by evidence from at least two independent sources. The essential facts are:

1. that the crime was committed; and
2. that the accused was the person who committed the crime.

Evidence can take many forms, including direct evidence such as that of an eyewitness, admissions made by the accused, and evidence of facts and circumstances (known as circumstantial evidence). At its most simple, corroborated evidence may come from two eyewitnesses who can both say they saw the crime being committed and can identify the accused as the perpetrator. Alternatively, one strong, clear source of evidence may be corroborated by evidence of facts and circumstances pointing to the guilt of the accused, such as a witness who saw the accused running from the scene of the crime, at the relevant time, holding a weapon that matches the relevant description.

At the other end of the scale, a corroborated case can come from entirely circumstantial evidence from two or more sources. Each fact or circumstance may, on its own, be of little significance but the strength of the case is based on their combination giving rise to an inference that the accused committed the crime. Only one witness need speak to each fact or circumstance.

A clear admission freely made by an accused is only one source of evidence and requires to be corroborated. The exception to that is where the admission contains “special knowledge”, which is knowledge which could only be known to the person who committed the crime, such as an accused confessing to murder and telling the police where the victim’s body has been concealed.

The significance of the corroboration rule

The rule requiring corroborative evidence is seen by some as a protection against miscarriages of justice in that it ensures that no person can be convicted of an offence solely on the basis of the testimony of a single witness.

The requirement for corroboration runs throughout the Scottish criminal justice system. For example:

- (i) A prosecutor may not take prosecutorial action unless they believe there is sufficient evidence in law – i.e. corroborated evidence of the essential facts.
- (ii) At the end of the Crown case, the case may be brought to an end by the judge, and the accused found not guilty, if the judge concludes that the evidence led by the Crown is not sufficient in law – i.e. if evidence of the crucial facts is not corroborated.
- (iii) The judge is required to explain corroboration to the jury. Since July 2020 it has been agreed that jurors should be provided with certain materials in

writing at the start of the trial. These set out amongst other things, the general directions which apply in every case as well as, if appropriate, specific directions which should also be provided in writing and read to the jury at the same time, depending on the circumstances (written directions on corroboration can be seen in Annex B).

(iv) An appeal may be taken on the ground that there was insufficient evidence in law (i.e. there was not corroborated evidence of the essential facts) to support a conviction.

(v) For these reasons, the investigation of a criminal case must be undertaken with the corroboration rule firmly in mind. Each essential fact must be capable of being proved by corroborated evidence. So, for example, a suspicious death will involve a two doctor post mortem, so that the cause of death can be corroborated; and expert reports (e.g. DNA, fingerprint analysis) will generally be produced jointly by two experts.

Corroboration in cases often committed in private such as sexual crimes

Corroborated evidence is more likely to exist in relation to some offences than others. For example, for crimes that are usually committed in private, the only potential evidence may be from the testimony of a complainer. This can be a particular barrier to obtaining corroboration for crimes such as domestic abuse, sexual crimes, and other abuse that may take place in a private or domestic setting such as abuse of older or otherwise vulnerable people. Therefore it has been argued that the practical effect of the requirement for corroboration can be to deny access to justice for victims of these types of crime.

The essential facts of the crime of rape¹⁹ are: identification of the accused, penetration and lack of consent. The traditional approach in rape cases was to consider each of the essential facts separately in assessing the presence of corroborative evidence. This has been developed in recent case law, outlined in Annex C.

A number of rules have developed over time to broaden what can be considered to be corroborating evidence and which lessen the challenges set out above, in some cases. Of particular relevance to sexual offence cases are the following:

¹⁹ The common law definition of rape (for offences committed before 1 December 2010) involves intentional or reckless penile penetration of the complainer's vagina where the complainer did not consent and the accused either knew that she did not consent or was reckless as to whether she consented. Rape in terms of section 1 of the Sexual Offences (Scotland) Act 2009 (offences committed on or after 1 December 2010) involves intentional or reckless penile penetration of the complainer's vagina, anus or mouth where the complainer does not consent and the accused has no reasonable belief that the complainer consented to penetration.

