# Criminal Justice Committee

## 4th Meeting, 2024 (Session 6), Wednesday 24 January 2024

# Victims, Witnesses, and Justice Reform (Scotland) Bill

# Note by the clerk

## Background

1. The Committee is taking evidence on the Victims, Witnesses, and Justice Reform (Scotland) Bill at Stage 1 of the Parliament's legislative process.

2. The Bill proposes changes to the law to try to improve the experience of victims and witnesses in the justice system. The Bill also proposes changes to the criminal justice system to try to improve the fairness, clarity and transparency of the framework within which decisions in criminal cases are made.

3. In general, the Committee is adopting a phased approach to its consideration of the Bill, to divide the Bill into more manageable segments for the purposes of Stage 1.

## Topics to be covered

4. At today's meeting, the Committee will begin taking evidence as part of the third phase of its scrutiny. This will cover the provisions in Parts 5 and 6 of the Bill, namely—



5. The Committee's scrutiny of Parts 5 and 6 of the Bill will continue until February. Further details of the Committee's phased approach can be found online.

## Today's evidence on the Bill

6. At today's meeting, the Committee will take evidence from the following witnesses.

Panel 1

- **Professor James Chalmers**, Regius Professor of Law, School of Law, University of Glasgow
- **Professor Vanessa Munro**, Professor of Law, Law School, University of Warwick
- **Professor Cheryl Thomas KC**, Co-Director of the UCL Judicial Institute

Panel 2

- **Tony Lenehan KC**, Chair of Scottish Criminal Bar Association, Faculty of Advocates
- **Sheila Webster**, President, Law Society of Scotland
- **Stuart Munro**, Criminal Law Committee Convener, Law Society of Scotland
- **Simon di Rollo KC**

7. The following submissions have been provided to the Committee, the relevant extracts of which (covering Parts 5 and 6 of the Bill) are reproduced at the Annex—

- Professors Chalmers and Munro (written jointly with two of their colleagues).
- Professor Cheryl Thomas
- Law Society of Scotland
- Tony Lenehan KC, President of the Faculty of Advocates Criminal Bar Association
- Faculty of Advocates
- Faculty of Advocates Criminal Bar Association

# Further reading

8. A SPICe briefing on the Bill can be found online.

9. The responses to the Committee's call for views on the Bill can be found online.

10. A SPICe analysis of the call for views, covering Parts 5 and 6, was circulated with the committee papers for the meeting on 10 January.

# Previous evidence sessions

11. At previous meetings the Committee has taken evidence from a range of witnesses on the Bill.

12. The Official Reports of these meetings can be found online.

**Clerks to the Committee**
**January 2024**

# ANNEX

## Extract from Submission from Professor James Chalmers, Eamon Keane, Professor Fiona Leverick and Professor Vanessa E Munro

This is a joint submission in response to the Commitee's Call for Views on the above Bill. We are academics working in law schools in Glasgow and Warwick with expertise in criminal law, evidence and procedure. Three of us (Chalmers, Leverick and Munro) were members of the team which carried out the Scottish Jury Research which has informed aspects of the Bill. We have also conducted research on rape myths (Leverick individually and Chalmers, Leverick and Munro jointly) which has been cited by the Government in the Policy Memorandum accompanying the Bill. Keane has (with Convery) carried out work on independent legal representation which was relied upon by the Dorrian Review in its recommendations which have led to Part 8 of the Bill.

We have written an article examining the Bill's provisions, "Putting victims and witnesses at the heart of the justice system? The Victims, Witnesses and Justice Reform (Scotland) Bill" which will be published later this year in the Criminal Law Review. This submission draws on that article but is framed around the questions asked by the Commitee with cross-references to the article (referred to as "the Criminal Law Review article") for further detail where appropriate, which we hope is of practical assistance.

James Chalmers, Eamon P.H. Keane and Fiona Leverick, University of Glasgow
Vanessa E Munro, University of Warwick
15 September 2023

**6. What are your views on Part 5 of the Bill which establishes a Sexual Offences Court?**

We support these proposals. As we note in the Criminal Law Review article: "These provisions have the potential to go some way to alleviating the re-traumatisation that sexual offence complainers have reported experiencing when giving evidence at trial. They can mitigate the lengthy delays that complainers often face in waiting to give their evidence and enable complainers to seek counselling support at an earlier stage with greater confidence that doing so will not impact on the justice process. The active management of questions by SOC judges trained in trauma-informed practice could also alleviate the worst excesses of inappropriate cross-examination. That said, as experience of implementing similar measures for adult sexual offence complainants in England and Wales has recently demonstrated, this is not necessarily a straightforward process. Recent research there has indicated that, in order for such measures to be successful, there will require to be 'buy-in' by justice professionals regarding the appropriateness of writen questions, and other mechanisms for management of their duration and content. Whilst evidence on commission is already quite common in Scottish sexual offences trials, the measures that are proposed in this

part of the Bill, if implemented, will necessitate an increased amount of preparation pre-trial. This is something which may prove problematic, particularly for the solicitors' branch of the defence bar that has repeatedly raised concerns about its ability to cope due to recruitment and funding issues." (text around fns.91-93, footnotes omited)

**7. What are your views on the proposals in Part 6 of the Bill relating to the anonymity of victims?**

We support these proposals, including the policy decision to take a narrower approach to the power of the court to set aside anonymity than that which exists in England and Wales (see the Criminal Law Review article, text around fns.107-107).

**8. What are your views on the proposals in Part 6 of the Bill relating to the right to independent legal representation for complainers?**

We support these proposals, and note our overall comments in the Criminal Law Review article as follows: "…these provisions are going to require greater preparation and coordination from all criminal justice stakeholders. The increase to the number of days required in order to advance an application – from seven to 21 – combined with a requirement for the Crown to seek authorisation to disclose evidence, and the operation of the right of ILR for complainers itself, is all going to necessitate extra labour from a criminal justice system that is already overstretched and beset by delay. It is important that the Bill has made it clear that legal aid should be provided to complainers on a non-means tested basis to facilitate this. Overall, these provisions of the Bill are to be welcomed and offer a solid foundation upon which to devise a coherent system of ILR for complainers at a stage of the criminal process which research has demonstrated is both extremely difficult for them to understand and distressing; and is likely to engage their legal rights. The support of the legal profession thus far is also commendable." (text around fns.124-126, footnotes omited). One of us (Keane) is, with colleagues at the University of Glasgow, leading the development of a law clinic to provide advice and representation to complainers by qualified solicitors – with assistance as appropriate from students – in such cases.

