



Law Society  
of Scotland

# Consultation Response

The not proven verdict and related reforms

March 2022



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the consultation: The not proven verdict and related reforms. The Committee has the following comments to put forward for consideration.

### General comments on the proposals

We believe that considering reforms to verdicts at this stage may not be an appropriate priority. The criminal justice system is emerging from the systemic shock of the pandemic, with backlogs in summary and solemn cases that may take until 2025 to resolve. This backlog affects all those who come to court to give evidence, with delays and uncertainty around when a case will proceed, and also accused, particularly those held on remand for periods that may be in excess of any sentence handed down, and that is if that person is ultimately convicted. The capacity of the profession to manage these challenges is also profoundly impacted. There is a crisis in defence provision, with increasing demands placed on a sector that had already declined by over 25% in the decade prior to the pandemic. We believe that building capacity and ensuring effective resources for all elements of the criminal justice system should be the priority. Notwithstanding these views, we comment in detail on the various questions contained in the consultation paper.

We consider it important to preface our response by putting into context the genesis of the discussions that surround the potential abolition of the not proven verdict. There is a complicated, and often misunderstood, historical background to the verdict that requires to be understood in order to appreciate its current legal status and effect. We are of the view that briefly explaining certain key contemporary reports, research findings and political discussions, which have led to the current proposals, are of benefit to add context to where matters currently stand. It is important to bear in mind what the legal effect of the not proven verdict actually is, it is a simple verdict of acquittal. Judges are explicitly advised not to seek to explain the difference between the verdict and that not of not guilty when charging juries.<sup>1</sup> This advice has been emphasised repeatedly by the Appeal Court and is contained in the jury manual.<sup>2</sup>

<sup>1</sup> *MacDonald v HMA*, 1989 SCCR 29.

<sup>2</sup> *Jury Manual: Some Notes for the Guidance of the Judiciary* (Judicial Institute for Scotland, Revised Edition 2019) 107.1 available at <http://www.scotlandjudiciary.org.uk/Upload/Documents/JuryManual2015.pdf> & *Fay v HMA*, 1989 JC 129 & *Cussick v HMA*, 2001 SLT 1316 & *Larkin v HMA*, 1993 SCCR 715.

## Background and relevant considerations

In 2010 following the judgment of the UK Supreme Court in *Cadder v HMA*<sup>3</sup>, which found the Scottish practice of interview without access to a solicitor to be in contravention of the Article 6 of the European Convention on Human Rights, the then Scottish Government asked Lord Carloway to conduct a review of various aspects of the Scots law of evidence and Scottish criminal procedure. The Carloway Report which was consequently produced in 2011 contained many recommendations which need not be considered here. Importantly, the report controversially recommended that the requirement for corroboration of crucial facts should be abolished in the Scots criminal law of evidence.

In 2013 the Scottish Government introduced a bill to the Scottish Parliament seeking to enact this recommendation, amongst others. The fact that such a longstanding and important feature of Scots law, now looked like being abolished without consideration of broader institutional safeguards, led to a fractious passage of the bill and fierce political debate. Ultimately, the Scottish Government, in the face of mounting political opposition, delayed progressing the bill to Stage 2 until an expert review group convened by Lord Bonomy reported on what safeguards would be required in the event of the abolition of corroboration.

Following the publication of the Bonomy Report in 2015, the Scottish Government then removed the provisions of the bill relating to the abolition of corroboration. Whilst the Bonomy Report considered the unique features of the Scots jury, and recommended:

“The time is right to undertake research into jury reasoning and decision making. Simultaneous changes to several unique aspects of the Scottish jury system should only be made on a fully informed basis”<sup>4</sup>.