- **Distress:** A series of cases has developed the rule that independent evidence of distress shown by the complainer which is attributable to the sexual assault can corroborate lack of consent. The rule was initially applied only in cases where the distress was shown a short time after the incident. However, this has developed to a position where what matters is whether the distress can be shown to have been caused by the sexual assault rather than the time interval being a determining factor.
- **The doctrine of mutual corroboration** (also known as the Moorov doctrine): The evidence of single witnesses to different incidents may provide what is known as mutual corroboration in certain circumstances. For example, in the Moorov case itself where an employer carried out a series of sexual assaults against female staff, it wasn't necessary for the complainers to have witnessed the assault on each other; each complainers' testimony about what happened to them, was considered enough to corroborate the evidence of other complainers where the incidents were sufficiently similar in "time, character and circumstance" from which an overall course of criminal conduct could be inferred.

It is not necessary for the crimes charged to be the same. For example, the evidence of a rape complainer and a complainer of lesser sexual assault can be mutually corroborative if there are sufficient similarities, such as the accused using similar methods to meet complainers and gain their trust. It should be noted that the doctrine of mutual corroboration does not apply only to sexual assault cases.

Calls for reform of the corroboration rule

However, despite these developments some argue that the corroboration rule should be either reformed or removed entirely. That is why the Scottish Government is giving further consideration to the issue in this consultation.

There have been suggestions that the corroboration rule could be selectively removed for particular offences or aspects of offences, for example for sexual offences. However, this has been criticised as overly complex, lacking in principle, and creating a two-tier system.

Although this section refers to specific issues the corroboration rule can cause when prosecuting sexual crimes and other crimes committed in private, it is important to note that the rule applies to the majority of criminal cases.²⁰ This would include, for example, cases where a police officer is the only witness to the alleged offence. Abolishing the rule in order to avoid issues for some sex offence cases might lead to problems in other types of cases. However, such issues are dealt with in other jurisdictions who do not have this rule.

²⁰ There are a discrete category of statutory offences to which corroboration does not apply – e.g. some motoring offences.

Previous consideration of corroboration reform

The Carloway Review, published in 2011, found no evidence that corroboration protects against unsafe convictions and suggested that corroboration could be a barrier to justice by creating an additional obstacle to the prosecution of some offences, such as rape, where corroboration may be difficult to obtain. The report recommended the removal of the requirement for corroboration.

The Scottish Government listened closely to the discussion following the publication of this report and then carried out two further consultation exercises: first on the recommendations of the Carloway Review, and then - when it became clear that a majority of respondents supported keeping the corroboration rule - a further consultation on Additional Safeguards Following the Removal of the Requirement for Corroboration.

Following this engagement, the Scottish Government proposed abolishing the corroboration requirement in all criminal proceedings in the Criminal Justice (Scotland) Bill – introduced in 2013.

During the parliamentary consideration some of the main arguments raised for corroboration abolition were:

- The practical impact on victims whose cases cannot be heard in court, even in some cases where there may be a reasonable prospect of conviction in another jurisdiction.
- The principle that corroboration is outdated, watered down by recent case law and out of step with comparable justice systems.
- The complexity that has built up around the corroboration requirement such that it is not well understood or easily explained.

Although there was some support for these points, particularly from organisations that support victims of crimes, there was strong opposition from a significant number of stakeholders. They were concerned that although other common law countries do not have a general corroboration rule, abolition may lead to a decrease in the quality of evidence and would not improve access to justice in a meaningful way for victims, particularly if cases were taken forward where there is not a realistic expectation of a significant increase in convictions.

Stakeholders argued that the case for abolition had paid insufficient attention to the importance of the corroboration rule in ensuring that the Scottish criminal justice system as a whole is properly balanced and gives due weight to the interests of those facing criminal allegations. Consequently there was a strong view that if the rule was to be abolished then additional provisions needed to be put in place to protect against wrongful convictions.

In light of these concerns, Lord Bonomy was appointed to head an independent review to consider what additional safeguards might be necessary. Consideration of stage 2 amendments for the Criminal Justice (Scotland) Bill was postponed until after publication of the review's recommendations.

On the day of the publication of Lord Bonomy's report in April 2015, the former Cabinet Secretary for Justice, Michael Matheson MSP, announced that it had not been possible to build agreement around the reform. Therefore, although the Scottish Government still believed there to be a case for abolishing the requirement for corroboration, he now considered that the corroboration provisions (and related measures dealing with jury majorities) should be removed from the Bill.

