



Law Society  
of Scotland

# Not Proven Verdict

Analysis of survey of members of the Law Society of  
Scotland on the not proven verdict

6 August 2021



## 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.

With indications from the Scottish Government that they are intending to carry out a consultation on Scotland's 'third verdict' of not proven, we undertook a survey on behalf of our Criminal Law Committee in June/July 2021 to establish the views of our members on the three-verdict system. The survey sought the views of all our members, and not just criminal practitioners.

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## Methodology

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An online survey was created and shared with the solicitor members of the Law Society by direct email invitation, on our website and through our fortnightly member newsletter Lawscot News. There was limited social media promotion of the survey to reduce the likelihood of non-members completing the survey as there was no requirement to login to our website or prove membership before completing it.

The survey was live between 21 June and 9 July 2021. The results from 1,035 responses are considered in this report. Not all the questions were mandatory, and therefore not every respondent included here will have answered every question. For each question where percentages are reported, these are the percentages of the number of respondents to that individual question. Where this is significantly different from the overall number of respondents to the survey, this will be highlighted. Percentages used have also been rounded to the nearest whole percent and therefore may not always add up to exactly 100%.

Further detailed analysis of the responses received especially in relation to the discussion of the wider changes that might be required to the Scottish criminal justice system will be undertaken by the Society's Criminal Law Committee in due course. These responses will be very helpful in helping focus attention on the wider system and support the Society's view that abolition of not proven cannot be considered in isolation. That more detailed analytical work will be used to help inform the Society's response in any future Scottish Government consultation.

The full list of questions asked in the survey can be found in Appendix 1.

## Executive Summary

The Society set out the background when seeking to undertake this survey on the not proven verdict. We recognised that the not proven verdict was a unique historical feature of Scots law with three possible verdicts following a criminal trial: guilty, not proven and not guilty. Just because the Scottish criminal justice system is different from other adversarial systems of justice does not imply that it is wrong. Recent debate over the not proven verdict's retention/abolition has sought to focus attention again. That debate is not new and has continued over many years

The Society's interest is in ensuring that our criminal justice system satisfies public confidence, minimises the risk of miscarriages of justice, and that those who are guilty of crime are found guilty and the innocent are acquitted. Conducting the survey allows us to inform our position with current views from the profession, ahead of a likely Scottish Government consultation on the retention/abolition of the not proven verdict.

The survey sought to obtain views from the solicitor profession as a whole and not just from those members whose work is predominantly criminal. The 1,035 member responses received, represents 8.6% of the Scottish solicitor profession. This response rate compares favourably with similar profession wide surveys, and underlines both the importance of the topic and its historical significance in Scots criminal law.

Out of the 1,075 responses, 808 were from non-criminal practising members, or 75.17% of all responses; 161 responses were from criminal defence practitioners, or 14.97 % of all responses, and 106 responses from prosecutors, or 9.86% of all responses to the survey.

In comparing these figures with the percentage splits of the Scottish solicitor profession as a whole, 89.03% are non-criminal practising members, 5.85% are criminal defence and 5.12% are prosecution.

Unsurprisingly, there was far greater participation from criminal practitioners, although perhaps this take up was not as high as anticipated.

We note that responses were received from all sheriffdoms to allow a nationwide view.

What was clear from the survey was that there was strong support for the retention of the not proven verdict. 743 respondents (72%) considered that the not proven verdict should be retained, and 292 respondents (28%) considered that the not proven verdict should be abolished. This was also the majority position from both criminal practitioners and non-criminal practitioners.

The support for not proven goes beyond its place in a three-verdict system. While 61% of respondents favoured a three-verdict system and 39% of respondents favoured a move to a two-verdict system, the question of what a two-verdict system should be showed a majority support for not proven to remain. When asked what the verdicts should be if Scotland moved to a two-verdict system, 42% favoured guilty and not guilty while 58% favoured proven and not proven.

The Society undertook this survey with no assumptions about what the feedback would say. To the best of our knowledge, no previous survey on this issue has taken place with the profession on this scale. While in previous debates over the abolition of not proven, the defence bar had shown strong support for retaining not proven, there was no evidence base for whether their colleagues in the wider Scottish solicitor profession would support that. It is clear on the evidence of this survey that they do.

The survey also invited respondents to share their thoughts on whether additional changes would be needed if Scotland were to move to a two-verdict system. There was widespread endorsement for reviewing both jury size and the simple majority verdict. That is supported by the work undertaken by Professor James Chalmers in the Independent Jury research.

While the survey did not go into detail of the range of possible changes, both legislative and non-legislative, there were opportunities to add additional comments. One of the key themes which emerged from these was the importance of public education which could apply whether or not the verdicts ultimately change. Legislation would not be required to promote the understanding of the public to the nature of the not proven verdict if this was thought to be required. That education would apply not only to support the public to undertake their important role as a jury member, but also to ensure their wider understanding of the criminal justice system.

If changes were to be made, education and training of the judiciary and the profession would also be required to understand the implications of any possible changes and how these might be brought forward. That would need to be factored into any timescales for reform. There would then be time required for changes and phasing for them to be then introduced. There is no quick solution.

As the not proven verdict has never been legally defined, no one has ever been able to surmise satisfactorily as to why juries or indeed judges, sheriffs or JPs have returned a not proven verdict. It is the only the effect on which we can be clear; the not proven verdict provides the same outcomes as a not guilty verdict to the effect that the accused is acquitted. No conviction then ensures. This lack of definition was referred to in various responses to the survey.

We believe that any consultation by the Scottish Government should seek to bring the longstanding debate on the not proven verdict to a conclusion. We are also of the view that the Scottish criminal justice system may benefit from a systemic and comprehensive review. A number of responses to the question of what changes might be required to support a move to a two-verdict system, went beyond consideration of the not proven verdict. Respondents took the opportunity to highlight other areas for review to promote the safeguarding of our criminal justice system, such as legal aid, a review of anonymity for the accused, section 275 of the Criminal Procedure (Scotland) Act 1995, retention of the requirement for corroboration and improved Crown provision of information.

We acknowledge that all these areas have their place in any proposed review of the Scottish criminal justice system.

While the results show that a majority of respondents believe that the not proven verdict should be retained, this does remain a complex issue. However, the results of this survey will help inform and support

the Law Society's response to a future consultation on the not proven verdict, whatever way it may be taken forward.

One of the issues not focused on in the survey, which may be considered further is that the proposed abolition of the not proven verdict would presumably apply in respect of both solemn and summary procedure. The effect of its removal must be viewed in relation to all serious offences prosecuted at solemn level such as murder and culpable homicide and also offences prosecuted summarily before the sheriff summary and Justice of the Peace Courts.

What is important is that any change to the verdicts in a criminal trial must be consistent with the principles of the Scottish criminal justice system that recognise the presumption of innocence, maintain the rights of all those involved in that system and minimises the risk of a miscarriage of justice.<sup>1</sup> That is vital when exploring the need to change and indeed any route to achieving that change must uphold that rule of law.