**9. What are your views on the proposals in Part 6 of the Bill relating to a pilot of single judge rape trials with no jury?**

We recognise these proposals are a mater of considerable controversy and will rightly be subject to careful scrutiny by the Parliament. Without expressing a categorical view on the decision which should be taken, we agree with the conclusion of the Dorrian Review that the evidence to justify a pilot exists, although are under no misapprehension regarding the magnitude of the proposed change. There is, as one of us has writen elsewhere following a comprehensive review of the literature, "overwhelming evidence that prejudicial and false beliefs held by jurors about rape affect their evaluation of the evidence and their decision making in rape cases" (F. Leverick, "What do we know about rape myths and juror decision making?" (2020) 24 International Journal of Evidence & Proof 255, 255, freely available at https://journals.sagepub.com/doi/full/10.1177/1365712720923157).

We discuss these proposals in more detail in the Criminal Law Review article (text around fns.128-167) and would highlight, drawing on the text of that article, a number of key points here, all of which are developed in more detail with full references in that article.

(a) *the absence of alternative means which can be identified as a way of addressing the problem of rape myths*. It is sometimes suggested that false beliefs held by jurors can be addressed through measures such as judicial direction or a pre-trial video. But these measures are likely to be limited in their effect. Evidence suggests that attitude change is most likely to be achieved via educational programmes that are longitudinal, contextual and participatory. This is near impossible in a trial context where jurors may sit only on a single case.

(b*) objections based on the right to a fair trial*. It is sometimes suggested that trial by judge alone might be problematic in terms of Article 6 of the European Convention on Human Rights. There are many jurisdictions around the world, including those bound by the European Convention on Human Rights, that do not have lay participation in criminal cases at all, and the European Court of Human Rights has expressly ruled that the right to a fair trial does not require that the determination of guilt is made by a jury. Although trial by jury reflects an important commitment to open justice, its value depends on our having adequate confidence that the common sense relied upon is not grounded in myth, misconception or prejudice; and the evidence on rape myths and juror decision making puts this into question in sexual offence cases. It is perfectly possible to hold the view that juries are a valuable component of our criminal justice system but that they might not be the most appropriate way of determining sexual offence cases.

(c) *objections based on the nature of the evidence demonstrating rape myths*. Objections have been made based on the use of research with mock jurors to demonstrate the problem of rape myths. It is important to bear in mind, however, that "real jurors" and those who participate in mock jury studies are not two entirely different populations. Those who participated in the Scottish Jury Research, for example, were all eligible for (compulsory) jury service. If research with voluntary participants demonstrates that a significant number of those participants subscribe to rape myths, those participants do not disappear from the jury pool merely because they are compelled rather than volunteers.

It has sometimes been argued that research in England and Wales (Thomas, "The 21st century jury: contempt, bias and the impact of jury service" [2020] Criminal Law Review 987) demonstrates that jurors do not believe rape myths. The English research does not demonstrate that (Chalmers, Leverick and Munro and others have set out why in detail elsewhere: references are at fn.162 of the Criminal Law Review article), but in any case, while the English research was carried out with real jurors following their jury service, that service was not necessarily on a sexual offence case and jurors were (unavoidably, given the statutory rules which prevent this) not asked about their deliberations, instead responding to abstract statements relating to rape myths in questionnaires. Research with real jurors about their deliberations in sexual offence cases is now available from work undertaken in New Zealand, and this found considerable evidence that misconceptions about sexual violence were present in

jurors' discussions (Tinsley, Baylis and Young, "'I Think She's Learnt Her Lesson': Juror Use of Cultural Misconceptions in Sexual Violence Trials" (2022) 52 Victoria University of Wellington Law Review 463, available at https://ojs.victoria.ac.nz/vuwlr/article/view/7128). The jurors interviewed often drew on 'real rape' stereotypes, including the extent of a complainant's physical resistance, in determining credibility, and placed undue weight on delayed reporting, despite having been directed otherwise. Complainants who did not display an appropriate degree of emotion when giving evidence were judged not to be credible and defendants who had been intoxicated at the time of the events in question were judged leniently as having made 'drunken mistakes'. By contrast, jurors endorsed victim-blaming attitudes relating to the complainant's clothing, flirtatious behaviour, lifestyle, intoxication and prior sexual history.

We note the work of Elisabeth McDonald, In The Absence of a Jury: Examining Judge-Alone Rape Trials (2022), freely available via https://dx.doi.org/10.26021/11869, which makes it clear that a move to single judge trials is not an easy or guaranteed solution to these difficulties. Rigorous evaluation and training will be essential.

# Submission from Professor Cheryl Thomas KC

This written submission addresses sections of the Bill relating to the piloting of single judge rape trials (ie juryless rape trials) (Part 6 section 65), the review of the pilot of juryless rape trials (Part 6 section 66) and pre-recording of complainants' evidence in the Sexual Offences Court (Part 5 sections 59, 60, 61)

## 1. Relevance of the experience in England and Wales

### 1.1 The justification for juryless rape trials in Scotland

Why are juryless rape trials needed in Scotland? The answer appears to be because there is a "low conviction rate"[1] in rape cases in Scotland which are tried by a jury. The first thing to say about this is that there is a lack of clarity in Scotland about jury conviction rates. Government crime statistics in Scotland do not provide information on the proportion of rape charges decided by jury deliberation that result in conviction, acquittal or verdicts of not proven[2]. The second thing is that if one accepts that the jury conviction rate for rape is low (however that is defined) in Scotland then it is clear that there are very substantial differences between outcomes for rape complainants in Scotland compared to England and Wales when tried by a jury. There are also claims of "overwhelming evidence"[3] that juries in Scotland are biased against rape complainants. If this is the case then there are also very substantial differences between Scotland and England and Wales on this issue as well.