Following this recommendation, research was commissioned by the Scottish Government into the Scots Jury, with an explicit direction to consider the effect of the not proven verdict. The research, involving the use of mock juries, undertaken by Ormston et al made a number of key findings<sup>5</sup>. The mock juries did not engage in detailed discussion of the consequences and meaning of the not proven verdict even in cases where it was used<sup>6</sup>. In the small number of cases where the not proven verdict was discussed there was no consistency in terms of the jurors’ understanding of its meaning and effect and how it differed (if at all) from the not guilty verdict<sup>7</sup>. Judicial directions on the not proven verdict did increase juror understanding<sup>8</sup>. The idea that the not proven verdict signified that the accused was guilty, but that said guilt could not be proven by the Crown to the requisite standard for conviction arose frequently during deliberations. Jurors accordingly tended to choose the not proven verdict where they believed the Crown had failed to discharge its evidential burden, in contradistinction to when they opted for the not guilty verdict, which was commonly selected where they believed in the accused’s innocence or disbelieved some aspect of a Crown witness’s account. Another key finding is the fact that in finely balanced trials, in other words where the evidence is capable of interpretation in a manner consistent with both the Defence and Crown accounts, the removal of the existence of the not proven verdict of acquittal might move jurors towards a guilty verdict.

<sup>3</sup> [2010] UKSC 43.

<sup>4</sup> Para 12.24 of the Bonomy Report.

<sup>5</sup> Rachel Ormston and others, *Scottish Jury Research: Findings from a Mock Jury Study* (Scottish Government 2019).

<sup>6</sup> Ormston and others (n 5) 6.2.

<sup>7</sup> *ibid.*

<sup>8</sup> Ormston and others (n 5) 6.3. On this point see also James Chalmers & Fiona Leverick, ‘Methods of Conveying Information to Jurors: An Evidence Review’ (Scottish Government 2018).

## Other relevant research

We note that Ormston et al's work is not the first or only piece of academic research to consider the operation of the not proven verdict, although it is the most comprehensive and it is the most legally informed. Two other pieces of work, that both originate from a non-legal discipline, psychology, are worth mentioning briefly. These studies focused on individual decision making in idealised settings. Hope et al's work in 2008 revealed that mock jurors, when presented with a choice of verdicts held erroneous views about the legal effect of the not proven verdict, given that some believed it permitted a retrial of the case.<sup>9</sup> Curley et al, in a number of studies, have argued generally that mock jurors appreciate the option of two verdicts of acquittal, as this permits them to express their views on the guilt of the accused even when the Crown's evidence fails to meet the requisite standard for conviction (i.e. beyond reasonable doubt).<sup>10</sup>

In other words, Curley et al argue that the jury should be permitted to communicate a suspicion of guilt even when acquitting the accused.

## The current political situation

At the most recent Scottish Parliamentary elections, several of the main political parties contained manifesto commitments to consider and potentially abolish the not proven verdict.<sup>11</sup> Some of these commitments justify abolition by way of reference to the low conviction rate in sexual offences trials.

In July 2021 the current Cabinet Secretary for Justice, Keith Brown remarked there was a strong case for the abolition of the not proven verdict in light of the low conviction rate in these types of cases, and that the government "would not shrink away from radical action"<sup>12</sup>. However, importantly he also stated that the matter would have to be consulted on, along with other changes suggested by the Dorrian Review into the management of sexual offences, given there were different views. He recognised that several other features of the Scots jury were relevant to the discussion about not proven:

"It's right to draw it into this area of work because it all hangs together – not proven, corroboration, the size of juries. We will take our time to consider that".<sup>13</sup>

The Scottish Government launched a consultation on the potential abolition of the verdict in December 2021. It should be noted that this consultation rejected as a basis for change the low conviction rate in sexual offences cases (notwithstanding earlier remarks by Cabinet Secretary for Justice). What should be borne in mind too in the context of the consultation is that discussion about the abolition of the not proven verdict is nothing new to legal and political discourse in Scotland, and that the debate about the merits and demerits of the not proven verdict has continued for a number of years.<sup>14</sup>

<sup>9</sup> Lorraine Hope and others, 'A Third Verdict Option: Exploring the Impact of the Not Proven Verdict on Mock Juror Decision Making' (2008) 32(3) Law and Human Behaviour 241.

<sup>10</sup> See e.g. Lee Curley and others, 'The Bastard Verdict and its Influence on Jurors' (2018) 59(1) Medicine Science and the Law, 26 & Lee Curley, 'Scotland's Not Proven Verdict Helps Juries Communicate their Belief of Guilt When Lack of Evidence Fails' (The Conversation, December 11 2018) < <https://theconversation.com/scotlands-not-proven-verdict-helps-juries-communicate-their-belief-of-guilt-when-lack-of-evidence-fails-to-convict-108286>>.