<sup>1</sup> <https://www.lawscot.org.uk/news-and-events/law-society-news/any-change-of-verdicts-must-be-consistent-with-principles-of-scottish-justice-system/>

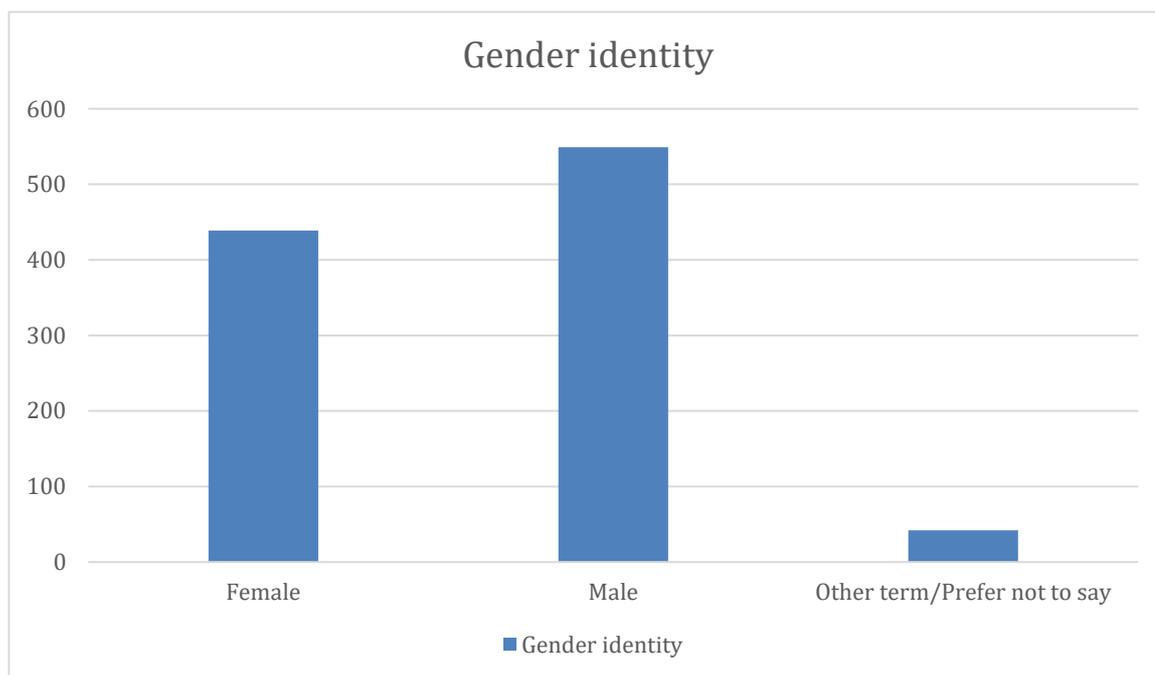
## Initial analysis

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### About the respondents

A number of demographic questions were asked to enable us to understand who completed the survey and to allow further analysis of the results. These questions assist in analysing any trends in attitudes shared by specific sectors of the profession. However, for the purposes of this initial report we focus on the key results.

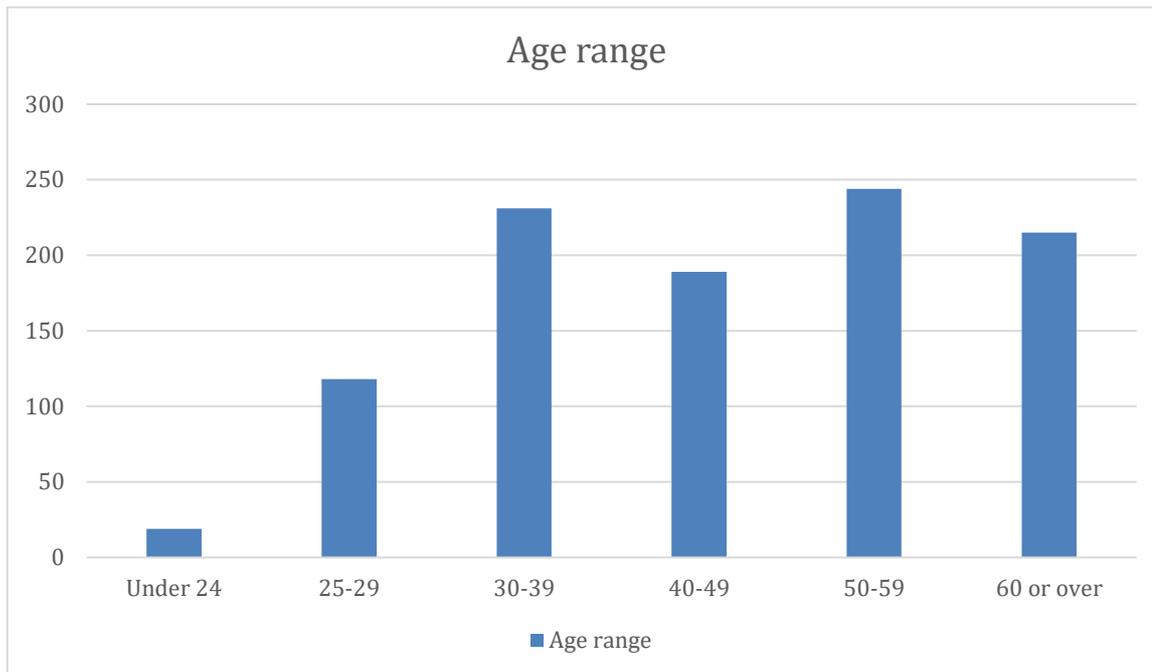
### Gender identity of respondents



Due to the small numbers of respondents who selected a gender identity option other than female or male, or chose 'prefer not to say', these have not been broken down further to avoid potential identification of respondents.

439 respondents (43%) answered female, while 549 respondents (53%) answered male, with the remainder choosing an alternative answer option from the list of intersex, non-binary, prefer to use a different term, or prefer not to say. 10 respondents accounted for elsewhere in this analysis chose not to answer this question.

It is worth noting that the profile of respondents does not quite match the overall profile of the profession. 53% of respondents to the survey identified as male, compared to the 1 June 2021 figure that 55.47% of all solicitors were female.



### Age of respondents

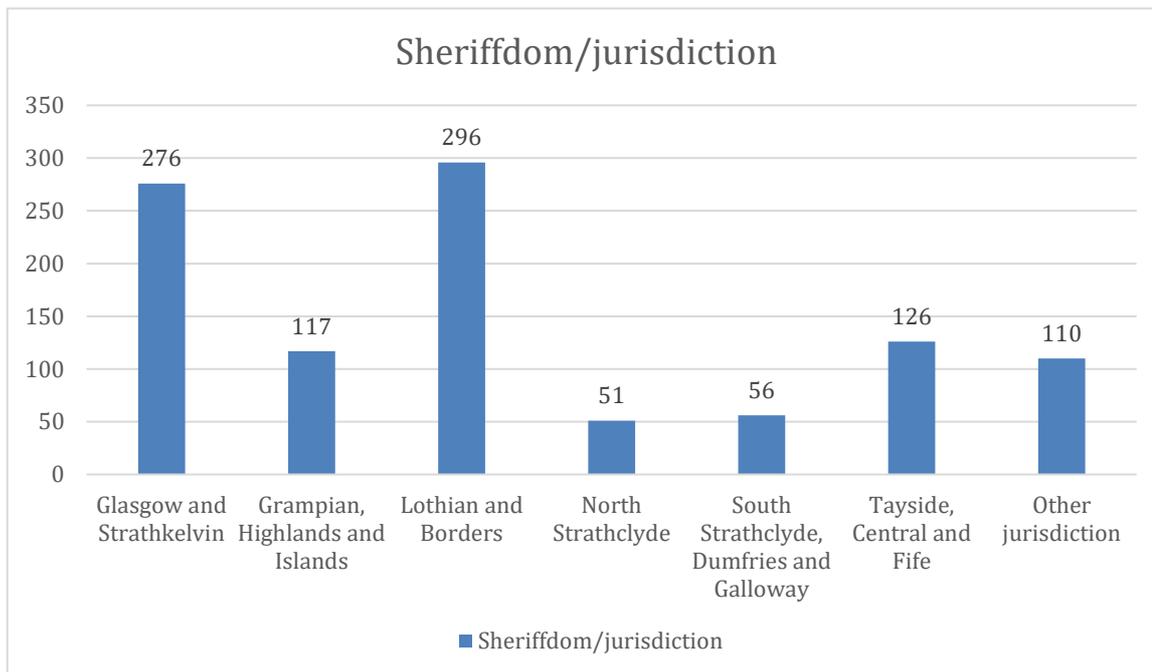
The following table shows the age profile of respondents. <b>Age</b>	<b>Number and percentage of respondents</b>
Under 24	19 (2%)
25-29	118 (11%)
30-39	231 (22%)
40-49	189 (18%)
50-59	224 (24%)
60 or over	215 (21%)

The remaining respondents either preferred not to say or did not answer this question.