### 1.2 The situation in England and Wales

In England and Wales, a detailed analysis of every single jury verdict by deliberation on rape charges over the 15 year period 2007-2021[4] shows that:

- Juries are more likely to convict than acquit a defendant on any type of rape charge (regardless of the age or sex of the complainant and whether it was a contemporary or historic allegation).
- Jury rape convictions are higher than jury conviction for other very serious offences against the person including GBH, threats to kill, attempted murder and manslaughter.
- In England and Wales the jury conviction rate for 10 different types of rape charges is known, and the conviction rates range from 63%-91% depending on the age and sex of the complainant and whether charged under the 2003 or 1956 Sexual Offences Act.
- The jury conviction rate for all types of rape offences has steadily increased in recent years.

[1] Criminal Proceedings in Scotland, 2021-22 https://www.gov.scot/publications/criminal-proceedings-scotland-2021-22/pages/9/
[2] Criminal Proceedings in Scotland, 2021-22 https://www.gov.scot/publications/criminal-proceedings-scotland-2021-22/pages/23/
[3] Victims, Witnesses, and Justice Reform (Scotland) Bill: factsheet: https://www.gov.scot/publications/victims-witnesses-and-justice-reform-bill-factsheet/pages/rape-myths/
[4] C. Thomas, "Juries, Rape and Sexual Offences in the Crown Court 2007–211" [2023] *Criminal Law Review* Issue 3

In England and Wales an attitude survey of serving jurors commission by the senior judiciary showed that the overwhelming majority of jurors do not hold false assumptions about rape complainants[5].

### 1.3 Why do there appear to be very substantial differences between England & Wales and Scotland in both jury trial outcomes in rape cases and juror attitudes about rape and sexual offending?

There are 2 possible factors that could account for these differences between the 2 jurisdictions:

1. That members of the public in Scotland who do jury service are much more likely to be biased against rape complainants than members of the public who do jury service in England and Wales.
2. That there are differences in the system of trial by jury in Scotland compared with England and Wales that contribute to these differences in jury rape verdicts in the 2 jurisdictions.

As there has not been any research with real jurors in Scotland, it is not possible to know whether the first factor has any bearing. But there are very substantive differences in jury trials in Scotland and England & Wales that should be considered.

### 1.4 Differences in approach to trial by jury and jury research in the 2 jurisdictions

There are a number of fundamental differences in approach to trial by jury between the 2 jurisdictions:

- **Evidential rules**: While corroboration is required to prove a charge in Scotland, this is not required in criminal proceedings in England and Wales.
- **Jury size**: The jury requires 15 jurors in Scotland with a simple majority for verdicts; in England and Wales the jury of 12 requires a weighted majority for majority verdicts (10-2/11-1).
- **Jury verdict options**: There are 3 verdict options in Scotland (guilty, not guilty, not proven) which is unique amongst common law jury systems; in England and Wales there are only 2 verdict options (guilty, not guilty) which is the international norm.
- **Judicial Directions**: The use of written jury directions has been standard practice in England & Wales for many years and is now effectively compulsory[6]; judges can direct the jury at any time during the trial (including in writing) when it would assist the jury to do so; judges have been able to direct juries on “rape myths” in England & Wales since 2006; and sample written jury directions on avoiding false assumptions in rape and sexual offences cases have been provided to judges since 2016[7].

### 1.5 Differences in approach to understanding juries in the 2 jurisdictions

In England & Wales, over the last 20 years the government and the judiciary have supported empirical research conducted with real juries at court as well as the long-

[5] See C. Thomas, “Juries, Rape and Sexual Offences in the Crown Court 2007–211” [2023] *Criminal Law Review* Issue 3

[6] See Criminal Procedure Rules section 25.14: https://www.gov.uk/guidance/rules-and-practice-directions-2020#trial

[7] See the *Crown Court Compendium*: Part 1 Jury and Trial Management and Summing Up, Section 20-1: https://www.judiciary.uk/guidance-and-resources/crown-court-compendium/

term analysis of Crown Court data to understand jury conviction rates by deliberation, by offence and by year. This research has not been granted nor did it require any special legal dispensation and all of the research has been carried out within the legal prohibitions on jury deliberations. In Scotland there has not been any similar body of research involving actual juries or analysis of jury verdicts on an ongoing basis.

### 1.6 Scope of jury research conducted by the UCL Jury Project

In England and Wales the UCL Jury Project has been conducting research with real serving jurors and juries at court for over 2 decades on a wide range of aspects of the jury process as well as jury outcomes and the impact of jury service. The following summarises some of the topics covered by this research in England and Wales:

- Jury summoning and empanelment
- Representative nature of juries
- Racial bias in jury decision-making
- Juror contempt (including juror internet and social media use)
- Juror understanding of the law
- Juror understanding of legal responsibilities
- How to improve judicial directions
- Impact of jury service on jurors
- How to improve jury deliberations
- Rape & sexual offences (jury decision-making/outcomes as well as juror attitudes)
- Jury conviction rates (by offence, court, defendant, age etc from 2006-present)
- Hung jury rates and majority verdicts
- Juror awareness of media coverage of cases
- Juror need for in-trial and post-trial support
- Juror experience of jury service

### 1.7 The understanding of juries in Scotland

Unfortunately, there is not a similar level of understanding of juries in Scotland because in the same period in Scotland there has been:

- No empirical research on the experiences, attitudes or understanding of real serving jurors in Scotland.
- No research on the decision-making of actual juries in Scotland.
- No robust analysis of actual jury conviction rates.

There has been one mock jury study in Scotland[8] where the researchers were specifically prevented from involving any real jurors or juries in the study.

