



JUSTICE
Scotland

Response to the Scottish Jury Research Findings

May 2020

For further information contact

Shelagh McCall QC, Chair, JUSTICE Scotland

email: shelagh.mccall@advocates.org.uk

Jodie Blackstock, Legal Director

email: jblackstock@justice.org.uk direct line: 07882433757

JUSTICE, 59 Carter Lane, London EC4V 5AQ tel: 020 7329 5100

fax: 020 7329 5055 email: admin@justice.org.uk website: www.justice.org.uk

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists. In Scotland we work under our title JUSTICE Scotland and through the assistance of our expert volunteers.
2. JUSTICE is a long-standing proponent of juries and the important constitutional role that they play in ensuring transparency and legitimacy in the criminal trial process.¹ Jury trials ensure that the public are able to participate in, and have confidence in, the criminal justice system. They reflect “the democratic ideals of community participation and [bring] a range of experiences and values to the issues to be decided in a case.”² Any proposed change to the criminal jury system in Scotland must therefore be subject to the utmost scrutiny, be grounded in principle, be based on proper evidence, and importantly must have a clearly defined aim.
3. We are pleased to have been asked to provide our views on the Scottish Jury Research and the jury system in general. The Research is an interesting piece of work. It provides insight into the relationship between the three unique elements of the Scottish jury system and the effect that they may have on jury decision making and the outcome of a trial.
4. Our position in relation to the findings can be summarised as follows:
 - **We do not consider that the research findings should be used as the basis for reforming any of three aspects of the jury system.** The research itself recognises this.
 - **Reforming one element of the jury system in isolation, based on the research findings or otherwise, is to be avoided.** All three aspects of the system are interlinked and some act as safeguards against each other. Altering one element of the jury system alone could therefore have dangerous consequences for the right to a fair trial.

¹ See our Working Party Report *Complex and Lengthy Criminal Trials* (2015) at <https://justice.org.uk/wp-content/uploads/2016/03/CLT-FINAL-ONLINE.pdf> and our Briefing on the Coronavirus (Scotland) Bill to the Scottish Parliament at <https://justice.org.uk/wp-content/uploads/2020/04/JUSTICE-briefing-Coronavirus-Scotland-Bill.pdf>.

² New Zealand Law Commission, *Juries in Criminal Trials*, Part One: a discussion paper (1998), pp.4 and 5, at <http://www.nzlii.org/nz/other/nzlc/pp/PP32/PP32.pdf>

- **Any proposed reform should be directed towards clearly identified aims.** There should be consultation on whether those aims are appropriate as well as on the proposed reforms themselves.
- **More research would have to be carried out to further investigate the effects of modifying the system if there is indeed support for reform.**
- **There is scope to improve both the information that juries receive and the way in which they receive this information.** This is demonstrated by the research findings and the accompanying paper *Methods of Conveying Information to Jurors: An Evidence Review*³.

³ J Chalmers and F Leverick, *Methods of Conveying Information to Jurors: An Evidence Review*, (2018).

Jury Size

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?

5. Jury size is perhaps the least controversial aspect of the jury system in Scotland. A previous paper by the Government, although now several years old, suggested that smaller juries were advantageous as they lessened the burden on citizens, were easier to administer and were cheaper as they required a smaller pool of jurors.⁴ It did not, however, look at the effect that reducing the size of juries may have on the outcome of trials.
6. The most recent findings provide more insight into how 15-person juries reach their decision compared with 12-person juries, and how this might affect the outcome of a trial. It found that reducing jury size might lead to more jurors participating more fully in the deliberations, although it was unlikely to have much impact on length or range of issues discussed.
7. The research also found that a reduction to 12 might, in some trials, lead to individual jurors switching to the majority view to facilitate a verdict. That potentially causes some concern. It is important that a juror's view properly reflects their own assessment as to whether the Crown has discharged the burden of proof on the evidence, rather than being arrived at for reasons of expediency.
8. Whilst these are interesting findings, we do not believe that they demonstrate a compelling case for changing the size of juries in Scotland. Although more jurors may be able to participate more fully in deliberations in 12-person juries, there may be other ways to improve juror participation without tampering with one of the key aspects of the jury system in Scotland without knowing for definite what effect it may have. For example, it may be that improving the way in which juries receive information (discussed below) would allow individual jurors to participate more fully in a 15-person jury.
9. As with all aspects of the system, it is difficult to look at jury size in isolation. Any changes must be assessed alongside the other two elements, reform of which raise more complex issues.