The response percentages based on age are broadly in line with the percentages by age of the profession as a whole.

These results are interesting but do not impact on the results as to any age and therefore historical support for retention of the verdict seems not to be based on any age significant factors.

#### Sheriffdom or jurisdiction



Sheriffdom or jurisdiction	Number and percentage of respondents
Glasgow and Strathkelvin	276 (27%)
Grampian, Highlands and Islands	117 (11%)
Lothian and Borders	296 (29%)
North Strathclyde	51 (5%)
South Strathclyde, Dumfries and Galloway	56 (5%)

Tayside, Central and Fife	126 (12%)
Other jurisdiction	110 (11%)

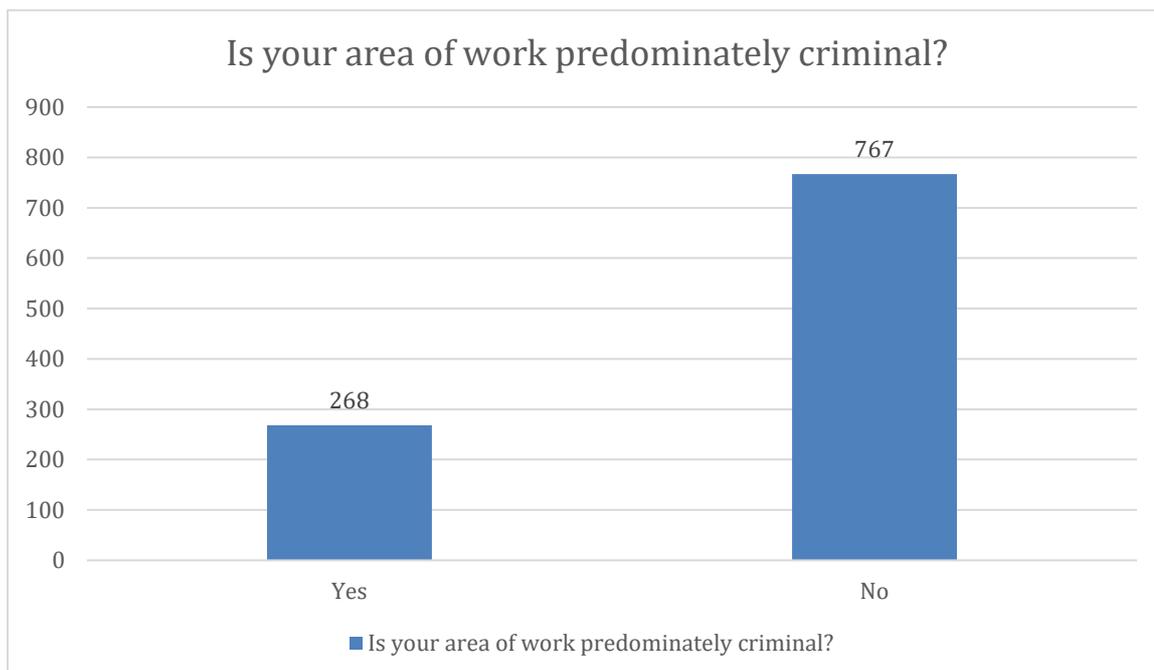
Of the answers given for other jurisdictions these included:

- retired
- England/Wales/Northern Ireland
- whole of UK
- whole of Scotland/more than one Sheriffdom

We would expect that the larger number of respondents are reflected in the percentages returns for the Sheriffdoms of Glasgow and Strathkelvin and Edinburgh. Where the respondents have indicated another jurisdiction, this has not been explained further but may relate to those non court or retired solicitors with no specific affiliation to one specific jurisdiction.

What the results demonstrate is that the discussion over the not proven verdict is not geographically split. That is expected as this is a question affecting the application of criminal law across Scotland.

### Criminal practitioners



268 (26%) respondents indicated that their area of work was predominately criminal, while 767 (74%) indicated that this was not their main area of work.

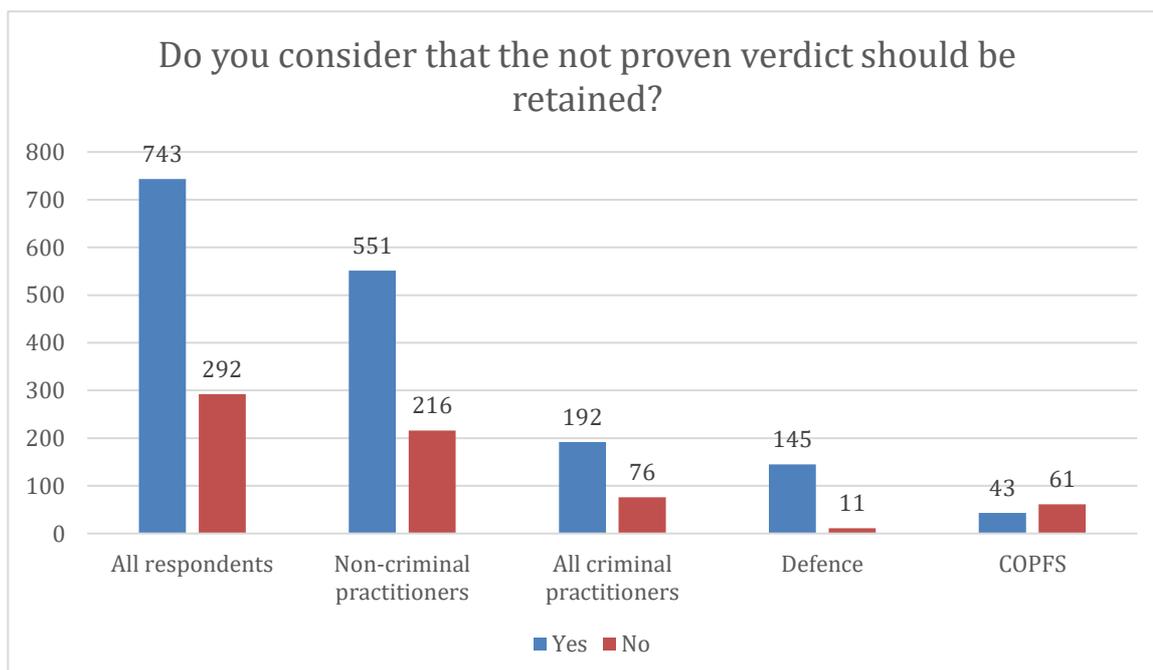
Of those who said that their area of work was predominately criminal, 158 (60%) said that they worked as part of the defence bar, and 104 (40%) said that they worked for the Crown Office and Procurator Fiscal Service. Six people who said that their area of work was predominately criminal chose not to answer this supplementary question.

In an additional supplementary question 131 respondents said that they were registered criminal legal aid practitioners.

Following these demographic questions, the remaining questions in the survey asked about respondents' views on the not proven verdict. Where appropriate, these answers have been broken down to show how criminal practitioners responded compared to respondents who had not identified as predominately criminal practitioners.

Given the subject nature of the not proven survey, we anticipated greater interest from those who are predominantly involved in criminal practice. It is important to recognise that the survey was aimed at the whole profession on the basis that the issue of the abolition or retention of the not proven verdict is of public interest and not just confined to those practising criminal law.

## Do you consider that the not proven verdict should be retained in Scots criminal law?



This was a mandatory question and was answered by all 1,035 respondents considered as part of this report.