### 1.8 Myths about jury research

Perhaps one of the reasons for the lack of understanding about the reality of trial by jury in Scotland is that there is an attachment to numerous myths about what research can and cannot be conducted with real juries. Myths about jury research in the UK

[8] *Scottish Jury Research: Findings from a Large Scale Mock Jury Study*, Social Research Series 10/19 (2019) https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2019/10/scottish-jury-research-fingings-large-mock-jury-study-2/documents/scottish-jury-research-findings-large-scale-mock-jury-study/scottish-jury-research-findings-large-scale-mock-jury-study/govscot%3Adocument/scottish-jury-research-findings-large-scale-mock-jury-study.pdf

continue to be perpetuated due to a misunderstanding about how to understand how juries make decisions. One central myth was nicely summarised by the Law Commission of England and Wales in its recent consultation on the prosecution of sexual offences: *"*A challenge faced by researchers is that the law prohibits anyone asking jurors about how they reached their verdicts and prohibits jurors from revealing information about that."[9] This is the fallacy about what questioning jurors about deliberations can reveal. As human beings, we cannot consciously know all the factors that influence our individual decisions. So we cannot accurately articulate them if questioned after the fact[10]. Jury verdicts are even more complex, as they are the combination of 12 individual decisions resulting in 1 group decision. Another myth is that if only researchers could hear what jurors say in the deliberating room this would reveal how they came to their decision. This too is a fallacy. Jurors may express views in the deliberating room, but these do not necessarily determine either the juror's individual decision in the case or the jury's verdict. This has been reinforced by research with actual jurors in New Zealand about attitudes to rape and sexual offences[11], which found that "if any cultural misconceptions were expressed in deliberations, it was not possible to draw conclusions about whether these influenced actual jury verdicts".

## 2. Single judge rape trial pilot and review

### 2.1 Juryless rape trials and review of the pilot

Given this lack of knowledge about actual juries in Scotland, the introduction of judge-only rape trials is at best premature. The use of juryless trials for rape offences will take place without any baseline knowledge about how actual juries in Scotland work against which to measure first the need for such a pilot and then the impact of the pilot of judge only trials. Without reliable baseline data on jury verdicts by deliberation over the previous years, it will not be possible to reliably measure the differences between jury outcomes prior to the legislative change and after the legislative change. In addition, the Bill will introduce a number of fundamental changes to the way juries in Scotland work at one time (size of the jury, different majorities for verdicts) and at the same time as changes in the need for corroboration may being taking place. Alongside these changes, judges in Scotland are also beginning to more routinely provide juries with written directions prior to their deliberations. Therefore changes in all of the main structural and procedural differences between juries in Scotland and juries in England and Wales will be taking place at one time. The introduction of juryless rape trials at the same time will compound the difficulty in drawing reliable comparisons between trials pre and post legislative change and in understanding the consequences of the changes introduced by the bill.

### 2.2 Unintended consequences of juryless trials?

There may also be unintended consequences for the democratic process in Scotland in removing criminal cases from public resolution, given what is known about the

[9] *Evidence in sexual offences prosecutions: A consultation paper*, Consultation paper 259 (2023)
[10] See for instance R. Nisbett and T. DeCamp Wilson (1977) "Telling More than We Can Know: Verbal Reports on Mental Processes" 84 *Psychology Review* 231.
[11] Y Tinsley, C Baylis and W Young, "'I think she's learnt her lesson': Juror use of cultural misconceptions in sexual violence trials" (2021) 52 *Victoria University of Wellington Law Review* 464.

impact of jury service on members of the public from empirical research in other jurisdictions. Research with real jurors in England & Wales and in other jurisdictions has demonstrated that serving on a jury can have a transformative effect on members of the public. In England and Wales[12] 87% of serving jurors said that when they were summoned they would have opted out of jury service if it was voluntary, but after serving on a jury 85% of these same jurors said they would be happy to serve again if summoned. They overwhelming described their experience of jury service as educational, interesting and challenging. This corresponds to more extensive long-term research conducted in the United States[13] that revealed how doing jury service increased the civic engagement of members of the public and led to long term changes in democratic behavior: making them more likely to vote, to change the way they consumed media for news and increased involvement in community and civic groups.

[12] C. Thomas, "The 21st Century Jury: Contempt, Bias and the Impact of Jury Service" [2021] *Criminal Law Review.*

[13] J. Gastil, E. Pierre Dress, P.J. Weiser and C. Simmons, *The Jury and Democracy: How Jury Deliberation Promotes Civic Engagement and Political Participation* (Oxford: Oxford University Press, 2010)

## 3 Pre-recorded cross examination

The information provided in this section is an extract from written evidence submitted to the UK Parliament Justice Select Committee in December 2023 for its inquiry "The use of pre-recorded cross examination under section 28 of the Youth Justice and Criminal Evidence Act 1999". [14]

### 3.1 Pre-recorded cross examination in England and Wales

The Youth Justice and Criminal Evidence Act 1999 (YJCEA) established the legal basis for the use of pre-recorded cross examination (s28) in England and Wales. Witness eligibility is based on two grounds: age or incapacity (section 16, referred to generally as "vulnerable" witnesses) or fear or distress about testifying (section 17, referred to generally as "intimidated" witnesses). *Speaking Up for Justice*, the 1998 consultation paper issued prior to the passage of YJCEA, set out the official view that special measures would be beneficial because they would:

1. encourage vulnerable witnesses to report offences and give evidence;
2. reduce the stress of giving evidence for vulnerable and intimidated witnesses;
3. help secure convictions.[15]

### 3.2 Introduction of section 28 pre-recorded cross examination in the Crown Court

Over the 24 years since the YJCEA was passed, the full range of special measures were introduced incrementally in the Crown Court in England and Wales. The last of the special measures to be introduced was Section 28. This provides for the pre-recording of a witness's cross-examination (and re-examination) where the witness's evidence in chief has also been given by means of a video recording of a police interview (section 27[16]). The introduction of the use of s28 pre-recorded cross-examination has occurred over an 8-year period via a series of pilots and phased "roll outs" across the Crown Court. Section 28 was first introduced for s16 vulnerable witnesses in pilots from 2014 with full implementation from 2021[17], followed by s17(a) intimidated witnesses in pilots from 2019 with full implementation from September 2022.

### 3.3 Analysis of the effect of pre-recorded cross examination

The UCL Jury Project has conducted a detailed analysis of the use and impact of s28 in all cases in the Crown Court from June 2016 – June 2023[18] at the request of the judiciary of England and Wales and the Ministry of Justice. It analysed a dataset of all

[14] The information provided in this section is an extract from written evidence submitted to the UK Parliament Justice Select Committee for it inquiry "The use of pre-recorded cross examination under section 28 of the Youth Justice and Criminal Evidence Act 1999". See: https://committees.parliament.uk/committee/102/justice-committee/

[15] Home Office (1998) *Speaking Up for Justice*, London: Home Office, p.1

[16] Pre-recorded evidence in chief under s27 is generally referred to as ABE (Achieving Best Evidence) evidence.