<sup>11</sup> These included The Scottish Conservative and Unionist Party, The Scottish National Party, the Scottish Green Party & the Scottish Labour Party.

<sup>12</sup> [Radical reforms could help sex crime victims, says justice secretary - BBC News](https://www.bbc.com/news/scotland-58111111)

<sup>13</sup> <https://www.scottishlegal.com/article/keith-brown-promises-reforms-to-raise-conviction-rate-in-sex-cases>.

<sup>14</sup> In this respect see James Chalmers, Fiona Leverick & Vanessa E. Munro, 'A Modern History of the Not Proven Verdict' (2021) 25(2) Edinburgh Law Review 151.

## The historical development of the not proven verdict

It is a common feature of the political and legal debate that surrounds the potential abolition of the not proven verdict that there often appears to be ambiguity as to the actual legal effect and meaning of the verdict. This feature of the debate, whilst regrettable, is understandable given the historical context to the current Scottish three verdict system. Whilst a detailed review of the legal history relevant to matters is beyond the scope of this consultation, it is useful to consider matters briefly so as to inform the discussion that follows. Indeed, understanding the complicated legal history that surrounds the verdict, also helps us understand why conflicting claims are often made about the verdict's use, and also goes some way to explain the affection that the verdict is held in by some in the legal profession and Scottish society.

In the first instance it is important to realise that not proven is not the original verdict of acquittal in Scottish criminal trials despite claims to the contrary. The earliest records from the 15<sup>th</sup> and 16<sup>th</sup> century reveal that Scots juries did not use a set form of words when delivering their verdicts but did generally express their verdicts in terms of guilt and innocence and not whether the charge had been proven or not. By the 17<sup>th</sup> century a common form of words was being used centred on culpability, innocence, and guilt. It was around about this time too that a change in criminal procedure resulted in the first use of what were then known as the 'special verdicts' of proven and not proven. What is vital to understand is that the verdicts of proven and not proven originally performed a completely different function, than the way in which not proven operates today.

At this point in the 17<sup>th</sup> century judges began issuing complicated interlocutors prior to trial, which pronounced upon the prospective legal effect of certain facts being proven after probation, following parties' written and oral submissions on the subject.<sup>15</sup> The Crown reacted to this development by increasing the complexity and length of the facts narrated in the minor premise of charges, seeking to anticipate defence submissions to the relevancy of the indictment.<sup>16</sup> The end result of all of this was that lay Scots juries, seemingly generally cognisant of the bench's superior legal expertise, started formulating and pronouncing their verdicts in line with the special interlocutors produced by the court prior to probation. Thus, they now decided simply whether they found the facts 'proven' or 'not proven' leaving the question of criminal liability to the bench, to be decided in light of the jury's factual determinations.

By the 18<sup>th</sup> century the practice of Scots juries returning special verdicts in this way was so widespread that the general verdicts of guilty and not guilty had almost fallen into abeyance. Whilst it is difficult to pinpoint the exact reason for the reintroduction of the guilty and not guilty verdicts, one can still say confidently that their use should be understood as a reclamation of power by the Scots jury to determine not merely whether facts had been proven but also the guilt and innocence of the accused explicitly. This is reflected in the celebrated 1728 case of *James Carnegie of Finhaven* where the jury, in contravention of directions from the bench, returned a verdict of acquittal at the invitation of the accused's advocate. If the jury had failed to return this verdict and only issued a verdict in terms of proof or its absence, it would have inevitably led to a worse outcome for the accused (who was popular at the time).

In the period following the case in the remainder of the 18<sup>th</sup> century there are instances of the special verdicts still being returned.<sup>17</sup> As Willock notes however the judicial practice of issuing special interlocutors prior to probation appears to have steadily declined, and eventually stopped altogether in this period, and

<sup>15</sup> Willock, *The Origins and Development of the Jury in Scotland* (n 4) 219. An interlocutor is a decision of a Scottish court prior to final judgment.