<b>Category and number of respondents</b>	<b>Not proven verdict should be retained – number and percentage of respondents</b>	<b>Not proven verdict should not be retained – number and percentage of respondents</b>
All respondents (1035)	743 (72%)	292 (28%)
Respondents who did not work predominately in criminal law	551 (72%)	76 (28%)
Respondents who worked predominately in criminal law	192 (72%)	76 (28%)
Criminal defence practitioners	145 (93%)	11 (7%)
Crown Office and Procurator Fiscal Service (COPFS)	43 (41%)	61 (59%)

Looking first at all respondents to the survey, 743 (72%) answered that yes, the not proven verdict should be retained, with 292 (28%) saying no it should not be retained.

The results for respondents who did not identify as working predominately in the criminal sector appear to correspond with the overall survey results. 551 respondents (72%) said that not proven should be retained and 76 (28%) said that it should not be retained.

Similarly, when the answers of all respondents who confirmed that they worked predominately in criminal law were analysed, the results remained consistent. 192 respondents (72%) said that the not proven verdict should be retained, and 76 respondents (28%) said that it should not be retained.

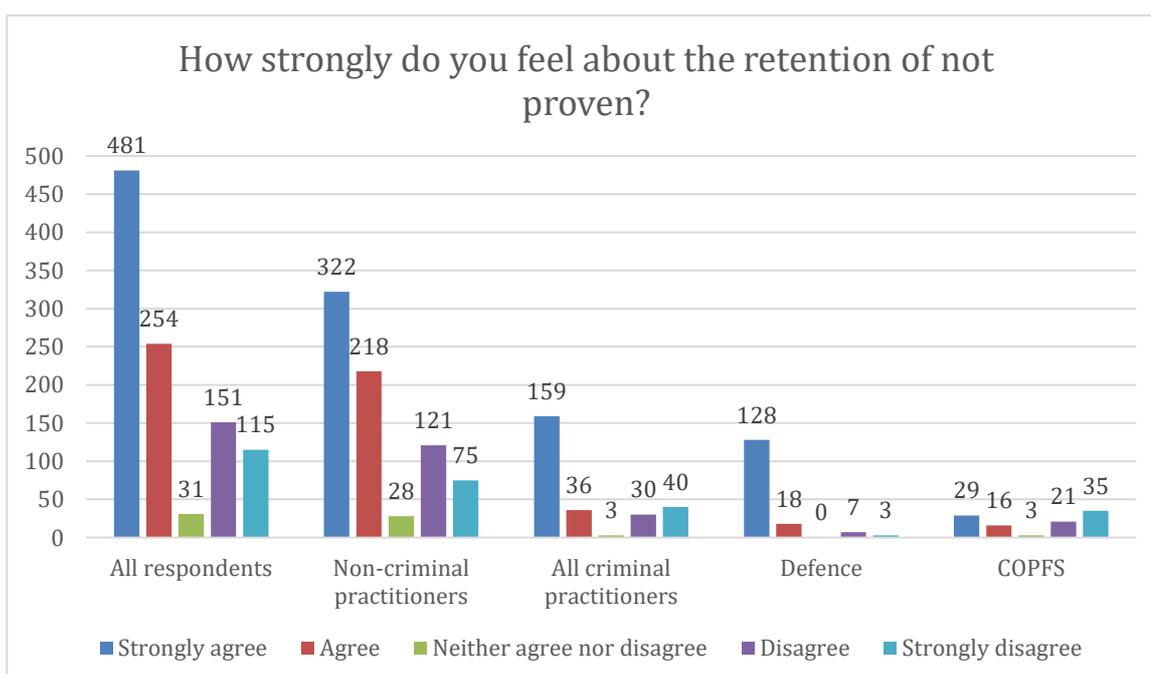
A further breakdown of the criminal practitioners who responded shows that of those who identified as defence practitioners, 145 (93%) said that not proven should be retained and 11 (7%) said that it should not. Of the respondents who identified as working for COPFS, 43 respondents (41%) said that the not proven verdict should be retained, and 61 respondents (59%) said that it should not be retained. It was not mandatory for respondents to identify whether they worked for COPFS or defence and a small number chose not to answer that question so the number of respondents at this level does not equal the number of all criminal practitioners who responded.

Our key finding from the survey reflects that the majority of respondents (72%) are in favour of retaining the not proven verdict. This is the same majority for the criminal practitioner and non-criminal practitioner members of the profession.

This result is significant. The reasons why respondents chose this answer was the subject of a later question, but there is attachment to the safeguard that the not proven verdict offers.

This significant majority may point to possible future research to consider the promotion of a better understanding and meaning of the verdict.

## How strongly do you agree or disagree with the retention of the not proven verdict?



This was not a mandatory question. However only 3 respondents did not answer it.

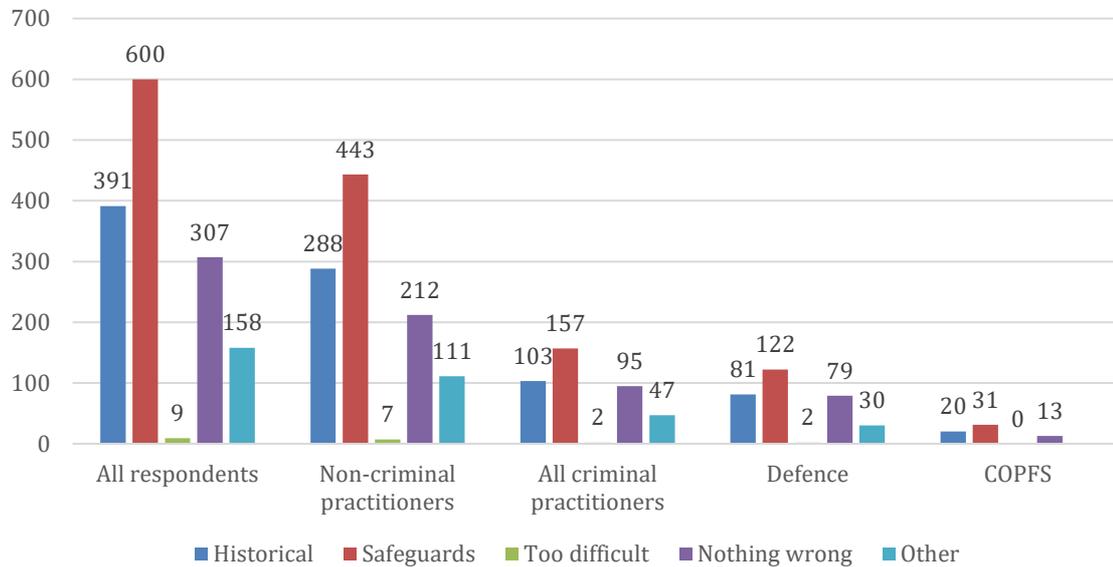
	<b>All respondents</b>	<b>Non-criminal practitioners</b>	<b>All criminal practitioners</b>	<b>Defence</b>	<b>COPFS</b>
<b>Strongly agree</b>	481 (47%)	322 (42%)	159 (59%)	128 (82%)	29 (28%)
<b>Agree</b>	254 (25%)	218 (29%)	36 (13%)	18 (12%)	16 (15%)
<b>Neither agree nor disagree</b>	31 (3%)	28 (4%)	218 (29%)	0	3 (3%)
<b>Disagree</b>	151 (15%)	121 (16%)	18 (12%)	7 (4%)	21 (20%)
<b>Strongly disagree</b>	115 (11%)	75 (10%)	16 (15%)	3 (2%)	35 (34%)

There is support here for an interpretation that views on the verdicts are well entrenched and not held lightly. The defence bar strongly agrees with its retention, with the results from COPFS being more mixed. We suggest that this finding is quite important in the overall context of considering if it should be removed, because fundamental to the criminal justice system is the need to have confidence that those who are found guilty according to the system in place are guilty after a fair trial. If the verdict were to be removed, a significant body of the profession which is strongly supportive of its retention will need to be convinced that any changes put in place maintain the rule of law and are consistent with the court/jury findings.