[17] The initial pilots of s28 for vulnerable (s16) witnesses set the witness age limit as under 16 (not under 18 as specified in YJCEA) but was increased to under 18 when s28 was fully implemented for s16 witnesses.

[18] A full analysis of this evaluation of s28 will be published in 2024.

charges against all defendants in all cases in all Crown Court Centres in that time period where s28 pre-recorded cross examination recordings were made. This has enabled the analysis to track the outcome of every single charge against every defendant in cases where a s28 recording was made. The analysis also has the benefit of the UCL Jury Project's existing dataset and analysis of all charges against all defendants in *all cases* in the Crown Court in the same time period[19]. This has enabled a direct comparison to be made between charges, pleas and jury verdicts in s28 cases and non-s28 cases in the same 7-year period.

### 3.4 The lower conviction effect of section with pre-recorded cross examination

In the 7-year period June 2016-June 2023, s28 recordings were used in 4392 cases, involving 4645 defendants and 28793 charges. Jury conviction rates were calculated for the most numerous offences when s28 was used and this was compared to the jury conviction rates for the same offences in the same period when s28 was not used. The main finding from this analysis is that conviction rates for every single offence are lower when s28 evidence is used then when it is not used. This is

- regardless of whether the s28 witness is a child/vulnerable or an adult/intimidated;
- regardless of whether the s28 witness is female or male; or
- regardless whether the offence is a sexual offence or a non-sexual offence.

The variations in conviction rates for child witnesses range from 1-14 percentage points lower with pre-recorded cross examination than without it. The variations in conviction rates are more substantial with adult witnesses than child or other vulnerable witnesses, ranging from 11-28 percentage points lower with pre-recorded cross examination than without it. For rape offences the conviction rate was on average 20 percentage points lower when s28 evidence was used compared to the same rape offences in the same period when pre-recorded cross examination was not used. These findings that conviction rates are consistently and substantially lower for all offences when s28 evidence is used is very strong correlational evidence that those assessing evidence experience pre-recorded cross examination differently than they do other forms of live cross examination.

### 3.5 Previous published assessments of pre-recorded cross-examination

In England and Wales the Ministry of Justice has published 2 "process evaluations" of the 2 pilots of pre-recorded cross examination[20]. In 2018, the Scottish Government published an "evidence review" of the impact of the use of pre-recorded evidence on juror decision-making[21], which was a literature review of mostly experimental studies in other jurisdictions most of which were not conducted with real jurors. The findings from

[19] See C. Thomas, "Juries, Rape and Sexual Offences in the Crown Court 2007–211" [2023] *Criminal Law Review* Issue 3

[20] John Baverstock, Process evaluation of pre-recorded cross-examination pilot (Section 28), Ministry of Justice Analytical Series (2016); and Daisy Ward, Irina Pehkonen and Molly Murray (MoJ), Caroline Paskell, Jessica Pace, Rachel Worsley and Sulaiman Nasiri (Ipsos UK), Process evaluation of Section 28: Evaluating the use of pre-recorded cross-examination (Section 28) for intimidated witnesses, Ministry of Justice Analytical series (2023)

[21] Vanessa Munro, The Impact of the Use of Pre-recorded Evidence on Juror Decision-Making: An Evidence Review (Scottish Government 2018)

the analysis in England and Wales of all jury verdicts in s28 cases from 2016-2023 run counter to many of the indications in both MoJ process evaluations of s28 and contradict claims made in a 2018 Scottish Government review. The MoJ process evaluations suggested that s28 would have minimal impact on jury conviction rates, and that it would be impossible to know how s28 affected jury verdicts. However, this first independent and detailed analysis of all s28 cases from June 2016-June 2023 has shown it is possible to know how s28 relates to jury conviction rates, and that jury conviction rates for all offences when s28 evidence is used are lower than when pre-recorded cross examination is not used. This analysis has also shown that the claim made in the 2016 Scottish review - that pre-recorded evidence would not have an impact on jury decision-making, whether for a child or adult witness or in rape cases – has not been borne out in reality in England and Wales.

### 3.6 Factors that may be affecting conviction rates in cases with pre-recorded cross examination

It is possible that there is an intrinsic difference in how juries (or any judicial decision-makers) experience evidence presented as pre-recorded in comparison to evidence that is presented live (either in court with or without screens or via a remote link). This would not be surprising given evidence from psychological research that in-person interactions can create higher levels of empathy than interactions experienced on screen. But the fact that the conviction rate is consistently lower when pre-recorded evidence in chief is combined with pre-recorded cross examination compared with similar cases where only the evidence in chief is pre-recorded suggests that the difference lies in the *combined effect* of all of the witness's evidence being pre-recorded. This means that other factors may be contributing to pre-recorded cross examination evidence combined with pre-recorded evidence in chief resulting in lower conviction rates. These may include:

1 *No comparability in evidence presentation between main prosecution witness and other witnesses including the defendant*. The s28 witness is likely to be the only witness in a case where no evidence is presented live (either in court with or without a screen or via a remote link).
2 *Timing of the main prosecution witness evidence*. The evidence of the main witness for the prosecution is presented first; it is the first evidence a jury will see/hear; it will all be presented by video playback; all other witness are likely to appear in person and appear after the witness with all pre-recorded evidence.
3 *Evidence structured differently for s28 witnesses from any other witness*. This includes (1) the s27 ABE evidence in chief recording that has to serve a dual purpose of an investigative tool for police and evidence in chief to a jury and (2) often more limited and formalised cross examination when s28 is used.
4 *Disjointed nature of evidence in chief and cross examination*. This may arise for several reasons: because the ABE is primarily recorded for police evidence gathering not trial evidence purposes; because the s28 style of presentation and questioning is different from ABE and also different from other in-court cross examination of other witnesses; because the witness is likely to look and sound different in the s28 recording than in the s27 ABE recording given the differences in recording location, set up and time.
5 *Poor quality of pre-recorded evidence*.

6 *Poor quality of playback equipment in court*. This can include poor audio (necessitating written transcripts), screens too far away, images too small within screens, etc.
7 *Inherently weaker cases use s28*. It is also a possibility that s28 is used in cases where the evidence needed for conviction is weaker than in cases that do not use s28, and this is what is producing lower jury conviction rates in s28 compared with non s28 cases.