<sup>16</sup> *ibid.*

<sup>17</sup> Willock, *The Origins and Development of the Jury in Scotland* (n 4) 221.

this fact, coupled with the abolition of the requirement for written verdicts in Scotland, rendered the use of the special verdicts practically obsolete. Remarkably, despite the end of the use of the special verdict system in Scotland, not proven remained, although it was now repurposed as a straightforward verdict of acquittal during this period, alongside not guilty. There now also existed attempts to reframe what the verdict meant in relation to not guilty. Hume for example believed that the difference between the verdicts was one of emphasis and that not guilty should be reserved for cases where innocence had been firmly established (e.g. where a specific defence had succeeded etc.).<sup>18</sup> This is of course a very different justification for the system than its original purpose in the time of special interlocutors. Not proven as a simple verdict of acquittal was very popular with Scots juries throughout the 18<sup>th</sup> century and into the early years of the 19<sup>th</sup>.<sup>19</sup>

With the advent of a formal system of criminal appeals in solemn cases in Scotland in the 20<sup>th</sup> century, the Appeal Court eventually came to be asked to define the difference between the verdicts. The court was initially reluctant to perform this task, however Lord Clyde endorsed Hume's view that the matter was one of emphasis in the 1961 case of *McNicol v HMA* albeit in *obiter* comments. These comments however were subsequently deemed by the Appeal Court to be an inappropriate way in which to charge juries in several later cases.<sup>20</sup> In the 1989 case of *MacDonald* Lord Dunpark went as far to state that it was 'highly dangerous' to attempt to explain the difference between the verdicts to the jury. This reflects the current legal position whereby judges are warned that it is dangerous to attempt to explain any differences between both verdicts to jurors.

What should be learnt from this brief outline of legal history is that not proven is not the original verdict of acquittal in Scotland, it operates in a remarkably different way to that in which it was originally used under the special verdict system given its current legal effect is simple acquittal, and that judges are advised not to attempt to explain the differences between it and not guilty to jurors.

## The central issue – confusion

One of the arguments most frequently deployed by those seeking the abolition of the not proven verdict is the confusion that it causes. The confusion, it is said, strikes at two critical points:

- in the minds of the jury trying the case, and
- in the minds of the public as it seeks to understand the verdict returned.

On the other hand, it has been asserted during debate that abolishing the not proven verdict may increase the rate of conviction. We have no way of knowing whether people who are acquitted on a not proven verdict are factually innocent.

The task of the jury is, at one level, a straightforward one - to return a true verdict based on the evidence. The onus is on the Crown to prove the allegation(s) beyond reasonable doubt. The accused has the presumption of innocence throughout the trial process. None of this is inherently confusing.

At the start of the trial process, juries take an oath to return a true verdict according to the evidence. To discharge that oath, they must understand the parameters in which they are working. We are of the view

<sup>18</sup> Hume.

<sup>19</sup> Chalmers et al.

<sup>20</sup> *MacDonald v HMA*, 1989 SCCR 29

that juries are capable of understanding and determining complex issues, such as the treatment of hearsay evidence, and so are equipped to distinguish between the three verdicts available to them.

There is no doubt that little is done in the trial process to explain the not proven verdict, and how that sits between the other verdicts that are available. Juries are told that not guilty and not proven are both verdicts of acquittal, with the same implications. Suggesting that the difference between the two is one of emphasis is now disapproved of<sup>21</sup>.

For empirical research on the issue of jury confusion, we have to look at Scottish research (as work done in two-verdict jurisdictions is unlikely to be of much assistance). We note some of the limitations of mock jury exercises; while this is the best evidence available around jury deliberation, these do remain, ultimately, simulated exercises. Fortunately, this was an area looked at by Ormston et al:<sup>22</sup>

### ***How do jurors understand the not proven verdict?***

***Although the not proven verdict was seldom discussed during deliberations, when it was discussed there were inconsistent views on what the verdict meant. In particular, jurors were unsure how a not proven verdict differed from a not guilty verdict.***

*Across the 64 mock juries conducted for this research, the meaning and consequences of the not proven verdict were rarely discussed at any length during deliberations, even in juries where that verdict was returned. Where the not proven verdict was discussed, however, there was evidence of jurors holding inconsistent understandings of what the verdict meant, along with some confusion over its effect. In particular, jurors expressed uncertainty as to how it differed (if at all) from a not guilty verdict. Although not proven and not guilty verdicts have the same effect in law, jurors tended to give different reasons for choosing them. Those who favoured the not proven verdict tended to base this on a belief that the evidence did not prove guilt beyond reasonable doubt, or on the difficulty of choosing between two competing accounts. Jurors choosing the not guilty verdict (where not proven was also an option), on the other hand, tended to attribute this to a belief that the accused was innocent or on some aspect of the complainer's or witness' evidence that suggested that they were not giving a truthful account.*