Lord Bonomy's review recommended a wide range of criminal justice reforms, indicating that some of these would be worthwhile improvements, independent of corroboration reform. The review group were unable to make any specific recommendations for the jury system due to a lack of research on the unique elements of Scottish juries (simple majority, jury size and three verdicts) so they recommended that research should be undertaken to better understand the dynamics of decision-making in Scotland's jury system.

Recent developments in law

It is important to note that how the corroboration rule works in practice, and its effect has developed substantially since these previous parliamentary considerations. This has been especially relevant for sexual offence and domestic abuse cases. In recent years, the Appeal Court has taken a broad, pragmatic and holistic approach and developments have been made in areas including distress, penetration, and mutual corroboration, so that it is now far more possible, in relation to sexual offences, to establish sufficient corroborated evidence in law.

The law on "dockets" has also been developed by the Court, leading to changes in policy and practice surrounding how these are used. A docket is a type of legal document which is used in a criminal trial.²¹ It allows prosecutors to lead evidence of behaviour which isn't included in the charges against the accused person. The purpose of leading such evidence is that it may be capable of corroborating the charge(s) against the accused person.

Separately, in 2019, section 1 of the Domestic Abuse (Scotland) Act 2018 came into force and created a new statutory domestic abuse offence. This new offence can be committed when a person engages in a course of behaviour which is abusive. A course of behaviour involves behaviour on at least two occasions. It is not necessary for the prosecutor to lead evidence that corroborates behaviour that has occurred on each occasion that makes up the course of behaviour which is specified in the charge. It is the course of behaviour itself that constitutes the offence which has to be corroborated by two sources of evidence.

Further detail is included at Annex C.

²¹ The use of dockets is set out in section 288BA of the Criminal Procedure (Scotland) Act 1995, which was added by the Criminal Justice and Licensing (Scotland) Act 2010. Prior to this, prosecutors were able to use dockets under the common law.

Jury research and engagement

The background to the jury research is set out in the introduction to this consultation. Although the jury research did not specifically consider the corroboration rule, the mock jurors were given standard directions on the meaning of corroboration as if they were in a real trial. In general, jurors appeared to have fewer difficulties understanding the corroboration requirement than other legal issues such as the standard of proof. However, there were occasional incorrect comments in the mock juries' discussions of the rape trial, suggesting that the doctor's forensic evidence would have to unequivocally indicate rape before the jury could convict. Although these comments were made by individuals in the mock jury discussions that took place in the study, it is not possible to say whether they had any impact on the verdicts those mock juries eventually reached.

As well as considering the findings from the jury research, a series of subsequent engagement events provided an opportunity to hear participants' views on related reforms such as corroboration.

Abolishing the corroboration rule was opposed by the substantial majority of those who participated in the engagement sessions, including legal professionals, officials from various public bodies giving their personal views, and academia. Even in groups who were open to other reforms such as moving to two verdicts, there was very limited support for this position and opposition was particularly strong amongst legal professionals. The small number who supported the abolition and/or reform of the corroboration rule – primarily, although not exclusively survivors - based this on a belief that it prevents strong cases with good quality evidence from getting to court, that the rule fails victims, that it is overly complex, hard to understand and not consistently applied and that it is hard to justify why Scotland alone, uniquely needs the corroboration rule.

The main reasons provided for keeping the corroboration rule were that it is a fundamental safeguard against wrongful conviction that the Scottish legal system is built on, and that its application has been significantly altered in recent years due to developments in case law.

Discussion

As set out above, most of the participants in the engagement sessions did not feel that reform or abolition of the corroboration rule would be desirable, either as a standalone reform, or linked to a move to a two verdict system.

However, the importance of a holistic approach was repeatedly emphasised, so it was considered appropriate to seek stakeholders' views on the corroboration rule alongside the other aspects of the jury system to facilitate this discussion of the whole system and its key safeguards.

Furthermore, as a government we understand the concerns with how the corroboration rule can affect access to justice for survivors of crimes committed in private. That was one of the main reasons why we previously tried to take forward corroboration reform and have now committed to giving it further consideration.

Questions

Having considered the views expressed throughout previous considerations of the corroboration rule, developments in case law, the evidence from the recent jury research and views gathered at the subsequent engagement sessions, the Scottish Government is seeking views on the following questions.

These questions focus on corroboration. There are specific questions on not proven in part 2, jury size in part 3 and jury majority in part 4.