### 3.7 Forthcoming research on factors affecting lower conviction rates in s28 cases

At present, there is no reliable evidence to indicate which if any of the above factors result in lower jury conviction rates across the board for all offences when section 28 pre-recorded cross examination is used. In 2024 the UCL Jury Project will conduct the final part of its research on the impact of special measures on jury decision-making. This research will test of each of these possible factors with real juries at court to determine whether they are associated with differences in juror perceptions of evidence and jury verdicts when s28 evidence is used in trials. This Nuffield Foundation funded research is expected to be completed in autumn 2024. See: https://www.nuffieldfoundation.org/project/juries-the-digital-courtroom-and-special-measures

January 2024

## Extract from submission from the Law Society of Scotland

**6. What are your views on Part 5 of the Bill which establishes a Sexual Offences Court?**

Part 5 follows Recommendation 2 of Lady Dorrian's Review in improving Management of Sexual Offence cases (the Lady Dorrian Review [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 new court would have the power to deal with sexual offences prosecuted under solemn procedure.

"Sexual offence" is defined by way of an extensive list at Schedule 3, including attempts to commit these offences.

In terms of Section 37, the Sexual Offences Court consists of the Lord Justice General (Lord Carloway) the Lord Justice Clerk (Lady Dorrian) and judges each to be known as a Judge of the Sexual Offences Court.

People are eligible to become a Judge of the Sexual Offences Court if:
· they already hold a relevant judicial office i.e., Lord Commissioner of Justiciary, temporary judge, sheriff principal or sheriff
· they have completed an approved course on training on trauma-informed practice in sexual offence cases
· the Lord Justice General considers them to have the skills and experience to fulfil the office

The Sexual Offences Court would not be limited to dealing with cases which consist of sexual offences only. Section 39 (2) provides that where an indictment includes at least one sexual offence when the trial diet commences, the Sexual Offences Court may try every offence listed on the indictment.

This would allow the court to deal with a charge of murder where it forms part of a case involving at least one sexual offence. It would therefore allow an appropriately trained sheriff with, in the view of the Lord Justice General, the necessary skills and experience to be able to hear cases involving rape and murder. A sheriff would also have the same sentencing power as the High Court in terms of Section 62. For some offences, this would provide the ability to impose a sentence of life imprisonment.

In a statement to the Scottish Parliament's Criminal Justice Committee on 3rd November 2021, the Lord Advocate stated that serious sexual offences constitute around 70 per cent of High Court work and 80 to 85 per cent of cases that proceed to trial. These proposals would no doubt result in a significant transfer of cases to this new court.

Also, while in terms of Section 47(2), only solicitor advocates with an existing High Court right of audience can appear where the indictment includes the offence of murder, rape or both, solicitors who have completed training will be allowed to

represent an accused in a wider range of serious sexual cases.

We had opposed the creation of a dedicated court -separate to the High Court- in previous responses, though we had supported many of the procedural measures that would be applied in this court, such as using prior statements as evidence-in-chief, ground rules hearings etc.

With reference to paragraph 275 of the Policy Memorandum accompanying the bill, which states that consideration was given to establishing specialist divisions of existing courts, namely the High Court and the sheriff court, we are still unclear as to how this arrangement would deliver less flexibility in the use of existing courts and judicial resources to deliver improvements in the efficiency and effectiveness of how sexual offences cases are managed. We already have such specialist courts as divisions of existing courts such as the Domestic Abuse Court in Edinburgh and Glasgow Sheriff Courts and the Court of Session Commercial Court.

These processes operate with enhanced rules and tend to be presided over by judges with a particular interest in that area of law. In general terms, specialist courts lead to more effective judicial case management. Cases tend to stay, at least for the procedural stages, with the same judge, which ensures consistency and reduces the time required for hearings. The process is often more flexible. The specialist court model has the potential to reduce delays, increase consistency of experience for all participants, encourage early resolution where appropriate, and ensure the focus remains on issues properly in dispute. One potential disadvantage is that as certain cases attract greater judicial attention, there is a risk that others receive less. Care should be taken to ensure that the experiences of those involved in non-sexual cases do not become worse. Further, we require clarity as to how this proposal would be resourced given the current financial climate and competing demands on all sides for those involved in the justice system.

There are two elements in Part 5 with which we have previously raised concerns:

1. The provisions now set out in section 40 regarding the appointment and removal of judges from the court. The Lord Justice General at Section 40(1) may appoint persons holding a relevant judicial office to hold office also as Judges of the Sexual Offences Court. Section 40(2) allows the Lord Justice General to appoint as many Judges of the Sexual Offences Court as is considered necessary for the purposes of Section 40(1). Section 40(7) allows the Lord Justice General to remove a Judge of the Sexual Offences Court from office. This appears to be at the Lord Justice General's absolute discretion as no reason for the decision to remove a judge is required, although before removing a judge, the Lord Justice General must consult the President and the Vice President of the court in terms of Section 40(8). Section 35 [https://www.legislation.gov.uk/asp/2008/6/section/35] of the Judiciary and Courts (Scotland) Act 2008 provides the procedure for removal of a judge. Section 35 provides for the constitution of a tribunal by the First Minister either when requested to do so by the Lord President or in such other circumstances as the First Minister thinks fit. The tribunal is required to investigate and report on whether a person holding a judicial office is unfit to hold the office by reason of inability, neglect of duty or misbehaviour. Judicial office for the purposes of Section 35 is either the Lord President, the Lord Justice Clerk, a judge of the Court of Session, the chair of the

Scottish land Court or a temporary judge. Similar provision exists in Section 21 [https://www.legislation.gov.uk/asp/2014/18/section/21/enacted] of the Courts Reform (Scotland) Act 2014 for the removal of a sheriff principal, a sheriff, a summary sheriff, a part-time sheriff or a part-time summary sheriff.

This is a serious concern which can place judicial independence at risk, particularly against a background of the Sexual Offences Court having jurisdiction to try cases under the single judge rape and attempted rape trials pilot outlined at Section 65 of the bill.

