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Interpreting sexual offence verdicts: public attitudes to complainer anonymity and the “not proven” debate

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In September 2020, we launched the Campaign for Complainer Anonymity at Glasgow Caledonian University.¹ Working with our LLB students, we argue that Scots law should be reformed to introduce comprehensive rules on anonymity for complainers in sexual offence cases, accruing early in the criminal justice process, and framed in a way which allows complainers to set aside these restrictions unilaterally if they choose to do so.² Complainers in Scottish sexual offence cases currently have no right to anonymity and may lawfully be identified in mainstream and social media forums without legal consequences unless orders have been imposed under section 11 of the Contempt of Court Act 1981.³ Our campaign is underpinned by comparative research within the UK, and with other common law jurisdictions,⁴ drawing on the experiences of these jurisdictions to ensure that a new Scottish framework learns the best lessons from this international experience and avoids the pitfalls and unforeseen consequences encountered by comparator systems in recasting reporting restrictions for the social media age.

This research significantly informed the Scottish Government’s consultation on reform of this area of law, which closed in August 2022.⁵ Moves to legislate for complainer anonymity have also been endorsed by Lady Dorrian’s independent review group,⁶ and by campaigning organisations including Rape Crisis Scotland.⁷ In parallel with our work, the Scottish Government consulted on the abolition

¹ Campaign for Complainer Anonymity (2020) accessible at:

<https://www.caledonianblogs.net/campaignforcomplaineranonymity/>.

² S Stevenson, A Mackay, F Ashfaq, (2021) *Journal of the Law Society of Scotland* (2021) 66(6)

<https://www.lawscot.org.uk/members/journal/issues/vol-66-issue-06/opinion-campaign-for-complainer-anonymity/>; A Tickell, “Complainers in sex offence cases need full legal protection” (2021) *The Times* 14th May 2021. S Stevenson, A Mackay, E Smith, “Complainer anonymity: Scots law in need of reform” *Legal Women* September 2021.

³ A Tickell, “Why Don’t Sexual Offence Complainers Have a Right to Anonymity in Scotland?” (2020) *Edinburgh Law Review* 24(3) 427 - 434.

⁴ A Tickell, “How should complainer anonymity for sexual offences be introduced in Scotland? Learning the international lessons of #LetHerSpeak” (2022) *Edinburgh Law Review* 26(3) 355 – 389.

⁵ Scottish Government, (2022) *Improving victims’ experiences of the justice system: consultation*, 47 - 63 and Annex B: *Complainer Anonymity: Approaches in Different Jurisdictions*.

⁶ Lady Dorrian, *Improving the management of sexual offence cases: Final report from the Lord Justice Clerk’s Review Group* (2021), para xv.

⁷ L Brooks, “Scottish experts call for rape complainer anonymity law” *The Guardian* 8th October 2020

<https://www.theguardian.com/society/2020/oct/08/scottish-experts-call-for-rape-complainer-anonymity-law>

of the “not proven” verdict in the winter of 2021.⁸ In September 2022, the First Minister announced that both issues would be addressed in a new Criminal Justice Reform Bill. Automatic complainer anonymity would be introduced, and the “not proven” verdict eliminated.⁹

As part of our broader campaign for law reform, we commissioned a nation-wide opinion poll in September 2021 to gain a clearer understanding of public attitudes towards complainer anonymity in sexual offence cases. As part of this quantitative research exercise, we included questions seeking to identify how attitudes to reporting restrictions relate to Scotland’s three verdicts in criminal cases. This article shares the findings of this element of our survey. While “not proven” verdicts are currently competent for all crimes, much of the debate on the future of Scotland’s third verdict has focused on its disproportionate use in sexual cases, anchored in critiques of the verdict from sexual offence survivors and campaigners.¹⁰ This discussion is also underpinned by the findings of the large-scale Mock Jury Study commissioned by the Scottish Government and conducted by Ormston, Chalmers, Leverick, Munro and Murray, which uncovered “evidence of jurors holding inconsistent understandings of what the verdict meant along with some confusion over its effect,”¹¹ including the belief that an accused person could be tried again for the same offence if a not proven verdict was returned,¹² and evidence some mock jurors understood the verdict as a “compromise” between conviction and acquittal in sexual cases.¹³