### **What are the main reasons you are in favour of retaining the not proven verdict?**

This question was only made available to respondents who had indicated that they strongly agreed or agreed with retaining the not proven verdict in the previous question. It was not a mandatory question, and respondents were invited to choose more than one reason from the options given or to add their own. This was designed to reflect some of the reasons which have appeared publicly to support its retention. 726 respondents answered this question.

### Reasons to retain not proven



Reasons	All respondents	Non-criminal practitioners	All criminal practitioners	Defence	COPFS
<b>Historical – it is a strength and a unique feature and identity of Scots criminal law</b>	391 (54%)	288 (54%)	103 (54%)	81 (57%)	20 (46%)
<b>Safeguards – it is a necessary safeguard preventing any wrongful convictions</b>	600 (83%)	443 (83%)	157 (82%)	122 (85%)	31 (70%)
<b>It is too difficult to change</b>	9 (1%)	7 (1%)	2 (1%)	2 (1%)	0
<b>There is nothing wrong with the current system</b>	307 (42%)	212 (40%)	95 (50%)	79 (55%)	13 (30%)
<b>Other reason given</b>	158 (22%)	111 (21%)	47 (24%)	30 (21%)	17 (39%)

The results show that the majority of respondents considered that there was a historical basis for its retention which was a view shared across both criminal and non-criminal practitioners. However, the historical basis is not on its own sufficient argument for its retention. Historically, many aspects of criminal practice have changed such as the abolition of the death penalty for murder in terms of the Murder (Abolition of Death Penalty) Act 1965 and the introduction of the statutory offence of rape in terms of the Sexual Offences (Scotland) Act 2009. These have markedly affected the prosecution of crime.

There was also overwhelming support for the need to retain the not proven verdict based on its role in being a safeguard to prevent wrongful convictions. That reflects the need for a criminal justice system in Scotland which is transparent, fair and compliant with the European Convention on Human Rights. Its removal would change that system. The issue may be what the effect would then be on the not proven verdict being removed without other changes being made such as the simple majority verdict or size of the jury.

Only 1% indicated that it was too difficult to change, with the majority of those who answered this being non-criminal practitioners. This shows that the profession understands that the difficulty of making a change should not be a barrier if there is justification for change being made.

While 42% of respondents said that there is nothing wrong with the current system, this does not appear to tie up with public opinion as reported in the media. This may be an indication of the higher degree of familiarity within the legal profession about how the three-verdict system works in practice, while those who do not work in this area are likely only to hear about occasional high-profile examples. However, it is worth noting that only 50% of criminal practitioners expressed this view, so there is not the same strength of feeling on this point as there are on others.

#### Other reasons given - themes

Of the 158 respondents who chose to give other reasons for retaining not proven, a number of themes emerge:

#### **The not proven verdict should be retained in preference to guilty and not guilty.**

This is very much a key finding from the survey and is repeated in responses to later questions. This view is that not proven is preferable to the guilty/not guilty verdict which does not accurately represent what the jury/court is considering. It is summed up well by one respondent that *“the tribunal of fact is asked to determine what has been proven, and therefore proven and not proven are more readily understandable and applicable without prejudice to the accused or any witness.”* These were felt to be the *“more intellectually honest verdicts of what a criminal trial is determining.”*

Various respondents then considered that *“a two-verdict system of proven and not proven is the most straight forward and understandable system for a jury.”* A number of respondents indicated that it was the logical verdict since the court’s/jury’s role is to determine whether the prosecution has proved the case to

the required standard of beyond reasonable doubt. It is not there to decide on the guilt or innocence of the accused as such and should not be expected to make absolute findings based upon imperfect knowledge.

### **There is some misunderstanding about what the verdict means**

There was recognition that there was no clear understanding of what the verdict means. Different interpretations result. Is it a message to the Crown that the case is not proven or is it a discerning verdict differentiating from a not guilty verdict? Some respondents suggested that there may be different interpretations such as *“not proven recognises that the accused had a case to answer but there was simply insufficient evidence to convict, while it is an acquittal it does not mean the accused was not guilty of the crime.”* Another respondent suggests the verdict *“indicates that the accused may not necessarily be innocent, just that the prosecution has not adequately proved its case.”*

While we do not know what message the jury was intending to convey when using the not proven verdict, these responses do tie in with the theme of education. That the public are not given enough information about the logical principles upon which our system rests. Reflecting on the risk of misconceptions about the verdict, one respondent noted that was *“not the fault of the verdict itself.”* Addressing that aspect in ensuring the public understanding and the profession’s ability to explain the verdict may help alleviate some of the issues. That could help support one response’s view that the verdict helped *“victims feel that they were believed albeit that the case was not proved.”*

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### **Safeguard in preventing wrongful conviction**

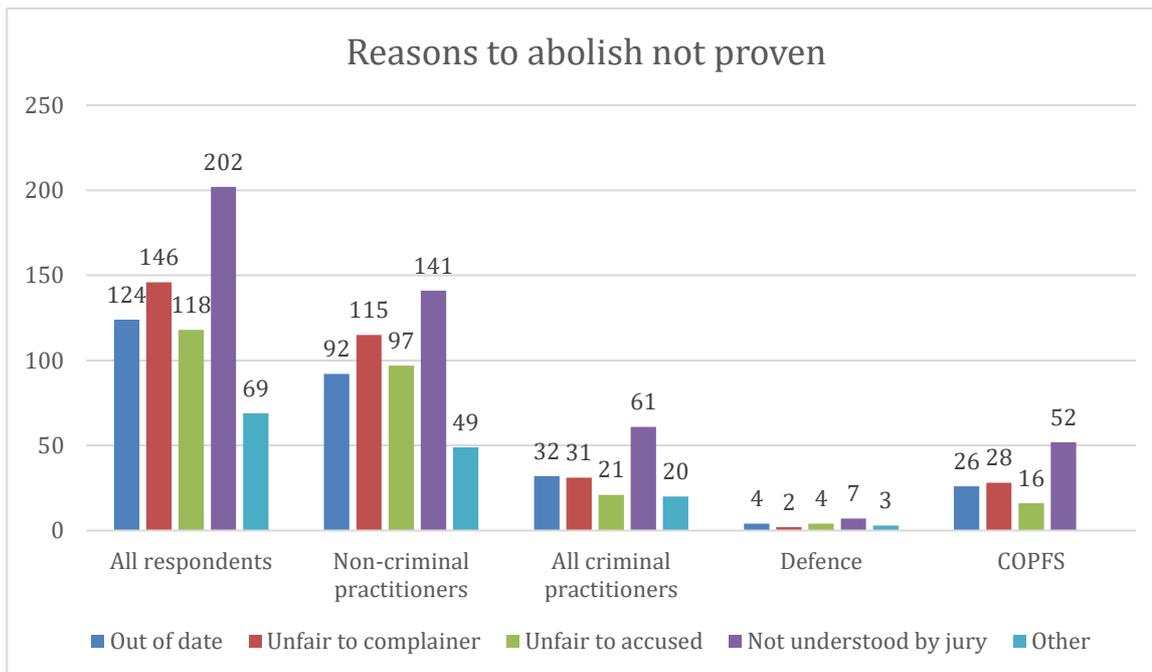
This is the main purpose of the not proven verdict as it is a verdict of acquittal. That highlights the answer about it representing an important safeguard which should be retained. As one respondent put it, it *“...prevents wrongful not guilty verdicts in areas of doubt - as important as safeguard to wrongful conviction.”* Another considered that *“...not think its removal will increase convictions, but it does allow jury to make clear that the Crown has not proved its case to requisite standard.”*

Others considered that its use by juries justified its continuing relevance. There was a suggestion that its removal would not necessarily encourage guilty verdicts but that *“...juries would still simply use the not guilty verdict instead if the not proven verdict were not available ...”* That was amplified by one respondent who suggested careful handling was required as *“improving conviction rates at the cost of all acquittals suggests that all persons accused of a crime are guilty. The message removing this verdict (which has a place in the law here) sends to jurors is that they have been getting it wrong for centuries. The verdict has a place in Scot’s Law and the verdict should remain. It fundamentally protects from miscarriages of justice.”* Another indicated that *“There appears to be a fundamental misunderstanding of it by those who wish to see its removal as they believe there would then be more guilty verdicts delivered in rape and sexual*

assault cases. A grave misunderstanding. I cannot see why its removal would result in more guilty verdicts.”