2. Solicitors (section 47) and advocates (Section 48) are required to have completed a Lord Justice General approved course on training on trauma-informed practice, a measure that we have previously opposed, and which may restrict the capacity of defence practitioners, already heavily constrained by the unsustainability of legal aid. Also, the Society's Council, in terms of Section 47(4) would be required to keep, and make publicly available, a record of the solicitors who have a right of audience in the Sexual Offences Court in accordance with this section.

The training on trauma-informed practice will not apply to prosecutors, although in terms of Section 49, the Lord Advocate must make available to the public a statement setting out any training on trauma-informed practice in sexual offence cases which prosecutors will be required to complete to conduct proceedings in the Sexual Offences Court.

We consider it is important for there to be greater clarity on what any training- whether for the defence or the Crown- would entail, and in particular whether it will be entirely evidence-based; whether there will be a transparent process whereby providers are identified and selected; and who will be expected to bear the cost.

We also have the following further comments to make on Part 5 of the bill.

Section 39 (6) allows Scottish Ministers to amend by regulations both the definition of sexual offence at Section 39(5) and the list of sexual offences at Schedule 3. We believe that such power should not be by regulation but only by amendment to the bill in terms of primary legislation. As the definition of sexual offence and the list of offences are serious for both the accused and the complainer, any change here should require parliamentary scrutiny. Section 39 (6) should therefore be removed from the bill.

Section 40(3) (a) - details on the form of training for the office of Judge of the Sexual Offences Court are required. It is unclear as to whether this training will be in the same or similar required in respect of rights of audience training required for solicitors at Section 47 and advocates at Section 48.

Section 43 deals with the President of the Sexual Offences Court's responsibility for efficient disposal of business and Section 44 deals with the sittings of the Sexual Offences Court. In terms of ensuring efficient disposal of business, the President of the Sexual Offences Court must have regard to the desirability of doing so in a way that accords with trauma-informed practice in terms of Section 43(4). In terms of Section 44(2), sittings of the Sexual Offences Court may be held at any place in Scotland. It is

apparent that conducting proceedings in a court as near as possible to the complainer's residence will help reduce potential trauma and conversely expecting the complainer and other witnesses to travel far to attend court would increase the likelihood for trauma. We welcome some clarity as to how these provisions will operate in practice.

Section 44(4) obliges the President of the Sexual Offences Court to consult with the Lord Justice General, if the President of the Sexual Offences Court is not the Lord Justice General and the Lord Advocate before making an order under Section 43(3) prescribing the number of sittings of the Sexual Offences Court that are to be held at each place they are to be held and the days and times at which sittings are to be held. We suggest that the Sheriffs Principal should also be consulted on the basis that the court will have national jurisdiction.

Section 45 deals with the transfer of cases on cause shown to the Sexual Offences Court from either the Sheriff Court on indictment or the High Court. This may be done by the "relevant court", that is the court from which the transfer is sought on application either by the prosecutor or jointly by the prosecutor and the accused. Although the accused or the accused who is not party to the application has the right to make either written or oral applications about the application, we believe that the accused should have a sole right to apply for a transfer, even if the prosecutor does not wish to apply.

We take the same view in respect of Section 46 which deals with the transfer of cases from the Sexual Offences Court to either the High Court or the sheriff court with jurisdiction to hear the case as specified in the application.

Section 52 allows the Sottish Courts and Tribunals Service to appoint persons to be the Clerk of the Sexual Offences Court in terms of Section 50 and Deputy Clerks of the Sexual Offences Court in terms of Section 51 only if they have completed an approved course of training on trauma-informed practice in sexual offences cases. The training course is one approved of by the Lord Justice General for the purpose of appointment to the office of Clerk or Deputy Clerk. Given the national jurisdiction of the court, it is assumed that local clerks will be clerking in their own court and consideration will have to be given to the cost of training clerks in rural courts where the Sexual Offences Court may infrequently sit.

Section 55 (2) allows for Scottish Ministers by regulation to make further provision for the procedure which applies to proceedings in the Sexual Offences Court having firstly consulted with the Lord Justice General in terms of Section 55(3). We believe that such procedural changes, if required, should be enacted by primary legislation and subject to the necessary scrutiny this will bring.

Section 56 prohibits the personal conduct of the defence in the Sexual Offences Court. In this regard, the Court must appoint a solicitor to conduct the accused's case the Court has ascertained that the accused does not have a solicitor to conduct his case and does not intend to engage a solicitor to do so. We note the requirements at Section 32 referred to above where there now must be a Register of solicitors established by Scottish Ministers and whether it is intended the Sexual Offences Court must appoint a solicitor who is on the Register. Also, on the basis that the Sexual Offences Court will sit in rural sheriff courts, we highlight the potential difficulty in

obtaining court appointed representation.

Section 58 provides for ground rules hearings in respect of vulnerable witnesses giving evidence at or for the purposes of any hearing during proceedings in the Sexual Offences Court. In our response to the consultation in respect of Grounds rules hearings, we considered Grounds rules hearings to be, in theory, useful although question their practical use on the basis that practitioners may have agreed a set of questions to put to the witness in cross examination, but if the witness does not answer in the manner expected or fails to understand the question, then matters can become derailed. Often, practitioners have to ask the same question in several different ways before the witness can understand its meaning. We note that obtaining evidence requires a degree of latitude and therefore suggest that, at Ground rules hearings, it may be more appropriate to ring fence that nature of the questioning such as questions can be permitted around the specifics of what happened in a particular location or questions relating to the examination of reasonable belief as opposed to agreeing specific questions. This should ensure that practitioners remain focused on the line of questioning and don't stray into other areas.

It is important to note that not all vulnerabilities are obvious. A trauma-informed approach requires vulnerabilities to be identified and, so far as possible, addressed. There may be funding implications, such as where some form of expert input is required.

Section 62 provides for the Sexual Offences Court to impose on a person that it convicts of an offence any sentence which the High Court would be entitled to impose. The practical effect of this Section would increase sentences in respect of cases that would otherwise have been indicted in the sheriff court, and to extend the sentencing power of a sheriff who is sitting as a Judge of the Sexual Offences Court. We are concerned that sheriffs are to be given this increased power in sentencing without ever having to apply to become a judge by making application to the Judicial Appointments Board for Scotland.