While our survey identified strong public support for complainer anonymity in sexual cases, our data also shows there are important differences in how “not guilty” and “not proven” verdicts are understood by the Scottish public in the context of sexual crime. While there is no accepted legal distinction between the two forms of acquittal in Scots law, in the public imagination, the two verdicts are *perceived* as sending distinct messages. Our data suggests the symbolic connotations of “not guilty” and “not proven” are relevant not only to the interests of accused people – but also to complainers in sexual cases. While existing studies have not identified statistically significant differences between self-assessed public understanding of the third verdict on the grounds of age or gender,¹⁴ our survey suggests that public attitudes to the distinction between the two acquittal verdicts *is* coloured to a significant extent by the gendered dynamic of sexual crime, with differences

⁸ Scottish Government, *The not proven verdict and related reforms: consultation* (2021).

⁹ Scottish Government, *A Stronger and More Resilient Scotland: The Programme for Government 2022-23* (2022), 13.

¹⁰ V E Munro, *Piecing together puzzles: Complainers’ Experiences of the Not Proven Verdict* (2020) (Coventry, University of Warwick).

¹¹ R Ormston, J Chalmers, F Leverick, V E Munro, L Murray, *Scottish Jury Research: Findings from a Large Scale Mock Jury Study* (2019), 59.

¹² Ormston et al 2019, 46.

¹³ Ormston et al 2019, 48.

¹⁴ Ormston et al 2019, 43.

between male and female respondents' support for complainer anonymity, turning exclusively on whether a hypothetical court reached a "not guilty" or "not proven" verdict in their case.

A. METHODOLOGY

In 2021, we obtained funding from Glasgow Caledonian University's Social, Criminal and Legal Justice Research Group to carry out a national opinion poll on attitudes to complainer anonymity. The Diffley Partnership were commissioned to carry out this quantitative research, which explored public attitudes towards complainer anonymity in the context of traditional and social media, as well as attitudes to when reporting restrictions should accrue, and in what circumstances and by whom anonymity could or should be capable of being set aside. Our results are based on a survey of 2,115 respondents from across Scotland. Fieldwork was conducted between the 6th and 10th of September 2021 using the ScotPulse online panel. The data was weighted to the Scottish population by age and gender. Because the technical terminology of "complainers" is not widely understood, and the language of "victim" tends to assume the truth of the underlying allegations, in our survey we characterised the beneficiaries of reporting restrictions as "people who say they have been a victim of a sexual offence." Our findings are set out in Tables 1, 2 and 3 above, broken down by gender. Percentages may not total 100 due to rounding."

B. FINDINGS

Our survey identified a high level of support for the principle of complainer anonymity and a degree of confusion about whether complainers already have a right to anonymity in Scots law. 42% of our respondents believed that "the media can never identify people who say they have been the victim of a sexual offence." 18% "didn't know" what reporting restrictions current applied. In principle, however, 73% tended to agree (26%) or strongly agreed (47%) with the proposition that "people who say they have been the victim of a sexual offence should have the right to anonymity for the rest of their lives, preventing them from being identified in the media or on social media," including 68% of male respondents and 78% of female respondents. 88% disagreed (18%) or strongly disagreed (70%) with the proposition that the media "should have the right to identify people who say they have been the victim of a sexual offence, whether or not they wish to be identified," including 84% of men and 90% of women.

We also asked our respondents to what extent they agreed that *after* trial, complainers should retain the right to anonymity after guilty, not guilty, and not proven verdicts. Respondents were asked to indicate whether they strongly agreed, tended to agree, neither agreed nor disagreed, tended to disagree, or strongly disagreed with the statements. They could also indicate they did not know. The

aim of incorporating this question into our survey was twofold. First, we were interested to understand how far public support for complainer anonymity was contingent on the *outcome* of criminal trials. Second, we wanted to take the opportunity of this wider survey of public opinion to test the claim that the public understands there is no distinction between the legal significance and effect of “not guilty” and “not proven” verdicts. Our poll identified significant differences in how the Scottish public understood the two acquittal verdicts in sexual cases. More striking were the differences between male and female respondents.