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 abolish the corroboration rule
- Scotland should reform the corroboration rule
- Scotland should keep the corroboration rule as it is currently

Please give reasons for your answer:

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

- Scotland should abolish the corroboration rule
- Scotland should reform the corroboration rule
- Scotland should keep the corroboration rule as it is currently

Please give reasons for your answer:

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

- Scotland should abolish the corroboration rule
- Scotland should reform the corroboration rule
- Scotland should keep the corroboration rule as it is currently

Please give reasons for your answer:

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

Question 13: Do you feel further safeguards against wrongful conviction should be in place before any reform or abolition of the corroboration rule? Yes/No

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

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?

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

Questions: Equality and human rights

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)?

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

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

Questions: Other impacts and comments

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?

Question 19: Do you have any other comments about the content of this paper?

Part 7: Key Terms

Accused - A person charged with committing a crime or offence.

Acquittal - An outcome after a trial which means that the accused is not convicted of the offence. In Scotland, this can be through either a “not guilty” or “not proven” verdict.

Admission - A statement by the accused admitting an offence or a fact.

Beyond reasonable doubt - The standard of proof in a criminal case (see 'standard of proof' below). The standard judicial direction for this as set out in the Jury Manual is:

“... a doubt, arising from the evidence, based on reason, not on sympathy or prejudice, or on some fanciful doubt or theoretical speculation. It's the sort of doubt that would make you pause or hesitate before taking an important decision in the practical conduct of your own lives. Proof beyond reasonable doubt is less than certainty, but it's more than a suspicion of guilt, and more than a probability of guilt. This doesn't mean that every fact has to be proved beyond reasonable doubt. What it means is that, looking at the evidence as a whole, you've to be satisfied of the guilt of the accused beyond reasonable doubt.”

Circumstantial evidence - Evidence that does not itself prove a particular fact but allows a reasonable inference to be made which supports that fact, for example, where an accused in a theft case has been found in possession of the stolen property.

Common law - A system of laws based on custom and court decisions (also known as “precedent”) rather than on written laws made by a parliament. Common law forms a large part of the legal system in Scotland.

Complainer - A person who, in criminal proceedings, claims to have been the victim of an offence.

Consent - In Scottish criminal law, consent in a sexual offence case means that the complainer freely agreed to have a particular type of sexual contact with the accused. Most sexual offences require proof that the accused acted without the complainer's consent.

Corroboration - The requirement in Scottish criminal law that an accused cannot be convicted of a crime unless there are at least two separate sources of evidence that:

- (a) the crime was committed; and
- (b) the accused was the person who committed the crime.

The corroboration rule is covered in detail in part 5.

Deliberations - The process of discussion by which juries reach a verdict.

Directions - The instructions given by a judge to a jury at the end of a criminal trial that tell the jury the legal tests that they should apply during their deliberations.

Finely balanced trials – The jury research showed mock jurors two specific trials where the evidence presented was deliberately designed to generate a degree of ambiguity, in order to encourage debate within the jury room about guilt and acquittal, and to maximise the likelihood that jurors would consider the difference between the not guilty and not proven verdicts. Had the evidence in these trials been differently balanced, for example with very strong evidence of the guilt of the accused, the balance between verdicts would probably have been different.

Hung juries – In some countries where a jury is required to reach a certain majority in order to return a verdict, and cannot do so, it is referred to as a 'hung jury'. Hung juries are not a feature of the current Scottish system as they have 15 members and return verdicts by a simple majority of votes.

Jurisdiction - The territory over which a Court has legal authority.

Majority required - The number of jurors required to support a verdict before it can be returned, for example in Scotland, eight out of 15 are required for a conviction.

Mock jury - The juries in the independent jury research study were made up of members of the public who were eligible to serve on a jury, but were asked to come to a verdict based on a fictional filmed trial simulation, rather than a real criminal case. This is a well-established type of research which is normally referred to as 'mock jury research'.

Miscarriage of justice - when a court proceeding has an unfair outcome, for example a person is convicted of a crime they did not commit.

Presumption of innocence - every accused person is presumed innocent until proved guilty and is not required to prove his or her innocence.

Simple majority - A rule requiring a majority of jurors (for example, eight out of 15) to support a verdict before it can be returned. This is the rule that currently applies in Scotland.

Standard of proof - The level of certainty needed to prove a legal claim. In a criminal trial this is "beyond reasonable doubt".

Survivor/Victims - As some people prefer the term victim and others' identify as survivors, both of these terms have been used throughout this paper. The use of these terms in this paper does not have any legal meaning or imply anything about specific cases.