⁴ Scottish Government, *The Modern Scottish Jury in Criminal Trials*, 2008.

Size of majority

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?

10. The research found that requiring a unanimous verdict may lead more individual jurors to favour an acquittal, which in turn might lead to more acquittal verdicts over a greater number of finely balanced trials. However, it was not possible to estimate the scale of this. It also suggested that a unanimous verdict may lead to longer deliberations and provide more opportunity for all jurors to feel like they had participated.
11. Regarding the first possible effect, this is difficult to comment on as we do not know the real impact that it would have across a large number of trials. More research would need to be conducted to study this. In relation to juror participation, we believe that it is important that jurors feel they have been able properly to contribute to the deliberations. Juries perform a fundamental constitutional role in ensuring and demonstrating legitimacy and transparency in the criminal justice process.⁵ The jury system must also work for jurors. Jury service is a civic duty, and we require a lot from the members of the public that undertake this duty. We ask them to take time out of their daily lives to contribute to the effective running of the criminal justice system. It is no easy task. Indeed, it can often have adverse effects on jurors' health.⁶ How jurors feel about their participation in a trial is therefore an important consideration. However, as discussed above in relation to jury size, there may be other ways to improve juror participation, and therefore improve jurors' experience of serving on a jury, rather than modifying one of the elements of the system. Therefore, we do not believe that the findings themselves demonstrate a case for reforming this aspect.
12. However, there are other concerns about the simple majority rule⁷ that may support moving to requiring a unanimous verdict. It is widely recognised that reaching a verdict by simple majority is only permissible due to the other safeguards that exist in the Scottish system, namely the corroboration requirement and the existence of three verdicts. There are already concerns that even with these safeguards in place, the simple majority system is not compatible with the principles of proving guilt beyond reasonable doubt nor the presumption

⁵ See our report *Complex and Lengthy Trials* (2015) <https://justice.org.uk/wp-content/uploads/2016/03/CLT-FINAL-ONLINE.pdf>

⁶ See Welsh et al, 'The Impact of Jury Service on Scottish Jurors' Health and Wellbeing', *The Howard Journal Vol 59 No 1*. (2020), pp. 3-16.

⁷ Strictly speaking what Scots law requires is a minimum number of votes for guilty, rather than a simple majority. With a full complement of jurors, this minimum number represents a simple majority.

of innocence, or the idea that jury verdicts are collective decisions. Indeed, at a Scottish Government engagement event held in February attended by our JUSTICE Scotland Chair Shelagh McCall QC, all participants in one break-out group felt that a guilty verdict returned by an 8-7 majority in the current system is worrying and difficult to reconcile with these principles. There therefore may be a case for looking at reforming the simple majority rule.

13. If it is decided that the simple majority rule should be changed, in our view it would be sensible to move to a system requiring a unanimous verdict or a close to unanimous verdict. For example, such as in England and Wales where juries must first attempt to reach a unanimous verdict, and only after deliberating for at least two hours may the jury then deliver a verdict by a majority of 11-1 or 10-2. Adopting any other qualified majority system, such as requiring a majority of 10-5, would be arbitrary. A 'close to unanimity' rule operates in order to allow for one, or sometimes two, 'rogue' dissenting jurors that may disrupt proceedings.⁸ This therefore does not mean that the number of dissenters allowed should be greater in the Scottish system.
14. It must again be emphasised that these issues must be looked at holistically. All three elements are too intertwined not to do so. If there is a move away from the simple majority rule towards requiring a unanimous or close to unanimous verdict like in England and Wales, it may be desirable to also reduce jury size to 12 to again mirror the English and Welsh system as there would be no need to maintain juries of an odd number.⁹ However, there is no third verdict in England and Wales so it may then be preferable to remove the not proven verdict so that we have a better idea of how the new system would work. Likewise, keeping the simple majority rule and removing the not proven verdict would be irresponsible. Without the availability of three verdicts, the simple majority rule could not be justified in terms of the principles of proving of guilt beyond reasonable doubt nor the presumption of innocence, and the right to a fair trial would therefore be under threat.

Verdicts

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?