## If you are in favour of abolishing the verdict of not proven, what are the main reasons?

This question was only shown to respondents who had indicated that they strongly disagreed or disagreed with retaining the not proven verdict in the previous question. It was not a mandatory question, and respondents were invited to choose more than one reason from the options given or to add their own. 267 respondents answered this question.



Reasons	All respondents	Non-criminal practitioners	All criminal practitioners	Defence	COPFS
<b>It is out of date</b>	124 (46%)	92 (47%)	32 (45%)	4 (40%)	26 (46%)
<b>It is unfair to the complainer</b>	146 (55%)	115 (58%)	31 (44%)	2 (20%)	28 (50%)
<b>It is unfair to the accused</b>	118 (44%)	97 (49%)	21 (30%)	4 (40%)	16 (29%)

<b>It is not understood by the jury</b>	202 (76%)	141 (72%)	61 (87%)	7 (70%)	52 (93%)
<b>Other</b>	69 (26%)	49 (25%)	20 (29%)	3 (30%)	15 (27%)

In the responses which were received, there was support for all reasons, but the largest responses related to the question of it not being understood by the jury 76%. This response also resonates with other responses to the survey, including those who wish to retain not proven. As noted previously this is an issue which could be addressed by education to ensure that the jury understand what it means.

There is some support for the verdict being out of date at 46%. We did not go on to ask in what way it was out of date although we had highlighted the need for criminal law to adapt and respond to current society and its values.

The result of the verdict being unfair to the complainer at 55% is interesting but perhaps not unexpected. Media and political focus on cases where not proven has been returned has tended to focus on the perspective of the complainer, so it is likely that this would be much higher in public opinion.

The result of the verdict at 44% being unfair to the accused is interesting and could be explored further. Any verdict of not proven is an acquittal, but this may suggest that there is a difference in the perception of not proven as compared to not guilty.

### Other reasons given - themes

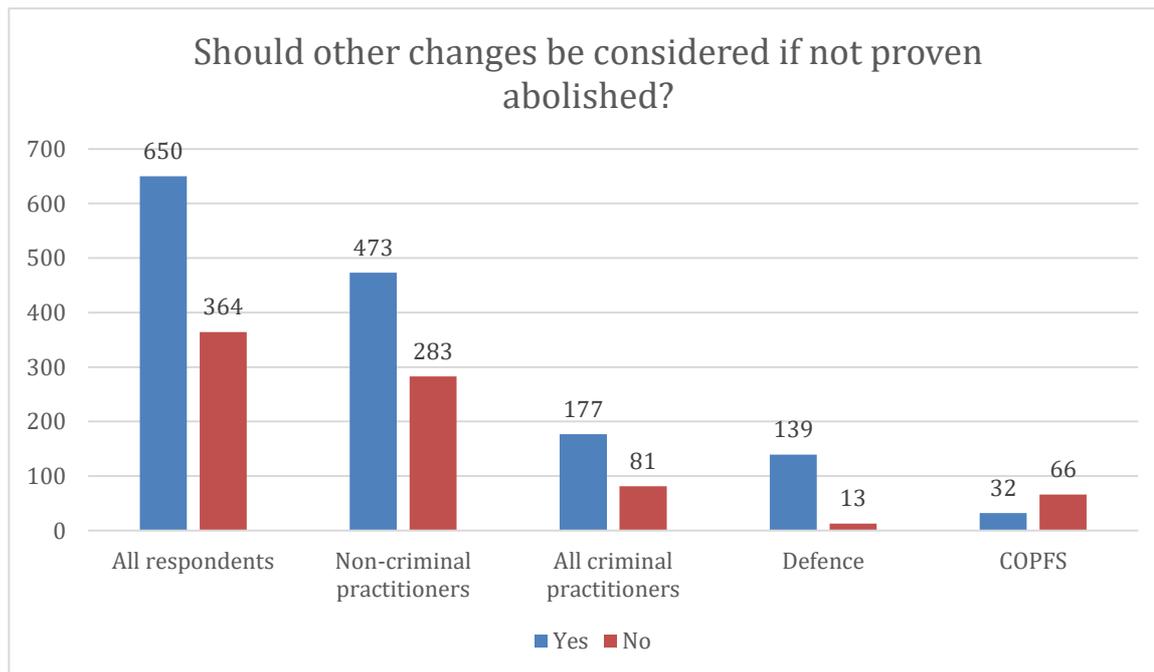
Of the 69 respondents who chose to give other reasons for why they disagreed with the retention of not proven, various themes emerge.

There were fewer responses to other reasons why the not proven verdict should be abolished. A number pointed out, as has already been reflected in the summary of the previous question, that the fact the verdict has been with us for many years is not a reason, on its own either to support its retention or indeed, prevent any comprehensive review of its role and purpose. While some respondents pointed out the inconsistency with other countries, this too is not a reason to change.

In highlighting the issue of fairness, which is paramount to the integrity of criminal law, there were common responses that it was hard for the legal profession let alone the public to understand the distinction between not proven and not guilty. One respondent replied that *"A lot of legal professionals have difficulty articulating its meaning."* There is of course no difference in the effect - of acquittal. However, there is further backing in these responses to the perception that there is an *"impression that the accused is not acquitted - it's a less good 'not guilty' verdict."* The concept of confusion was prevalent and detracts from guilty/not guilty. As with those other respondents who raised concerns about whether not proven is fully understood, education could provide a non-legislative solution.

## If the not proven verdict were to be abolished, do you think any other changes should be considered to the Scottish criminal justice system?

This question was mandatory, although if respondents chose to exit the survey at this point rather than continue to the next page their answers were not recorded. 1,015 responses were received to this question.



	<b>Yes – other changes are required to safeguard the system</b>	<b>No – the change can be made without any other changes taking place</b>
<b>All respondents</b>	650 (64%)	364 (36%)
<b>Non-criminal practitioners</b>	473 (63%)	283 (37%)
<b>All criminal practitioners</b>	177 (69%)	81 (31%)
<b>Defence</b>	139 (91%)	13 (9%)
<b>COPFS</b>	32 (33%)	66 (67%)

The response rate in its consistency was encouraging in respect of this question reflecting the interest in the criminal justice system which went beyond merely criminal practitioners. Overwhelmingly there was support for other changes to be made to the criminal justice system if the not proven verdict was abolished.

This is not surprising as to abolish the not proven verdict on its own as was envisaged by Criminal Verdicts (Scotland) Bill in 2013 may be too simplistic an approach. That approach would not produce the results that are being used to support its abolition and would have significant consequences.

Just how far the scope of any Scottish Government consultation regarding the possible removal of the not proven verdict would go regarding consideration of any other specific changes is awaited. Responding to this detail will be a matter for the Society's Criminal Law Committee once any consultation is published.