Solemn cases - Cases which are determined at trial by a jury, either in the High Court or the Sheriff Court. These cases are usually considered to be more serious.

Summary cases - Criminal cases that are considered less serious and are determined at trial by a Sheriff or a Justice of the Peace. Juries are not used for summary cases.

Unanimity and near unanimity - A rule requiring that either all, or almost all, jurors support a verdict before it can be returned. Unanimity requires that every juror supports the verdict, while 'near unanimity' requires no more than two dissenting jurors (i.e. 10 out of 12 must agree). In England and Wales juries are asked to reach unanimity initially but if they are unable to do so, they are instructed that a 'near unanimous' verdict may be accepted.

Part 8: Responding to this Consultation

We are inviting responses to this consultation by Friday 11 March 2022.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/justice/not-proven-verdict>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of Friday 11 March 2022.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form and return along with your response to:

Criminal Justice Reform Unit
Scottish Government
Justice Directorate
St Andrew's House
Edinburgh
EH1 3DG

Or by email to: notprovenverdict@gov.scot

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our privacy policy: <https://www.gov.scot/privacy/>

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or to notprovenverdict@gov.scot.

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online at <http://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.



The Not Proven Verdict and Related Reforms: Consultation

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:
<https://www.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
 Publish response only (without name)
 Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

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 Scottish Government to contact you again in relation to this consultation exercise?

Yes

No

For the purposes of analysing the responses to this consultation it would be helpful to know a bit more about your personal experiences of the criminal justice system that you feel are relevant to your response to this consultation. Please note that the question below is optional.

If you are responding to this consultation as an individual, please select any of the following that apply:

Not applicable – this response is on behalf of an organisation

I have been/I am a victim/complainer/survivor of a crime that was reported to the police

I am a family member or friend of a victim/complainer/survivor of a crime that was reported to the police

I have been charged with a crime

I am a family member or friend of someone who has been charged with a crime

I have been a juror in a criminal trial

None of the above

If you are responding to this consultation as an individual: Have you ever worked professionally or volunteered in any of the following types of roles (please select all that apply)

Not applicable – this response is on behalf of an organisation

I have worked as a legal professional (for example, as a lawyer or judge)

I have worked in another justice system organisation (for example, as a justice social worker, in a prison or for the Police)

I have worked for a third sector organisation that operates in the justice system (for example, working for a charity that supports people convicted of crimes, provides rehabilitative interventions, or supports victims and witnesses)

I have worked as an academic or professional researcher on issues related to the justice system

I have not worked in any of the types of roles listed above

Annex A: Summary of Consultation Questions

If you have experience of jury duty and this has contributed to forming your views on these issues, please avoid giving any specific details of anything that took place on the juries you served on. This is because according to section 8(1) of the Contempt of Court Act 1981, “it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings”.

You are encouraged to set out your views on these important issues and we recognise that your personal experience on a jury may have contributed to shaping those views. However, we recommend that you answer these consultation questions in general terms and do not disclose any details of the cases you decided or anything else specific that took place in any juries you have served on.

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 keep all three verdicts currently available
- Scotland should change to a two verdict system

Please give reasons for your answer:

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

- Guilty and not guilty
- Proven and not proven
- Other

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

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?

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?

- 1 – Appropriate
- 2 – Inappropriate
- 3 – Don’t know

- 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.

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

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

Yes/No/Unsure

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

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/No/Unsure

Please give reasons for your answer:

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

Yes/No

Please give reasons for your answer:

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
- Juries should change to 12 jurors
- Juries should change to some other size

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:

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 continue to require juries to reach a “simple majority” decision (8 out of 15).
- 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).
- We should reduce the jury size to 12 and require a “qualified majority” of 10 jurors for conviction as in the system in England and Wales.
- We should change to some other majority requirement.

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:

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/No/Unsure

Please give reasons for your answer:

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 abolish the corroboration rule
 - Scotland should reform the corroboration rule
 - Scotland should keep the corroboration rule as it is currently

Please give reasons for your answer:

- b) If Scotland changes to a two verdict system and keeps the simple majority:
- Scotland should abolish the corroboration rule
 - Scotland should reform the corroboration rule
 - Scotland should keep the corroboration rule as it is currently

Please give reasons for your answer:

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

- Scotland should abolish the corroboration rule
- Scotland should reform the corroboration rule
- Scotland should keep the corroboration rule as it is currently

Please give reasons for your answer:

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

Question 13: Do you feel further safeguards against wrongful conviction should be in place before any reform or abolition of the corroboration rule? Yes/No

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

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?