15. The research found that removing the not proven verdict and moving to a two verdict system may not have an impact on key aspects of the decision making process, such as the length of

⁸ *Post-Corroboration Safeguards Review: Report of the Academic Expert Group*, (2014) p. 151.

⁹ *Post-Corroboration Safeguards Review: Report of the Academic Expert Group*, (2014) p. 161.

deliberations, the number of issues raised, the accuracy of the legal issues discussed, or juror participation. It did however find that removing the not proven verdict may lead to more jurors favouring a guilty verdict. The combination of features that resulted in most jurors favouring a finding of guilty was a system with 15 jurors, a simple majority and two verdicts.

16. We would ask whether modifying part of the system to increase conviction rates is desirable. If so, why is this desirable? These questions must be answered by any reform proposal. The answers are not clear at present. What is certain is that the not proven verdict acts as a safeguard against wrongful conviction in the current system. If there is a change from the simple majority rule to requiring unanimity, this safeguard may not be necessary. Likewise, moving to a two-verdict system without looking at the other elements is highly undesirable and would pose a threat to the right to a fair trial. This again emphasises the need to look at all three elements of the jury system holistically.
17. The arguments for and against the not proven verdict are well known, therefore we will not rehearse them here. However, we believe that more research into the reasons it is selected by jurors and the effects of its removal is needed if any serious reform to the system is considered. It would be helpful if this could be done with real jurors involved in real cases. We note that two of the main researchers on this project previously supported this idea.¹⁰ The research findings, as the research itself acknowledges, have limitations. The trials do not, and could not, accurately reflect what happens in a real trial. The mock trials were deliberately created to be finely balanced, which created outcomes that were not wholly representative of what happens in reality. In the three verdict simulations, juries tended to choose not proven rather than not guilty as the means to acquit the accused. Out of the 32 juries with three verdicts available to them, 26 chose to acquit the accused, with 24 of these acquittals being delivered by a not proven verdict.¹¹ Put another way, 92% of acquittals were not proven verdicts.
18. This does not reflect what happens in reality. The most recent figures from 2018-19 demonstrate that not proven verdicts make up 19% of all acquittals.¹² Evidently, these figures vary depending on the type of trial. In the mock rape trials with three verdicts, the conviction rate was just below 19%, and 100% of acquittals were not proven verdicts. In the mock assault trials with three verdicts available, the conviction rate was 6% and not proven verdicts made

¹⁰ J Chalmers and F Leverick, 'How should we go about jury research in Scotland?' *Criminal Law Review*, (2016), 10, pp. 697-713.

¹¹ Scottish Government, *Scottish Jury Research: Findings from a Large Scale Mock Jury Study*, (2019), p. 20.

¹² Scottish Government, *Criminal Proceedings in Scotland, 2018-19*, (2020) p. 54.

up 86% of acquittals. The real figures show that not proven verdicts made up 40% of acquittals in rape trials (which had a conviction rate of 47% in 2018-19), and in attempted murder and serious assault trials the figure was 23% (with a conviction rate of 66%).¹³ Again, we acknowledge that the mock trials were deliberately finely balanced, but due to the difference in the findings and the real figures we do not consider that the findings can therefore be used as a basis to justify reform of the system.

19. If the Scottish Government wishes to reform the jury system, it needs to identify a clear aim. The aim should be the subject of consultation as to its legitimacy and desirability. Without a specified aim, it is difficult to assess the purpose and value of any potential reform. Further, if the Scottish Government does propose reform, as two of the lead researchers stated in a previous paper: “The onus should be on the Scottish Government to prove that its proposals are a safe way to run a justice system, not on critics to prove that they are unsafe.”¹⁴

20. No suggested aim has yet been identified by the Scottish Government in its consultation on the research. We are aware that some groups advocating on behalf of those who are the victims of sexual crime strongly support abolition of the not proven verdict (it would appear in the belief that the conviction rate will increase). It is important to note that in the two verdict system in England and Wales, the conviction rate is comparable to Scotland (36% in 2017¹⁵). It should also be noted that the conviction rate for rape and attempted rape in Scotland has increased significantly, perhaps as a result of other reforms already instituted in this area (the number of convictions for rape and attempted rape increased by 43% from 2017-18 to 2018-19¹⁶).