### **If the not proven verdict were to be abolished, what other changes should be considered to the Scottish criminal justice system?**

This question was only shown to respondents who had previously answered that yes other changes are required to safeguard the system if the not proven verdict were to be abolished. It was not mandatory for those who did see the question. There were 134 responses. The key themes which emerged:

#### **Changes being made to the number of the jurors and the majority verdict.**

Many of the responses endorsed these views. These picked up too on the preference for not proven to be retained and in preference to not guilty with support for its specific role within a two-verdict system. One response summed this up neatly with *"abolish guilty/not guilty and return to Scottish tradition with proven/not proven and increase the number of jury votes required to result in a proven verdict."*

#### **Better education of the jury reflecting the sensitive nature of the trials.**

This reflects comments made previously about the need for education about what the not proven verdict means. This is reflected in the judges'/sheriffs' restricted charge to juries emphasising that it is a verdict of acquittal and no more. Responses to the survey asked how can or do the profession explain the verdict to either the complainer or the accused? This then results in dissatisfaction more frequently from the complainer and the accused as to any nuance perceived or otherwise about what the jury was saying.

One response went further than to suggest education on the not proven verdict to suggest that the *"jury should receive more training on how to analyse evidence, how to disregard hearsay, and how to detach themselves from what they might have read or heard in the media, there should also be training on conscious and unconscious bias, and the harm that (quick) judgement of people may cause to the interested party. Thus, in general, more legal or quasi-legal training for the jury, and more awareness for bias for all involved."* There is clear support for more education needed to ensure an understanding of the criminal justice system both currently and if any changes are implemented.

#### **Education of court officials, judges and the legal profession if changes are made**

This is part of the scope of the Report published by the Lord Justice Clerk with a respondent echoing that there is a need for *"review of the impact in criminal trials and procedure and then a comprehensive consequential training of Court officials, judges; the legal profession as to what the abolition means in practice in advance of changes becoming effective."*

## Retention of corroboration requirement

This was anticipated as a response to the question. That recognises that while debate on the abolition of the requirement for corroboration may not have been a recent feature of criminal justice reforms since the Criminal Justice (Scotland) Act 2016 was passed it is a topic that has remained under the surface. A balanced view to the survey was picked up where it stated that *“ensuring the rest of corroboration remains and ensure that the burden of proof on the prosecution remains high. Perhaps, a reassessment of the worth of circumstantial evidence and its place in assisting a prosecutor in bringing charges...”*

In asking the question we recognised that allowing open-ended responses meant inevitably that the answers would cover a substantial range of topics within the Scottish criminal justice system that were in their view requiring to be changed. Respondents did not go on generally to indicate how these changes if brought forward would assist in the actual focus of the survey which was to look at the abolition of the not proven verdict.

As one respondent pointed out: *“the system really needs to be looked at as a whole, rather than piecemeal, which is what is happening at present.”* Changes to the not proven verdict cannot be considered in isolation.

The profession’s more general views on the reasons for abolition were indicated in responses such as *“the suggestion by pressure groups and politicians that there would be more guilty verdicts is simply wrong and .... need to get that message out there”* and that *“it is being used as the sledgehammer to crack a nut as regards rape and sexual assault cases. It should not be singled out in isolation without a fuller review. I think those calling for abolition may find it was not the reason for the lack of guilty verdicts.”* That endorses the view that it is not a simple issue and the case for its abolition cannot be brought forward on its own as there are other reasons too why the conviction rate may be low.

Of a general nature, responses also mentioned better access to Crown information, anonymity of the accused, review of the section 275 of the Criminal Procedure (Scotland) Act 1995 which covers exceptions in restrictions on evidence relating to sexual offences, adverse inference and dock identification. These may be best summed up by one response highlighting that *“fundamental root and branch restructuring of criminal law and procedure ... is required.”*

One respondent suggested that there was a need to look elsewhere, saying: *“the reform of rape procedures in England should inform reform in Scotland and evidence of prior convictions of career criminals should be allowed at the discretion of the judge.”*

It is worth noting that such a review has been undertaken with “Improving the Management of Sexual Offence Cases Final Report” from the Lord Justice Clerk’s Review Group in March 2021.<sup>2</sup> Just how the Scottish Government will take forward these recommendations is awaited, and the inevitable overlap with

<sup>2</sup> <https://www.scotcourts.gov.uk/docs/default-source/default-document-library/reports-and-data/Improving-the-management-of-Sexual-Offence-Cases.pdf?sfvrsn=6>

the debate on the abolition of the not proven verdict means it will be important for the any future consultation on this issue.

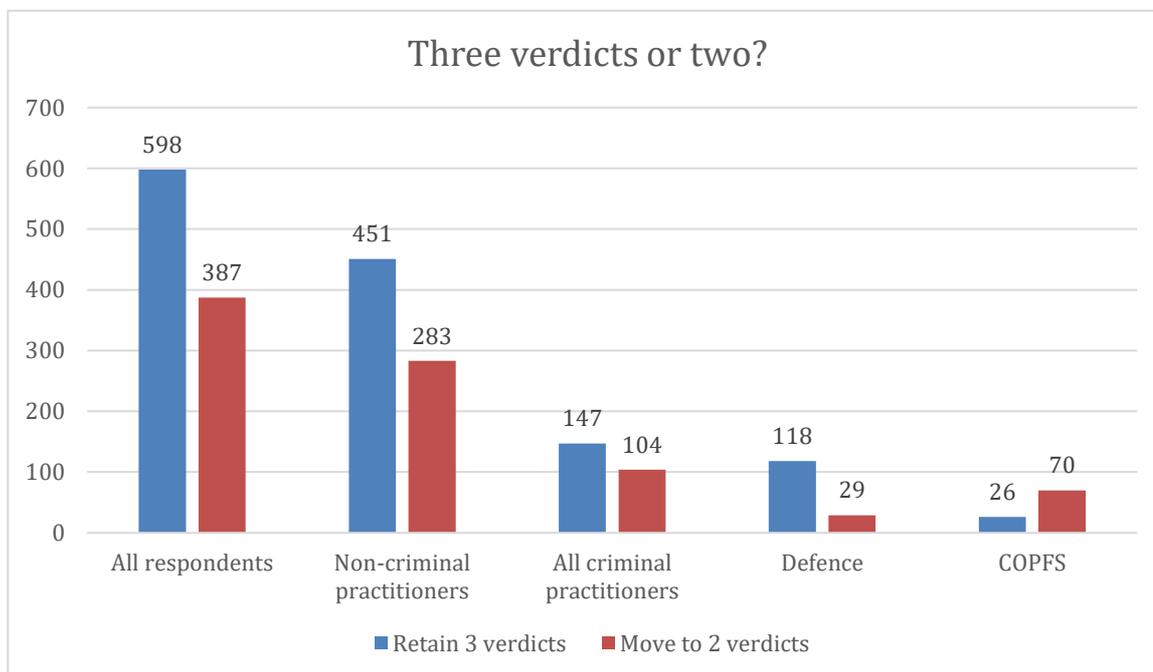
There is not the time in this report to consider in greater detail the effect and range of all the responses not directly related to not proven. However, the answers provided within the survey will help inform much more detailed work being undertaken by the Society’s Criminal Law Committee, and to help in relation to any consultation brought forward by the Scottish Government.

### Three verdicts or two verdicts?

Respondents were asked which of the following two statements was closer to their own view:

- Scotland should retain a three-verdict system in criminal trials
- Scotland should move to a two-verdict system in criminal trials

This question was mandatory, although if respondents chose to exit the survey at this point rather than press submit their answers were not recorded. 985 responses were received to this question.