EQUALITY AND HUMAN RIGHTS

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)?

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

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

OTHER IMPACTS AND COMMENTS

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?

Question 19: Do you have any other comments about the content of this paper?

Annex B: Jury Directions

Since July 2020 it has been agreed that jurors should be provided with certain materials in writing at the start of the trial, setting out amongst other things, the general directions which apply in every case as well as, if appropriate, specific directions which should also be provided in writing and read to the jury at the same time, depending on the circumstances.

Regarding corroboration, these directions state that:

“the law is that nobody can be convicted on the evidence of one witness alone, no matter how credible or reliable his or her evidence may be. The law requires a cross-check, corroboration.

There must be evidence you accept as credible and reliable coming from at least two separate sources, which, when taken together, implicate the accused in the commission of the crime. Evidence from one witness is not enough.

Be clear about this:

Every incidental detail of a charge, such as the narrative of how the crime is alleged to have been committed, does not need evidence from two sources. But there are two essential matters that must be proved by corroborated evidence. These are:
that the crime charged was committed and
that the accused committed it.”

The evidence and submissions of the parties will inform the extent to which anything more need be said in relation to matters touched upon in the introductory directions.

Annex C: Recent Developments Regarding the Corroboration Rule

Development of the rule of mutual corroboration

The law in relation to the requirement of corroboration has continued to develop since the publication of the Carloway Review in 2011, in particular as regards the application of the doctrine of mutual corroboration. “Mutual corroboration” is a rule in law which means that evidence of separate offences can be used to corroborate each other, when certain criteria are met.²² For example, it might mean that the evidence of one witness that they have been sexually assaulted by the accused person, can be used to corroborate the evidence of another witness that they have also been sexually assaulted by the accused person (and vice versa).

In 2013, the case of *MR v H. M. Advocate* confirmed that offences which might be seen by some as “less serious” (such as an offence that doesn’t involve penetration) can corroborate a “more serious” offence (such as an offence that involves penetration).

Sometimes during a trial for a sexual offence, a question comes up as to whether the accused reasonably believed that the complainer was consenting. In 2019, in the case of *Maqsood v H. M. Advocate*, the Court confirmed that the prosecutor does not have to corroborate the fact that the accused did not have reasonable belief in consent – this can be inferred from other facts and circumstances which are proven in the course of trial. For example, it can be shown through evidence that the complainer was obviously intoxicated and therefore the accused would have known the complainer was not consenting. This decision is particularly important in cases where physical force has not been used by the accused.²³

In 2019, the case of *Jamal v H. M. Advocate* confirmed that in an allegation of rape, penetration does not have to be corroborated by medical or scientific evidence: a broad, holistic approach should be taken and corroboration can be found in other facts and circumstances which support or confirm the direct evidence of the complainer, for example, evidence of dishevelment or loss of clothing.

Additionally, the Court also confirmed that it is possible that evidence of a non-penetrative sexual offence (such as sexual assault) may corroborate evidence of a penetrative sexual offence (such as rape).

It remains the position that distress cannot corroborate penetration, as set out in the case of *Smith v Lees*. The case of *Jamal*, however, confirmed that evidence of distress should not be disregarded, as it can still play an important role when taken alongside other circumstances that support or confirm the complainer’s evidence. This is particularly so when the evidence is that the distress was of an extreme nature.

²² As set out in *Moorov v H.M. Advocate* 1930 J.C. 68

²³ Recently, in the case of *Nyiam v H. M. Advocate*, the Court confirmed that the law as set out in *Maqsood* is correct.

Evidence of a complainer's distress may also provide supporting evidence regarding the accused's state of mind and whether they reasonably believed the complainer was consenting.

Also in 2019, *HMA v Taylor*²⁴ clarified both that the doctrine of mutual corroboration does not necessarily require the criminal conduct to be directed towards more than one complainer and that corroboration by mutual corroboration could be established within a single charge provided that there are sufficient similarities between the instances of criminal behaviour.