Table 1. All Respondents

	Strongly agree	Tend to agree	Neither agree nor disagree	Tend to disagree	Strongly disagree	Don't Know
	%	%	%	%	%	%
The victim of a sexual offence should have the right to anonymity after the criminal trial if the person accused is convicted on a guilty verdict	61	25	4	4	3	3
People who say they have been the victim of a sexual offence should have the right to anonymity after the criminal trial if the accused is acquitted on a ' <i>not guilty</i> ' verdict	30	21	12	17	11	8
People who say they have been the victim of a sexual offence should have the right to anonymity after the criminal trial if the accused is acquitted on a ' <i>not proven</i> ' verdict	36	28	13	11	6	7

Table 2. Male Respondents

	Strongly agree	Tend to agree	Neither agree nor disagree	Tend to disagree	Strongly disagree	Don't Know
	%	%	%	%	%	%
The victim of a sexual offence should have the right to anonymity after the criminal trial if the person accused is convicted on a guilty verdict	57	27	4	5	4	3
People who say they have been the victim of a sexual offence should have the right to anonymity after the criminal trial if the accused is acquitted on a ' <i>not guilty</i> ' verdict	23	18	15	20	18	6
People who say they have been the victim of a sexual offence should have the right to anonymity after the criminal trial if the accused is acquitted on a ' <i>not proven</i> ' verdict	30	28	15	12	9	6

Table 3. Female Respondents

	Strongly agree	Tend to agree	Neither agree nor disagree	Tend to disagree	Strongly disagree	Don't Know
	%	%	%	%	%	%
The victim of a sexual offence should have the right to anonymity after the criminal trial if the person accused is convicted on a guilty verdict	64	24	4	3	2	4
People who say they have been the victim of a sexual offence should have the right to anonymity after the criminal trial if the accused is acquitted on a ' <i>not guilty</i> ' verdict	36	24	9	15	6	10
People who say they have been the victim of a sexual offence should have the right to anonymity after the criminal trial if the accused is acquitted on a ' <i>not proven</i> ' verdict	42	29	10	9	3	8

Aggregating this data, while 86% of respondents supported the retention of anonymity after guilty verdicts in sexual cases, this contracted to 51% after a “not guilty” verdict and 64% after a “not proven” disposal. This is mirrored in levels of support for removing reporting restrictions. While only a small proportion of our respondents supported the elimination of anonymity after a guilty verdict (9% of men and 5% of women), 28% of respondents did so if a “not guilty” verdict was reached. Only 17% thought reporting restrictions should be dropped if the headline verdict was “not proven.”

Underneath these aggregate numbers, our polling data was strikingly gendered. While 41% of men supported reporting restrictions being retained after a “not guilty” verdict, 58% did so after a “not proven” finding. 38% of men strongly or tended to disagree that complainers should benefit from anonymity after a “not guilty” verdict. This contrasted with 21% who thought reporting restrictions should fall after a “not proven” disposal. This represents a 17% difference in attitudes between the two – legally identical – acquittal verdicts.

Our data suggests that overall, women are more supportive of complainer anonymity in all circumstances than men – but that women too drew a significant distinction between “not guilty” and “not proven” outcomes. While 60% of women continued to support complainer anonymity after a “not guilty” verdict in a sexual offences trial (19% higher than men), 71% did so where the hypothetical case concluded in a “not proven” verdict (13% higher than men). This dynamic is mirrored in women’s attitudes to removing anonymity. 21% of women opposed complainer anonymity after a “not guilty” verdict (some 17% lower than men), with just 12% opposing reporting restrictions if the case concluded on a “not proven” verdict (just under 10% lower than our male respondents).