Juror Understanding

21. The research findings and the accompanying paper *Methods of Conveying Information to Jurors: An Evidence Review* demonstrate that there is considerable scope to improve the way in which juries receive information. This was also illustrated by the Post-Corroboration

¹³ Scottish Government, *Criminal Proceedings in Scotland, 2018-19*, (2020) p. 55.

¹⁴ J Chalmers and F Leverick, ‘Majority jury verdicts’, *Edinburgh Law Review*, 17 (1), p. 96.

¹⁵ Office for National Statistics, *Sexual offending: victimisation and the path through the criminal justice system*, (2018). See MoJ Appendix Table 8. Available at:

<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/sexualoffendingvictimisationandthepaththroughthecriminaljusticesystem/2018-12-13#convictions>

¹⁶ Scottish Government, *Criminal Proceedings in Scotland, 2018-19*, (2020) p. 19.

Safeguards Review.¹⁷ Other studies have also found inconsistencies in juror understanding,¹⁸ and that jurors tend to overestimate their understanding of the judge's directions.¹⁹

22. It is fundamental that jurors understand what is happening in a trial. The directions given by a trial judge to the jury play an important role in ensuring that this happens and have a significant impact on the outcome of a trial.²⁰ Effectively communicating these directions so that each juror fully understands them is therefore a safeguard against a miscarriage of justice occurring.²¹
23. The current Jury Manual states that judges should use simple, clear language so that the jury's task is easily understood. Whilst this is important, we consider that more can be done to improve the way juries receive information and therefore improve their understanding and participation. In our Working Party Report *Complex and Lengthy Criminal Trials*, we made several recommendations towards improving communication with juries in England and Wales that we consider to be applicable to Scotland.²² In particular, we consider that providing jurors with written directions should be standard practice. One study found that jurors' understanding of the law greatly increased once they were provided with a written summary of the judge's directions.²³ The Evidence Review also highlights this method as an effective way of providing jurors with information. Providing jurors with a written 'Route to Verdict', as often happens in England and Wales, may also be beneficial in certain trials.
24. Methods of improving juror understanding should also not be limited to looking solely at the directions at the end of the trial. In *Complex and Lengthy Criminal Trials*, we strongly supported the recommendations made by Sir Brian Leveson.²⁴ These included that juries could be better engaged during the trial via the electronic presentation of evidence, which can significantly support jurors' understanding, especially when navigating through evidence in lengthy or complex cases. Giving written direction to jurors at the beginning of the trial on the relevant legal issues in the case may also assist them to better understand what is happening.

¹⁷ *Post-Corroboration Safeguards Review*, chapter 13.

¹⁸ Hope et al, 'A third verdict option: Exploring the impact of the not proven verdict on mock juror decision making', *Law and Human Behaviour*, 32, (2008), pp. 241-252.

¹⁹ C Thomas, 'Are Juries Fair', *Ministry of Justice Research Series 1/10*, (2010).

²⁰ *Post-Corroboration Safeguards Review*, para 13.1.

²¹ *Supra*.

²² Available at <https://justice.org.uk/wp-content/uploads/2016/03/CLT-FINAL-ONLINE.pdf>.

²³ C Thomas, 'Are Juries Fair', *Ministry of Justice Research Series 1/10*, (2010).

²⁴ Sir Brian Leveson, *Review of Efficiency in Criminal Proceedings*, (2015), available at <https://www.judiciary.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>

25. We acknowledge that the Jury Manual and jury directions are a matter for the Judicial Institute. However, we believe that there is still scope for the Government to propose measures to assist in improving juror understanding.

Other Reforms

26. The Post Corroboration Safeguards Review identified a series of safeguards which should be implemented in the event that the corroboration rule were abolished. It also recommended that a number of these measures should be introduced irrespective of whether corroboration was abolished.

27. In our response to the consultation on the Review, JUSTICE largely supported the safeguards recommended by Lord Bonomy and indeed proposed the introduction of additional measures.²⁵ We submitted that the case for abolition of corroboration had not been made out. Our view was that the safeguards proposed by Lord Bonomy should be additional to, and not a replacement for, the requirement for corroboration. That remains our view.

²⁵ We recommended that the criteria for admitting expert evidence should be put on a statutory footing. See <https://justice.org.uk/wp-content/uploads/2015/01/JUSTICE-Scotland-Response-to-the-Post-Corroboration-Safeguards-Review.pdf>