When prosecutors rely on the doctrine of mutual corroboration to prove a case, they have to show that the offences are linked by time, character and circumstance so that it can be said that the offences amount to a single course of conduct with each individual offence corroborating the other(s). Where there is a significant gap in time between the individual offences, for example, seven or more years, there also has to be "special, compelling or extraordinary circumstances" for mutual corroboration to be possible.²⁵ The Court has, however, confirmed that where a case involves sexual abuse of children by adults, this is in itself a special, compelling or extraordinary circumstance which is sufficient for the doctrine of mutual corroboration to apply, even where there is a lengthy gap in time between the individual offences.²⁶

Since the decision in *Jamal*, in particular, cases are proceeding on the basis of the broader approach recommended. It is important to note, however, that it remains crucial to weigh the evidence as a whole and it cannot be said, for example, that the presence of a single piece of circumstantial evidence will be considered sufficient to corroborate the account of the complainer, in the absence of other compelling facts and circumstances. The decision in each of these cases removed significant barriers to the effective prosecution of allegations involving sexual offending in Scotland.

The use of dockets

During a criminal trial, prosecutors cannot (as a general rule) lead evidence of criminal behaviour that the accused person has not been charged with. There are a few exceptions to this rule but of particular relevance, is the law relating to "dockets" in sexual offence cases.

A "docket" is a type of legal document which allows prosecutors to lead evidence of behaviour which isn't included in the charges against the accused person. The purpose of leading such evidence is that it may be capable of corroborating the charge(s) against the accused person, even though there isn't enough evidence to charge the accused person with the behaviour in the docket. This might be, for example, because the conduct in the docket would constitute an offence but the statutory time-limit for prosecution of the offence has passed (it is 'time-barred') or because the accused has previously been tried for the behaviour.

The use of dockets sometimes means that a person can be convicted of a sexual offence where there would otherwise have not been enough evidence to corroborate

²⁴ *H.M. Advocate v Taylor* [2019] HCJAC 2

²⁵ See, for example, *KH v H. M. Advocate* 2015 S.C.C.R. 242

²⁶ *Adam and Daisley v H.M. Advocate* [2020] HCJAC 5

the charge. For example, if a complainer gives evidence about a sexual offence which took place in Scotland, this could be corroborated by evidence of another witness that similar behaviour happened to them outside of Scotland (provided that the other criteria for using the doctrine of “mutual corroboration” are met).

Dockets can also be used to allow the prosecutor to lead evidence of criminal behaviour that an accused person has previously been convicted of. This could be used to support a sexual offence charge by showing that the charge formed part of a wider course of criminal behaviour.²⁷ It is important to note that it is the evidence of the behaviour which is included in the docket, not the fact that the accused has been convicted of it.²⁸

Section 1 of the Domestic Abuse (Scotland) Act 2018 - Engaging in a course of abusive behaviour in the context of domestic abuse

A new specific offence of domestic abuse was introduced in 2019. Domestic abuse is often an offence committed in private where the challenges of corroboration can be greater.

This new offence is committed if three conditions are met. A person commits an offence if they engage in a course of behaviour (involving behaviour on at least 2 occasions) which is abusive of their partner or ex-partner. The course of behaviour must be such that a reasonable person would consider the course of behaviour to be likely to cause the victim to suffer physical or psychological harm and the person intended, by the course of behaviour, to cause the victim to suffer physical or psychological harm or is reckless as to whether the course of behaviour causes the victim to suffer physical or psychological harm.

Proof of the offence requires prosecutors to corroborate the course of behaviour, not individual occasions of behaviour which constitute the course of behaviour. Thus prosecutors do not require to corroborate every part of the charge, or corroborate each piece of behaviour that makes up the course of conduct.²⁹ The offence allows prosecutors to include, within a charge, uncorroborated conduct, potentially including conduct amounting to serious sexual and violent offending, provided that the conduct constitutes abusive behaviour, as defined in the legislation. The conduct must form part of an overall corroborated course of behaviour. As such, a sufficient connection must exist between any allegation relating to an incident which is not corroborated of itself and the other corroborated allegations of abusive behaviour which form part of the course of conduct, to enable them to be properly be regarded as component parts of the one course of behaviour that meets the requirements of the offence.

²⁷ H.M. Advocate v Moynihan [2018] HCJAC 43

²⁸ H.M. Advocate v Adams [2021] HCJAC 19

²⁹ See Stephen v H.M. Advocate 2007 J.C. 61



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This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-80201-779-3 (web only)

Published by The Scottish Government, December 2021

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS983946 (12/21)

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