*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 arose frequently, albeit briefly, in deliberations. It was also the issue on which there was the clearest agreement in questionnaire responses. Jurors also expressed the view that there would be a lingering stigma attached to receiving a verdict of not proven.*

*It should be stressed however, that while there was some uncertainty over the meaning of the not proven verdict, jurors relatively rarely expressed beliefs about the verdict that were definitively incorrect. This is in part because the not proven verdict does not have a specific definition beyond it being one of two verdicts of acquittal, which leaves room for a number of different understandings of its meaning and purpose. An exception was that it was incorrect for some mock jurors to believe that not proven opens up the possibility of retrial, but not guilty does not.*

The authors go on to suggest that juror misunderstandings could be addressed by the use of written directions or routes to verdict. Such an action may assist in clearing up some commonly expressed

<sup>21</sup> *MacDonald v HMA*, 1989 SCCR 29, *ibid*.

<sup>22</sup> <https://www.gov.scot/publications/scottish-jury-research-findings-large-mock-jury-study/pages/5/>.

misconceptions, such as whether an accused person could be tried again following a not proven verdict. But so long as the courts shy away from defining the not proven verdict, particularly with respect to the not guilty verdict, written directions and routes to verdict will add little.

All a jury can ever do is return a true verdict based on the evidence presented before it – has the prosecution proved beyond reasonable doubt that a crime was committed, and the accused was the perpetrator? The verdict can tell us little more than that. Objective truth is a different concept. A person who commits a crime may nonetheless be acquitted if there is insufficient evidence, or if witnesses are prevailed upon not to identify. A person who is objectively innocent may nonetheless be convicted if witnesses give untrue or mistaken evidence.

But in some respects that obvious disconnect is simply not good enough. The presumption of innocence has a meaning which goes beyond the narrow issue of onus. Public confidence depends upon the criminal justice system generally coming to the right conclusion – of convicting the guilty and acquitting the innocent. That confidence is tested where a person generally believed to be responsible is nonetheless acquitted of a crime (possibly because essential evidence is not presented – see, for instance, the 2007 World’s End murder trial), or where innocent parties are convicted (a recent example being the English postmasters’ appeals). The current clamour to abolish the not proven verdict is at least partly based on a belief (which is arguably impossible to test) that conviction rates in sexual cases are too low. It should however be noted that the removal of the not proven verdict would affect all criminal cases not just sexual offence cases. We acknowledge that the current system for dealing with sexual offences in Scotland can improve but note that work is currently underway to improve the treatment of sexual offence cases as a result of the review undertaken by the Dorrian Review<sup>23</sup>. We have concerns that the proposals set out in this consultation could potentially hamper efforts made in light of the review’s recommendations which are intended to bring wholesale improvement to those affected by sexual offences.

## Addressing the confusion

The introduction of remote juries during the Coronavirus pandemic brought with it a move towards providing juries with opening legal directions, in writing<sup>24</sup>. The standard opening directions cover various principles, including the presumption of innocence and requirement for corroboration, and set out the way in which evidence should be assessed. Perhaps unsurprisingly, given the directions are provided at the start of the case, nothing is said about verdicts.

The move towards opening legal directions in writing is to be welcomed, insofar as it should mean juries are better equipped to consider the evidence and try the accused fairly in accordance with their oath.

In England, it is now common for juries to be given written, case-specific directions at the end of the case. This is often accompanied by a ‘route to verdict’, which can take the form of a flowchart, identifying the critical issues for the jury to determine and signposting the verdict that would result. On one view, the route to verdict is no more than a modern version of the historical special interlocutor process described in section 2 above. A literature review on written directions in criminal trials supports an expansion of this practice<sup>25</sup>. It is likely that written materials assist jurors in understanding complex concepts and processes.