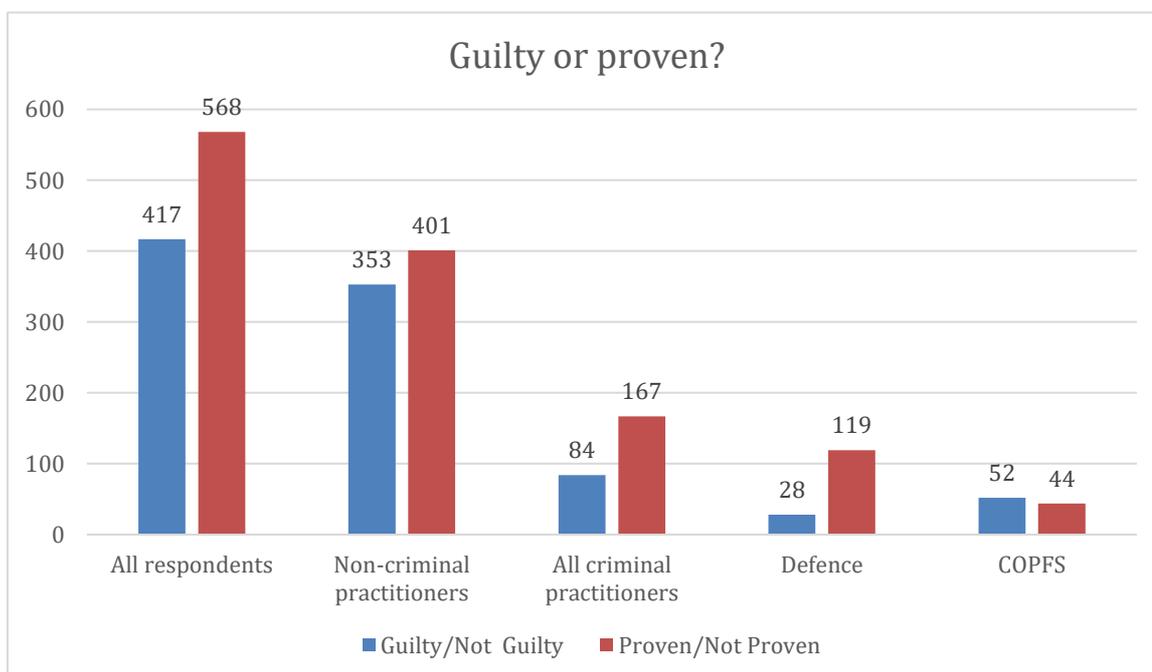
	<b>Scotland should retain a three-verdict system in criminal trials</b>	<b>Scotland should move to a two-verdict system in criminal trials</b>
<b>All respondents</b>	598 (61%)	387 (39%)
<b>Non-criminal practitioners</b>	451 (61%)	283 (39%)
<b>All criminal practitioners</b>	147 (59%)	104 (41%)
<b>Defence</b>	118 (80%)	29 (20%)
<b>COPFS</b>	26 (27%)	70 (73%)

The responses are interesting as there is support for the three-verdict system not only by criminal practitioners but also the profession as a whole. The COPFS majority preference is for a two-verdict system.

## Verdicts in a two-verdict system

Respondents were asked if Scotland did move to a two-verdict system, which of the following two statements was closer to their own view:

- The available verdicts should be guilty and not guilty
- The available verdicts should be proven and not proven



This question was mandatory, although if respondents chose to exit the survey at this point rather than press submit their answers were not recorded. 985 responses were received to this question.

	<b>The available verdicts should be guilty and not guilty</b>	<b>The available verdicts should be proven and not proven</b>
<b>All respondents</b>	417 (42%)	568 (58%)
<b>Non-criminal practitioners</b>	333 (45%)	401 (55%)
<b>All criminal practitioners</b>	84 (34%)	167 (67%)
<b>Defence</b>	28 (19%)	119 (81%)
<b>COPFS</b>	52 (54%)	44 (46%)

These highlight support for the change in terminology to proven /not proven. These are consistent with the other questions in the survey.

## Appendix 1

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### Not Proven Verdict Consultation

#### Introduction

We are awaiting information from the Scottish government about how or when it intends to take forward manifesto promises to consult on the not proven verdict. In the meantime we consider that there is a need to develop a better understanding of the views of the profession on this issue.

We welcome views from all our members, and not just criminal practitioners.

#### Data Protection and Privacy Policy

In accordance with the UK General Data Protection Regulation and the Data Protection Act 2018, the Law Society of Scotland is committed to the protection of your data and processing it within the required legal bases.

Although we may rely on our legitimate interest in understanding the views of our members, the public and stakeholders, by participating in this consultation, to the extent that any personal data is provided, you are providing us with the required consent under Articles 6 and 9 of the UK General Data Protection Regulation, and/or the relevant provisions of the Data Protection Act 2018, for us to process that data.

#### About you

**1. Which sector do you work in?**

- Sole practitioner
- 2-9 partner firm
- 10+ partner firm
- In house solicitor public sector
- In house solicitor private sector
- Third sector
- Other (please specify)

**2. Which of the following best describes your current position in your firm/organisation?**

- Trainee solicitor - private practice/in-house public/in-house private
- Employed solicitor - private practice/in-house public/in-house private
- Associate/Manager in-house
- Partner/Director or equivalent in-house
- Sole practitioner
- Consultant
- Retired
- Career break/not in employment
- Prefer not to say

**3. In which Sheriffdom or jurisdiction do you mainly work in?**



- Glasgow and Strathkelvin
- Lothian and Borders
- North Strathclyde
- South Strathclyde, Dumfries and Galloway
- Tayside, Central and Fife
- Grampian, Highlands and Islands
- Other jurisdiction (Please specify)

**4. Which of the following age brackets do you fall into?**

- Under 24
- 25-29
- 30-39
- 40-49
- 50-59
- 60 or over
- Prefer not to say

**5. Which of the following best describes your position in your firm/organisation?**

- Employed solicitor
- Associate
- Partner
- Consultant
- Director
- Prefer not to say

**6. What is your gender identity?**

- Male
- Female
- Intersex
- Non binary
- Prefer not to say
- I prefer to use a different term

**7. Do you prefer to identify as transgender?**

- Yes
- No
- Prefer not to say
- Other (please specify)

**8. Do you consider your area of work to be predominately criminal?**

- Yes (go to question 9)
- No (go to question 11)

**9. Do you work for:**

- Crown (COPFS) (go to question 11)

- Defence (go to question 10)

**10. Are you a registered criminal legal aid practitioner?**

- Yes
- No

**11. Do you consider that the not proven verdict should be retained in Scots criminal law?**

- Yes
- No

**12. How strongly do you agree or disagree with the retention of the not proven verdict?**

- Strongly agree
- Agree
- Neither agree nor disagree
- Disagree
- Strongly disagree

**13. What are the main reasons you are in favour of retaining the not proven verdict? (Please select all that apply.)**

- Historical – It is a strength and unique feature and identity of Scots criminal law.
- Safeguards- It is a necessary safeguard preventing any wrongful convictions
- It is too difficult to change
- There is nothing wrong with the current system
- Other (please specify)

**14. If you are in favour of abolishing the verdict of not proven what are the main reasons? (Please select all that apply.)**

- It is out of date
- It is unfair to the complainer
- It is unfair to the accused
- It is not understood by the jury
- Other (please specify)

**15. If the not proven verdict were to be abolished, do you think any other changes should be considered to the Scottish criminal justice system?**

- Yes - other changes are required to safeguard the system (go to question 16)
- No - the change can be made without any other changes taking place (go to question 17)

**16. If the not proven verdict were to be abolished, what other changes should be considered to the Scottish criminal justice system?**

**17. Which of these statements is closest to your own view?**

- Scotland should retain a three-verdict system in criminal trials
- Scotland should move to a two-verdict system in criminal trials

**18. If Scotland were to move to a two-verdict system, which of these statements would be closest to your own view?**

- The available verdicts should be guilty and not guilty
- The available verdicts should be proven and not proven