Our results were also disaggregated by six age bandings reflecting the Scottish voting population – broken down from 16 to 24 years old, 25 to 34, 35 to 44, 45 to 54, 55 to 64 and 65+. Support for anonymity after a guilty verdict was broadly consistent across all age cohorts, ranging from between 82% and 88%. Responses varied much more significantly in respect of retaining anonymity after the two acquittal verdicts. The youngest cohort in our study was the most supportive of automatic reporting restrictions overall, with 88% supporting anonymity after a guilty verdict, 60% after a “not guilty” verdict, and 79% after a “not proven” verdict. Support was generally lower amongst older cohorts, with 48% and 49% of respondents aged 55 to 64 and over 65 respectively supporting the retention of anonymity after “not guilty” verdicts, and 61% after verdicts of “not proven.” Cutting across all age groups and genders, it is clear the acquittal-label has a significant effect on how some respondents understand verdicts the courts reach in sexual cases

C. DISCUSSION

First, our poll demonstrates public support for complainant anonymity in Scotland irrespective of the outcome of criminal cases, with majorities in favour of complainant anonymity across all three potential outcomes of a criminal case. It is clear, however, that attitudes to reporting restrictions are situational, are impacted by acquittal verdicts, and are impacted – in particular – by which of the two verdicts of acquittal is returned. In the absence of any legal difference between the two verdicts, our findings support the proposition that a proportion of the Scottish public believe there are important differences between the two trial outcomes, to the extent they are prepared to endorse the elimination of reporting restrictions solely on the basis of *which* acquittal verdict the jury majority reaches. While this perception of difference is important inside the jury room, it is also important in terms of the wider public's *understanding* of and reactions to jury verdicts which are reported.

Our survey did not ask our respondents to explain their answers, however the socio-legal literature offers powerful explanations for the discrepancies in public opinion our research has identified. As Chalmers, Leverick and Munro suggest, the two verdicts of acquittal can be seen as sending different social messages. If “the message conveyed by a not guilty verdict is that the accused is factually innocent,” then “the message conveyed by a not proven verdict is something ‘less’ than this.”¹⁵ Our data demonstrates the social force of this assumption. In the recent large-scale mock jury study, Ormston et al found “the idea that the not proven verdict means the accused is guilty, but that guilt has not been proven to the necessary standard for conviction, arose frequently” during deliberations.¹⁶ The study found “jurors choosing the not proven verdict tended to base their decision on a belief that that the evidence did not prove guilt beyond reasonable doubt” while jurors choosing the not guilty verdict “tended to base this on a belief that the accused was innocent, or some aspect of the complainant’s or witness’ evidence that suggested that they were not giving a truthful account.”¹⁷

These findings provide a helpful framework for the interpretation of our data. If “not proven” verdicts are understood to communicate that the accused is or may be factually guilty but that the burden of proof has not been discharged by the prosecution, then retaining complainant anonymity in these circumstances is consistent with the idea the complainant was not necessarily disbelieved. While existing social research establishes that complainants in sexual offence cases do not consistently

¹⁵ J Chalmers, F Leverick, V E Munro, “Beyond Doubt: The Case Against Not Proven” (2022) *Modern Law Review* 85(4) 847 – 878, 855.

¹⁶ Ormston (n11), 40.

¹⁷ Ormston, 40.

experience “not proven” acquittals as positive,¹⁸ the more ambivalent reactions from our respondents to “not proven” disposals suggests that “not proven” verdicts may be *generally* interpreted in ways which are less adverse to complainer credibility, producing greater sympathy for the idea reporting restrictions should persist in these cases, notwithstanding the acquittal verdict at trial. If, by contrast, “not guilty” verdicts are understood as a vindication of the accused person’s factual innocence – that, in essence, the complainer has given false evidence of being a victim of sexual crime – then the removal of protections might seem to be justified. This approach to interpreting “not guilty” verdicts can also be related to empirical studies which have identified a “culture of distrust” in response to allegations of sexual wrongdoing by agents working in criminal justice system and amongst the wider public,¹⁹ including beliefs that false allegations of rape and serious sexual offences are commonplace.²⁰