<sup>23</sup> [Improving the management of Sexual Offence Cases.pdf \(scotcourts.gov.uk\)](https://www.scotcourts.gov.uk/improving-the-management-of-sexual-offence-cases.pdf)

<sup>24</sup> [https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/judicial-institute-publications/amalgamated-briefing-paper-on-restarting-solemn-trials-220921.pdf?sfvrsn=4aedd348\\_0](https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/judicial-institute-publications/amalgamated-briefing-paper-on-restarting-solemn-trials-220921.pdf?sfvrsn=4aedd348_0), page 69 onwards.

<sup>25</sup> [Methods of conveying information to jurors: evidence review - gov.scot \(www.gov.scot\)](https://www.gov.scot/methods-of-conveying-information-to-jurors-evidence-review).



Issues such as whether an accused person can be retried after a not proven verdict can be dealt with in written directions.

But on the central issue, the difference between not guilty and not proven, written directions are unlikely to assist. For some time, the courts have steered clear of seeking to explain or justify the availability of a second verdict of acquittal. The manner of communication is irrelevant if there is nothing to say.

### **Consequences of abolishing the not proven verdict**

The criminal justice process is a complex system. Even the smallest changes can have large, and sometimes unanticipated, results.

Each and every criminal case is important. The court is being asked to make decisions which will affect people's lives. A convicted person may lose their career. A complainer may be exposed to further harm. Children may be taken into care. The impacts can go far beyond the narrow issues of conviction and sentence.

Any systemic change must be justified, proportionate and implemented with great care.

A perception that conviction rates are 'too low' in certain types of cases is not, in our view, proper justification for considering abolition of the not proven verdict. Our system aims to, through a fair trial, convict the guilty and acquit the innocent. Juries must reach their decisions on the evidence put before them. Even if it could be empirically demonstrated that too few guilty people are being convicted (and, short of making value judgements about individual cases, it cannot), that does not lead to the conclusion that the fault lies with juries. More likely, the problem lies with a lack of evidence.

Manipulating the system to increase conviction rates is a very dangerous path that will lead to miscarriages of justice.

The availability of the not proven verdict is an important safeguard – a key element in the mix that produces a fair, balanced system. Simple abolition of the third verdict would upset that balance.

There are some wider improvements needed to the trial process that perhaps stray beyond consideration of this consultation but they are linked all the same, e.g. trauma informed advocacy and a need for the profession to accept there is no set response a complainer should be expected to display in the aftermath of an allegation. The reality is that more often than not complainers are challenged as if there exists somewhere in the ether a written set of responses and that failure to display one or more of those somehow casts doubt over their credibility and reliability. A recent call for profession training in relation to sections 274 and 275, the Lord Justice Clerk's review group paper on improving the management of sexual offence cases, and the decision in *MacDonald*<sup>26</sup> are examples which demonstrate the need for these wider improvements and their importance in delivering justice and maintaining public confidence in the Scottish legal system.

We believe the removal of this long recognised safeguard would be dangerous and would undoubtedly result in miscarriages of justice. We are firmly of the view that it would be irresponsible to implement

<sup>26</sup> *MacDonald v HMA* [2020] HCJAC 21

changes at a time where the criminal justice system and the profession in such disarray given the extensive backlogs in the court system, the chronic underfunding of the legal aid system and growing challenges with recruitment in the defence sector.

## Consultation questions

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### 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:

**Scotland should keep the three verdicts system currently available.** As set out in detail above, we believe the removal of this long recognised safeguard would be dangerous and would undoubtedly result in miscarriages of justice.

We are firmly of the view that it would be irresponsible to implement changes at a time where the criminal justice system and the profession in such disarray given the extensive backlogs in the court system, the chronic underfunding of the legal aid system and growing challenges with recruitment in the defence sector.

### 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:

Should there be a move to a two-verdict system, which we oppose for the reasons above, those verdicts should be proven and not proven..

This would more closely reflect the task that juries are asked to perform – to determine, against the background of the presumption of innocence, whether the Crown has proved its case beyond reasonable doubt.

In some cases, there may be little or no evidence to establish the commission of a crime or the identity of the perpetrator. It may be impossible to know the truth of what actually happened. The public may crave certainty; but the criminal justice system cannot always provide it.

**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?**

This is a difficult question to answer and is a matter which would benefit from further consideration.

**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.**

This is **appropriate** in our current system.

