



## **Joint Briefing on the Scottish Government Consultation on the Not Proven Verdict and Related Reforms**

### **Rape Crisis Scotland and Miss M | February 2022**

Rape Crisis Scotland is Scotland's leading organisation working to end sexual violence.

We should all be able to live free from the fear and threat of sexual violence. At Rape Crisis Scotland we work to raise awareness of the prevalence and impact of rape, sexual assault and abuse, advocate for better health, justice and community responses, and work to make sure that no matter what happened or when, survivors can access specialist support.

#### **Context**

Following a Not Proven verdict in a criminal trial in 2015, Miss M successfully sued her rapist in the civil courts, in what was the first civil damages action for rape following an unsuccessful criminal prosecution in almost 100 years. Rape Crisis Scotland and Miss M launched a campaign in November 2018 to end the Not Proven verdict, due to its impact on rape survivors and concerns that it was contributing to guilty men walking free.

The Scottish Government is currently consulting on whether the Not Proven verdict should be removed and asking for views on what they consider to be related issues around corroboration and jury size and majority.

The consultation <https://consult.gov.scot/justice/not-proven-verdict/> closes on the 11<sup>th</sup> March 2022. This paper summarises the existing data and evidence around not proven and outlines some views from rape survivors about why the Not Proven verdict should be removed. We are encouraging organisations and individuals to consider survivors' views on these issues and respond to the consultation.

## Why is change needed?

Most rape cases never make it to court. Of those that do, only 43% result in a conviction, compared to an 88% overall conviction rate.<sup>1</sup> Rape and attempted rape have the lowest conviction rate of any crime type, and not proven verdicts account for a significant proportion of acquittals.

<b>Rape &amp; attempted rape</b>	<b>2015/16</b>	<b>2016/17</b>	<b>2017/18</b>	<b>2018/19</b>	<b>2019/20</b>
Reported	1809	1878	2255	2426	2343
Prosecuted	216	251	246	313	300
Convicted	105	99	106	142	130
% of cases prosecuted	48.6%	39.4%	43%	45.37%	43.33%

There is a high level of secondary trauma caused by going through the criminal justice process, with complainers described their experience in court as “absolutely horrendous”, “the most degrading and terrifying thing”, and “worse than being raped”. One woman said that despite the case resulting in a guilty verdict, she would never go through it again.<sup>2</sup>

Overwhelmingly, complainers tell us that the cost of trying to obtain justice in Scotland following rape is too high.

## The Not Proven Verdict

In the Scottish criminal justice system, there are three verdicts – Guilty, Not Guilty, and Not Proven. Not Guilty and Not Proven have the same impact – they are both acquittals, and there are no legal consequences for the accused if they get a Not Proven verdict. Scotland is the only European nation to have a third verdict.

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<sup>1</sup> Criminal Proceedings in Scotland, 2-19-20, Scottish Government

<sup>2</sup> Thematic Review of the Investigation and Prosecution of Sexual Crimes, Inspectorate of Prosecution in Scotland, November 2017

According to statistics published by the Scottish Government, the Not Proven verdict is used disproportionately in sexual crime cases, particularly in rape and attempted rape cases.

The Scottish Government commissioned research using mock juries to examine a number of issues, including potential jurors' understanding of the Not Proven verdict.<sup>3</sup> The research is the largest study of its kind ever undertaken in the UK, and the first study to be undertaken in the Scottish context.

It involved 64 mock juries and 969 individual participants who were similar in demographic composition to the Scottish population eligible for jury service. The research found that when the Not Proven verdict was available, more individual jurors favoured acquittal. This difference was apparent both before and after deliberation - in other words, the availability of Not Proven was associated with individual jurors being less likely to favour a Guilty verdict, independently of any impact of deliberating as a group.

Jurors had inconsistent understandings of the Not Proven verdict. Across the 32 mock juries that had Not Proven as a verdict option, 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.

Complainers in rape cases have spoken powerfully of the impact of the verdict on them, describing the bewilderment they felt when they were informed this was the outcome of their case:

"I didn't even know that it existed, to be honest, because I've never been through the court system...I've never been in any trouble, none of my family has. So we were totally unaware of the court system, so seeing it come back with a not proven verdict, we were absolutely gob-smacked, like, what do you mean? We didn't even really know. And maybe that's ignorance on our part, but we didn't even know that that was a possibility."<sup>4</sup>

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<sup>3</sup> Scottish Government, 'Scottish jury research: findings from a mock jury study', Social Research, 2019, DOI: <https://www.gov.scot/publications/scottish-jury-research-findings-large-mock-jury-study-2/pages/3/>

<sup>4</sup> Munro, Vanessa (2020) *Piecing together puzzles: complainers' experiences of the not proven verdict*. Coventry: University of Warwick

## Corroboration

The formal requirement in Scotland for corroboration before a case can be prosecuted has a disproportionate impact on crimes predominately experienced by women, namely sexual crimes and domestic abuse. This can provide a significant barrier to justice, particularly in non-recent child sexual abuse cases.

The Crown Office are often reliant on the moorov doctrine to prosecute these cases, which requires at least two complainers willing to give evidence, meaning that historical child abuse cases with only one complainer can be extremely difficult to prosecute, due to the corroboration requirement.

Survivors including [Speak out Survivors](#) have spoken passionately about the injustice they have experienced where if their abuse had taken place in England, it might have been prosecuted but because it took place in Scotland a prosecution wasn't possible.

## Jury majority

There is considerable evidence from mock jury research<sup>5</sup> of problematic attitudes towards rape complainers.

One judge was quoted in the report from Lady Dorrian's review expressing serious concerns about the reluctance of juries to convict even where there was sufficient evidence:

"The cases in which it appears to me that, regardless of the quality and quantity of evidence juries do not convict with appropriate regularity, are cases where there is one complainer and a single charge of rape. In cases where there is evidence of a quality and quantity which for any other kind of crime would lead to a conviction, I see a number of acquittals each year in rape cases which, to my mind, are not explicable by rational application of the law to the evidence. Not all judges will agree with my views on this, but I have reason to believe that they are shared by at least a number of senior and experienced judges [...] Every year I preside over several rape trials of this kind in which I would have no difficulty on the evidence in being satisfied beyond reasonable doubt of the guilt

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<sup>5</sup> See [Chalmers, J., Leverick, F., Munro, V.E., 'The provenance of what is proven: exploring \(mock\) jury deliberation in Scottish rape trials', \*Journal of Law and Society\*, 48:2 \(2021\), pp. 226-249., DOI: <https://onlinelibrary.wiley.com/doi/10.1111/jols.12287>](#)

of the accused only to see the jury return a verdict of acquittal, usually not proven.”<sup>6</sup>

We have grave concerns that rape survivors are systematically being denied access to justice – and guilty men regularly acquitted – due to jury decision making being influenced by attitudes and belief in myths about rape.

Given the existing evidence about the reluctance of juries to convict in rape cases, even in the face of considerable evidence, we have grave concerns that increasing the jury majority will increase the barriers to justice for rape survivors in Scotland and result in even fewer rape convictions.

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If you have any further questions, or would like to discuss this briefing in more detail, please don't hesitate to get in touch in the first instance with Sandy Brindley:

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<sup>6</sup> IMPROVING THE MANAGEMENT OF SEXUAL OFFENCE CASES Final Report from the Lord Justice Clerk's Review Group  
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