While our data shows “not guilty” and “not proven” verdicts are understood in different ways by the Scottish public, it also suggests that these understandings are strikingly gendered, with substantial differences in the level of support for complainer anonymity expressed by women and men after acquittal verdicts. How can these differences be understood? One explanation is that sexual crime is gendered, and that this gendered experience has important consequences in terms of public attitudes towards alleged sexual victimisation, identification with complainers, and understandings of sexual violence. The most recent Scottish Crime and Justice Survey shows that a greater proportion of women have experienced serious sexual assault since the age of 16 than men. The 2019/20 survey showed that 6.1% of women experienced serious sexual assault compared with 0.8% of men.²¹ In terms of wider public attitudes towards sexual victimisation and the criminal justice process, Leverick argues that “studies have consistently found that men are more likely to endorse rape myths than women.”²² This may include the idea that false accusations are commonly made in sexual cases. This gendered difference is borne out in Scottish social data. The 2019 Scottish Social Attitudes Survey, for example, found that “65% of women disagreed that ‘women often lie about being raped’ compared with 55% of men.”²³ While these findings do not have a linear relationship with support for reporting restrictions, this constellation of beliefs and attitudes towards sexual offending and the likelihood of

¹⁸ Munro (n10), 5.

¹⁹ D White and L McMillan, “[De]-Centering the Victim: Police Perceptions of Victims of Sexual Violence through a Comparative Lens of Evidence Collection and Processing” (2021) *Feminist Criminology* 16(5) 680 – 700, 694.

²⁰ L Ellison and V E Munro, “A stronger in the bushes, or an elephant in the room? Critical reflections upon received rape myth wisdom in the context of a mock jury study” (2010) *New Criminal Law Review* 13 781 – 801, 794 - 798.

²¹ Scottish Government, *Scottish Crime and Justice Survey 2019/20* (2021), Table 9.11.

²² F Leverick, “What do we know about rape myths and juror decision making?” (2020) *International Journal of Evidence and Proof* 24(3) 255 – 279, 258.

²³ Scottish Government, *Scottish Social Attitudes Survey 2019* (2020), Figure 2.4.

false allegations inevitably helps form assumptions and social scripts about what acquittal verdicts communicate in sexual cases, including whether rights to anonymity should be preserved.

D. CONCLUSION

While Chalmers, Leverick and Munro have emphasised the “stigmatic meaning” of the “not proven” verdict for people accused and acquitted of crime,²⁴ our findings suggest that in terms of public attitudes, a stigmatic meaning can be attached to complainers too – depending on the *outcome* of a prosecution. This reflects the broader social assessment that a “not proven” verdict can be understood as communicating a less adverse judgment on complainer credibility than a “not guilty” disposal.

In terms of informing the Scottish Government’s plans to reform the system of verdicts, our data has important limitations. The answers given by our respondents must be understood in the context of the current three-verdict system, and the legally-empty but socially-laden distinction between not guilty and not proven acquittals. The fact that respondents gave the answers they did in a three-verdict poll does not mean, for example, that “not guilty” or “not proven” would necessarily be interpreted in the same way if Scots law moves to a two-verdict system of “proven” and “not proven” or “guilty” and “not guilty.” It is clear, however, that labelling acquittals as “not proven” is perceived as considerably less stigmatic for assumed complainer credibility in sexual cases than “not guilty” disposals in the current framework. More broadly, these findings suggest that the significance of acquittal verdicts – and the various routes to acquittal verdicts in cases involving sexual crime – are not well understood. Our findings reinforce suspicions that the Scottish public attribute significant symbolic connotations to the distinction between the two verdicts of acquittal which are currently available, and many are prepared to endorse radical consequences for hypothetical complainers, based on the – legally meaningless – distinction between “not guilty” and “not proven.”

²⁴ J Chalmers, F Leverick, V E Munro (n15), 877.