

Ending the Not Proven Verdict

Scottish Conservative & Unionist Party

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Contents

Foreword	3
Background	4
Key Points	5



Foreword

The Not Proven verdict is a historical anomaly that fails victims, fails the accused, and undermines the fundamental decision-making purpose of a court.

That's why we are calling for the Not Proven verdict to be abolished and for Scottish criminal trials to move to a two-verdict system of Guilty and Not Guilty, as used in other jurisdictions across the UK and the world.

It's time to end the confusion and distress caused by Not Proven, particularly amongst victims of the most horrific crimes like rape, and improve the integrity of our justice system.



Background

- **Scotland has three possible verdicts in a criminal case.** These are *guilty*, *not guilty* and *not proven*. Guilty means the evidence has been enough to prove ‘beyond reasonable doubt’ that the accused person committed the crime or part of the crime. Both not guilty and not proven have the same legal effect which is that the accused is acquitted. (Scottish Government, what happens at a criminal court case, 22 May 2018, [link](#); Justice Committee, Stage 1 Report on the Criminal Verdicts (Scotland) Bill, 9 February 2016, [link](#)).
- **Most English language jurisdictions use two verdicts: guilty and not guilty.** According to a research paper commissioned by the Scottish Government, ‘There is a substantial body of jury research worldwide. However, the vast majority is concerned with the traditional common law jury found in most major English language jurisdictions, which typically: has 12 members, a choice of two verdicts (guilty or not guilty), and is required to reach a unanimous verdict on which the whole jury is agreed.’ (Scottish Government, Scottish Jury Research: Findings from a Large Scale Mock Jury Study, 9 October 2019, Page 1, [link](#)).
- **In 2016, a Justice Committee report concluded that Not Proven should be abolished.** Although dismissing the Bill in question for other reasons, the committee noted ‘A clear majority of the Committee supports the intention of the Bill to abolish the not proven verdict’. Convenor Christine Grahame said the verdict was on ‘borrowed time’. (Justice Committee, Stage 1 Report on the Criminal Verdicts (Scotland) Bill, 9 February 2016, [link](#); BBC News, 9 February 2016, [link](#))
- **In 2019, the Scottish Government published ‘jury research’ on the Not Proven verdict.** This found that removing the Not Proven verdict might incline more jurors towards a guilty verdict in finely balanced trials. It also found inconsistent views on the meaning of not proven and how it differed from not guilty. (Scottish Government, Scottish Jury Research: Findings from a Large Scale Mock Jury Study, 9 October 2019, Page viii, ix, [link](#)).
- **‘Miss M’, a rape complainer, is campaigning alongside Rape Crisis Scotland to end the Not Proven verdict.** 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. The campaign is also supported by Engender, Scottish Women’s Aid, the Scottish Women’s Rights Centre and Zero Tolerance. (Rape Crisis Scotland, End Not Proven, [link](#)).



Key Points

- **The Not Proven verdict is at odds with the fundamental purpose of a court.** If the object of a criminal trial is to decide – one way or the other- whether someone has committed a particular crime, it is illogical to have a third verdict which fosters ambiguity in the outcome.
- **Not Proven has been used disproportionately in rape cases.** In 2016-17, only 39 per cent of rape and attempted rape cases resulted in convictions, the lowest rate for any type of crime. Nearly 30 per cent of acquittals were not proven, compared with 17 per cent for all crimes and offences. (Rape Crisis Scotland, End Not Proven, [link](#)).
- **There is some evidence that abolishing Not Proven may increase conviction rates.** According to academic jury research, ‘26 out of 32 juries where not proven was available returned acquittals and, of those 26, 24 returned not proven verdicts and only two returned not guilty verdicts. This suggests that, in finely balanced trials, juries have a preference for acquitting via not proven rather than not guilty. Individual jurors were significantly less likely to favour a guilty verdict when the not proven verdict was available...these findings suggest that removing the not proven verdict might lead to more jurors favouring a guilty verdict, which might, therefore, lead to more guilty verdicts over a larger number of trials.’ (Scottish Government, Scottish Jury Research: Findings from a Large Scale Mock Jury Study, 9 October 2019, Page viii, [link](#)).
- **There is confusion over the meaning of Not Proven.** Although the legal meaning of Not Proven is identical to Not Guilty, even Police Scotland have got confused, stating incorrectly in a letter to Dundee City Council that ‘Where not proven is the outcome in a case this shows the jury believed the person in question is guilty of the offence, however there is an insufficiency of evidence to convict’. Victim Support Scotland have said it is ‘unsettling that juries neither seem to understand the not proven verdict, nor use it in the way in which they should.’ (The Times, 7 May 2019, [link](#); Justice Committee, Stage 1 Report on the Criminal Verdicts (Scotland) Bill, 9 February 2016, Page 7, [link](#)).
- **Even jurors can be confused after having the verdict explained to them by a judge.** As professors James Chalmers and Fiona Leverick argue, ‘It is tempting to assume that any problems with the not proven verdict...should be capable of being cured by appropriate direction from the trial judge. However, if a criminal justice system employs two different verdicts of acquittal, it is rational to assume that there is some meaningful difference between them, whether in meaning, effect, or both. The notion that there is no meaningful difference – or, at least, none which can be safely spelt out – is at first sight so irrational that it is plausible that a juror may fail properly to understand a direction to that effect.’ (University of Glasgow School of Law Blog, 16 December 2020, [link](#)).
- **Scotland is the only European nation to have a third verdict in criminal cases.** (Rape Crisis Scotland, End Not Proven, [link](#)).