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

**Don't know** - This may be a situation where a jury would select a not proven verdict. The difficulty is that any meaning is impossible to ascertain. Juries are told that the practical effect of a not proven verdict is identical to that of not guilty. Any jury may or may not have a reason for choosing not proven; but without further explanation, which cannot be given, there is no way of knowing.

- **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.**

**Don't know** - This may be a situation where a jury would select a not proven verdict. The difficulty is that any meaning is impossible to ascertain. Juries are told that the practical effect of a not proven verdict is identical to that of not guilty. Any jury may or may not have a reason for choosing not proven; but without further explanation, which cannot be given, there is no way of knowing.

- **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.**

**Don't know** - This may be a situation where a jury would select a not proven verdict. The difficulty is that any meaning is impossible to ascertain. Juries are told that the practical effect of a not proven verdict is identical to that of not guilty. Any jury may or may not have a reason for choosing not proven; but without further explanation, which cannot be given, there is no way of knowing.

### **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:**

**Yes.** The availability of a third verdict has long been regarded as an important safeguard and we endorse that position.

The criminal justice system aims to provide a fair process whereby, on the basis of the available evidence, those who are guilty are convicted, and those that are not are acquitted. Different jurisdictions have arrived at different ways of achieving the same end result. Our own system has been developed over centuries, through challenge and refinement.

In any complex system, the effect of any one part is not always easy to define. But it might be said that the availability of a third verdict acts to balance the fact that Scotland – almost uniquely – permits simple majority verdicts. Abolishing the not proven verdict while leaving majority verdicts intact would materially increase the risk of 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:**

**Unsure** - That may be the case in certain verdicts, arising from the common misconception that a not proven verdict is something less than a true acquittal. However, in terms of stigma, an accused is far more likely to have experienced this at other stages in the criminal justice process than at the stage of acquittal.

### **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:**

**No** - It is not clear that a not proven verdict would be more traumatic than one of not guilty to a victim of crime or their family. This question presupposes that in the absence of the option of not proven, the verdict would have been one of guilty.

## **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:**

There is some evidence, particularly from the Scottish Jury Research<sup>27</sup> to suggest that 12 may be the optimal number for jury size. It is worth noting that the larger the jury, the greater the spread of backgrounds and experiences that can be drawn upon. However, there is also a greater risk that some jury members will not be heard.

The Thomson Committee proposed that the Scottish jury system should be reduced to 12 members<sup>28</sup>. That is consistent with practice in many other jurisdictions, including England and Wales, Ireland, Australia, Canada, New Zealand and many US states. The Academic Expert Group for the Post-Corroboration Safeguards Review in 2014, noted that there is a considerable amount of information and experience from other jurisdictions with the operation of 12 person juries and majority verdicts<sup>29</sup>.

## **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.**

<sup>27</sup> [Scottish jury research: findings from a mock jury study - gov.scot \(www.gov.scot\)](http://www.gov.scot/resources/documents/2015/04/Scottish_jury_research_findings_from_a_mock_jury_study_-_gov.scot.pdf)

<sup>28</sup> Criminal Procedure in Scotland (Second Report) (Cmnd 6218: 1975) para 51.11

<sup>29</sup> <http://eprints.gla.ac.uk/99080/1/99080.pdf>

- 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:

The availability of a simple majority for conviction in Scotland has long been a source of concern to practitioners and academics. In June 2013 the Scottish Government proposed a move to majority verdicts in the Criminal Justice (Scotland) Bill<sup>30</sup>, but the change was not taken forward.

Most jurisdictions require unanimity, or something close to it. As the Academic Expert Group said (ibid, pp.150-151):

*‘...As the above analysis demonstrates, there is a clear consensus across the common law world (courts martial aside) that jury verdicts should be reached by unanimity. This is regarded as a consequence of the requirement of proof beyond reasonable doubt, the presumption of innocence, and the view that a jury verdict is a collective decision. The verdict is one of the jury as a whole, not simply the result of counting votes in a ballot. Over time, this rule has been qualified in most – not all – jurisdictions to permit juries to return verdicts by qualified majority. Qualified majority rules exist because of a recognition that in some cases an individual juror, or perhaps two jurors, may not participate properly in the process, because they have been intimidated or have taken an unreasonable or perverse approach to their task. The acceptance of a qualified majority, therefore, does not undermine the principle that the verdict should be one of the jury as a whole. Instead, it recognises that an individual juror or jurors may not be willing or able properly to participate in the collective decision-making process.*