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- **Not Proven can leave an innocent person tainted with the idea that they ‘got off with it’.** Proposing a Bill to abolish Not Proven in 2016, Michael McMahon said ‘Some people who corresponded with me said that they had been acquitted on a not proven verdict and had to move because they believed that the local community thought that they were guilty and had got off with it... a not proven verdict suggests that there may have been some evidence that the person had done it—just not enough to convict them.’ (Justice Committee, Criminal Verdicts (Scotland) Bill: Stage 1, 19 January 2016, [link](#)).
 - **Not Proven can be distressing for victims.** Victim Support Scotland have said ‘many victims and witnesses find the third verdict to be confusing and disappointing. Finality and certainty are crucial elements of an effective criminal justice system. With the added option of the not proven verdict, and how it is understood in the context of standing alongside guilty’ and ‘not guilty’ options, many victims are left without the conclusive answer they were looking for from the justice system’ (Justice Committee, Stage 1 Report on the Criminal Verdicts (Scotland) Bill, 9 February 2016, Page 8, [link](#)).

Legal support for abolition

- **Professor Duff of Aberdeen University said ‘the presumption of innocence leaves no room for the not proven verdict’.** Duff was

one of the first members of the new Scottish Criminal Cases Review Commission. He said ‘I have written about the not proven verdict in the past and said that it should be abolished. That has been considered at least twice in the past 20 years. However, for reasons that are not clear, it has been kept; it is probably because of a historical fondness for the fact that it is very different. To me, though, the presumption of innocence leaves no room for the not proven verdict. In a trial, someone is either found guilty or the presumption of innocence means that they must be found not guilty. There is no room for a kind of second-class acquittal that states “Well, we’re finding you not guilty, but we’ll leave you with a bit of bad press hanging around your name.” ’ (Justice Committee, Criminal Justice (Scotland) Bill: Stage 1, 10 December 2013, [link](#)).

- **Professor Pamela Ferguson of Dundee University said it was a ‘historical anachronism’.** Professor Ferguson was a member of the Crown Office and Procurator Fiscal Service from 1986-1989, an examiner for the Law Society of Scotland for six years, and Convenor of the Law Society’s Examination Board for three years. She said ‘it should be abolished. The biggest problem with the verdict is that jurors are not told by judges what it means specifically. When we talk to first-year law students about what the not proven verdict means, quite a number of them assume that it means that the Crown has not established the case beyond reasonable doubt and that therefore there is a kind of hung trial, which means that the jury could not make up its mind and the Crown could



have another bite at the cherry. That is quite wrong. People do not appreciate that the not proven verdict is the same as a not guilty verdict. It is a historical anachronism and we should get rid of it.' (Justice Committee, Criminal Justice (Scotland) Bill: Stage 1, 10 December 2013, [link](#)).

- **Professor Fiona Rait of Dundee University said 'I agree that the not proven verdict should go because it does not add anything.'** (Justice Committee, Criminal Justice (Scotland) Bill: Stage 1, 10 December 2013, [link](#)).
- **Professor James Chalmers of the University of Glasgow said 'I cannot see any rational reason for retaining the [Not Proven] verdict.'** (Justice Committee, Criminal Justice (Scotland) Bill: Stage 1, 10 December 2013, [link](#)).

Further Support

The pledge to scrap Not Proven has been welcomed by campaigners including Joe Duffy whose daughter Amanda, 19, was murdered in 1992. The case against her alleged killer Francis Auld was found not proven.

Also backing the Scottish Conservative pledge is Miss M, who successfully sued her alleged rapist after he received a not proven verdict in 2015.

Joe Duffy said: "Myself and my family are delighted the Scottish Conservatives are including a proposed change to the three-

verdict system in their manifesto and advocating to end the contentious not proven verdict.

"The return of a not proven verdict exacerbates the trauma and loss for victims and their families. It is misunderstood, unnecessary and out of date.

"We sincerely hope there will be cross-party support in the Scottish Parliament for this proposal for the benefit of everyone affected by the criminal justice system."

Miss M said: "I began the End Not Proven campaign in collaboration with Rape Crisis Scotland two years ago this week.

"I am pleased to see political parties recognising this issue. I have met with each party and expressed my concerns to the First Minister and hope to see continued support.

"We have the evidence, and Scotland's survivors and their families have spoken out. It's time to end the use of not proven - a misunderstood acquittal verdict which causes untold damage".