*Scots law, by contrast, stands entirely apart from this consensus. There is no clear basis on which the simple majority verdict can be reconciled with the requirement of proof beyond reasonable doubt, the presumption of innocence, or the concept of the jury as a body which takes collective decisions. The Scottish approach has consistently been justified on the basis that Scotland applies a unique set of practices in jury trials – corroboration, three verdicts and simple majority verdicts – which, taken together, represent a proper approach to the criminal justice system’s key goal of acquitting the innocent and convicting the guilty...’*

We agree with that analysis. A simple majority system cannot be reconciled with the presumption of innocence and the need for proof beyond reasonable doubt.

Other common law jurisdictions tend to have the following features: a jury size of 12, an initial requirement for unanimity, and then (subject to the trial judge’s discretion) the possibility of a qualified majority verdict, either 11/1 or 10/2. Such majorities have the effect of excluding outliers. Were Scotland to move to a qualified majority verdict system, it may make sense to adopt all of these features, rather than trying to

<sup>30</sup> [Criminal Justice Scotland Bill | Scottish Parliament Website](#)

manufacture something new. But if the 15 member jury were to be retained, the qualified majority required for conviction should broadly match the ratio used elsewhere, which would suggest a maximum 12/3 split.

**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:**

**Unsure** - This is a matter which would benefit from further consideration. In England and Wales, any verdict – guilty or not guilty – requires unanimity or at least a 10/2 majority. In practice, however, hung juries (where no verdict can be returned) are rare, accounting for considerably less than 1 case in 100.

**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:**

The Society considers that **Scotland should keep the corroboration rule as it is currently.**

While Scotland is unusual in having a general requirement for corroboration, that fact should not be viewed out of context. Other jurisdictions highlight the desirability of corroborative evidence and apply a wider definition of what can qualify. Indeed, some jurisdictions specifically require corroboration for particular categories of evidence, such as confessions or statements alleged to have been made to fellow prisoners while incarcerated. Some jurisdictions have a stronger committal process which goes beyond an assessment of sufficiency; the quality of evidence is tested too.

It should also be noted that the meaning of corroboration has moved on significantly in recent years, particularly in relation to course of conduct (Moorov) and distress, as the consultation paper itself describes.

For all of these reasons, no change should be made to the present rules on corroboration unless there is a wider review of the criminal justice process.

**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:**

**Scotland should keep the corroboration rule as it is currently** – please refer to our answer at Question 11 a above.

**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:**

**Scotland should keep the corroboration rule as it is currently** – please refer to our answer at Question 11 a above.

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

We consider that the requirement for corroborated evidence is not an antiquated or outmoded legal notion but is a fundamental principle on which the Scottish Criminal justice system has been founded. Any proposal to remove this requirement should be set against the background of a wider review into the Scottish criminal justice system.

**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:**

**No** - Please refer to our response to question 11. The corroboration rule should not be reformed or abolished without a wider review of the system as a whole.

**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?**

The corroboration rule should not be reformed or abolished without a wider review of the system as a whole.

**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)?**

It is in the interests of every citizen that we have a fair, just and open criminal justice system for all those involved. The scope of these reforms is such that every criminal prosecution would be affected, and as a result, likely engages all of the protected characteristics under the 2010 Act.

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

We have no comment to make here.

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

Article 6 of the European Convention guarantees the right to a fair trial. Parliament cannot legislate in a manner which would undermine that right.

Article 3, the protection from torture, has been interpreted as conferring a right on the victims of serious crime to a proper investigation and, where appropriate, prosecution. See the UK Supreme Court decision in *Commissioner of the Police of the Metropolis v DSD and another*<sup>31</sup>.

Article 8, the right to respect for private and family life, includes the right not to be arbitrarily prosecuted (*SXH v. CPS, Whitehouse v. Lord Advocate*).

**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?**

We have no comment to make here

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

We have no comment to make here.

<sup>31</sup> [Commissioner of Police of the Metropolis \(Appellant\) v DSD and another \(Respondents\) \(supremecourt.uk\)](#)



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