**7. What are your views on the proposals in Part 6 of the Bill relating to the anonymity of victims?**

Section 63 inserts Chapter 2B into the Criminal Justice (Scotland) Act 2016 providing an offence (subject to a defence set out at Section 106F) to publish information relating to a person if that information is likely to lead to the identification of the person as being the victim of an offence listed at Section 106C (5)

At consultation stage, we agreed that complainers of sexual offences should have an automatic right to anonymity. We note that the list of offences at Section 106C (5) is extensive, includes an offence to which section 288C of the Criminal Procedure (Scotland) Act 1995 applies, that is sexual offences where the accused is prohibited from personally conducting his own defence, and is subject to modification by Scottish Ministers at Section 106C (5). We suggested at consultation stage that sexual offences at Section 288C of the 1995 Act, Section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 and offences under the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 be included and are pleased to note that these offences are included at Section 106C (5)

Our only substantial comment is that we suggested at consultation stage that anonymity should continue in perpetuity, rather than end at death, if the principle behind anonymity is to preserve the complainer's dignity. While we note that Section 106C (3) (b) stops the restriction on the complainer's death, we believe that, should another person wish to name a complainer of a sexual offence after the complainer's death, then application could be made to the court outlining the justification for setting aside the right to perpetual anonymity and seeking the court's approval to do so.

**8. What are your views on the proposals in Part 6 of the Bill relating to the right to independent legal representation for complainers?**

Section 64 amends Section 275 of the 1995 Act by making available Independent Legal Representation (ILR) for complainers in relation to Section 275 applications. Section 274 of the 1995 Act restricts the admission of certain evidence relating to sexual offences. Section 275 provides exceptions to the restrictions under Section 274 of the 1995 Act.

This was another recommendation in Lady Dorrian's review:

'Independent legal representation (ILR) should be made available to complainers, with appropriate public funding, in connection with section 275 applications and any appeals therefrom. Complainers should have a right to appeal the decision in terms of section 74(2A)(b) of the Criminal Procedure (Scotland) Act 1995. Representation at any review further to limit the permissible evidence under section 275(9), should be at the judge's discretion.'

At consultation stage, we agreed with this recommendation noting that there are two strands supporting the introduction of ILR for complainers in relation to Section 275 hearings:

(i) While not every Section 275 application will engage a complainer's Article 8 right to respect for private life under the European Convention on Human Rights, most applications will do so. We consider it reasonable to amend criminal procedure in this relatively minor way to ensure all those participating have their rights protected.

(ii) The potential introduction of the complainer's sexual history and character evidence cause a considerable degree of distress. The introduction of ILR in Section 275 applications could help to ensure that complainers are independently and accurately informed of their rights under sections 274 and 275.

The ability of those representing an accused person to test the evidence against them in a manner which is both robust and appropriate is a crucial aspect of the right to a fair trial. The availability of independent legal representation to complainers may provide an additional measure of reassurance to complainers that their questioning in court, particularly under cross-examination, has been appropriate.

We would welcome further clarification as to how the right for independent legal representation will operate in practice. Is it intended that representation will be

provided by criminal defence solicitors on a legal aid basis? Will such representation only be provided where a Section 275 application has been made in advance of the trial? We are aware of situations where the judge or sheriff may determine that Section 275 issues arise during the course of the trial- is it envisaged that independent representation will be available at every trial to accommodate this possibility? On this approach, we would have concerns regarding any extension or delays to the trial, and the impact on resources.

**9. What are your views on the proposals in Part 6 of the Bill relating to a pilot of single judge rape trials with no jury?**

Section 65 would allow Scottish Ministers, by regulations, to provide that trials on indictment for rape or attempted rape which meet specified criteria are, for a specified period, to be conducted by a court sitting without a jury.

We are firmly opposed to this measure on the basis that trial by jury for serious crimes is a cornerstone of the Scottish legal system, in common with most comparable jurisdictions and such fundamental rights should not be removed without the greatest care and caution.

In our consultation response we said:

'The right to trial by jury for serious crimes is a cornerstone of the Scottish legal system, in common with most comparable jurisdictions. Fundamental rights should not be removed without the greatest care and caution.

While Scotland does not have the right to elect trial by jury for minor crimes that exists in England, for generations there has been a right to trial by jury for serious crimes – currently anything that may, in the opinion of the Crown, justify a sentence of more than twelve months' imprisonment. That basic right is shared with most other comparable jurisdictions. Some countries are moving to reinstate the right to trial by jury.

Juries take an oath to try the accused fairly according to the evidence. For generations we have accepted that they will do so. There is no empirical evidence to suggest that anything has changed. The current concern appears to relate to an impression that conviction rates are 'too low'; but even if that were the case, it does not necessarily mean the 'fault' rests with juries.

Sexual offence cases are, by their very nature, often difficult cases to prosecute. There are often no eye-witnesses. Proving the allegation can be technically complex. Juries can be presented with competing accounts which both appear plausible. Not all allegations are true. Complainers can, on occasion, misremember events, or incorrectly identify perpetrators. The differences may be in the detail; but those differences can be hugely important.

If judges replace juries in determining guilt, they will face the same difficulties. There is no obvious reason why judges should be more prone to convict in identical circumstances.

Most comparable jurisdictions have determined, over centuries, that a jury is the best and fairest way of determining these issues. In many jurisdictions, such as England and the USA, that is regarded as constitutional. Juries guard against unfairness and oppression (see, for instance, the discussion about the justification for unanimous jury verdicts in the recent US Supreme Court decision of Ramos v. Louisiana as above referred to.

All sections of society are, at least in principle, reflected in juries: male and female, black and white, rich and poor, university educated and not, young and old, straight and gay, and so on. The justiciary in Scotland is less diverse than the wider population: in 2021, of 232 judicial office-holders, 109 were aged over 60 and 89 aged between 50 and 59; 68 were female (29%) and 164 male (71%)26. The diversity guaranteed by juries benefits not just the accused, but complainers too.

Juries are anonymous. Judges are not. Sentencing decisions by judges are from time to time criticised in the media. Judicial sentencing statements are designed to better inform the public and thereby improve confidence in the system. Verdicts – often after days or weeks of evidence - many not be so easily explained. Passing the responsibility from juries to judges will inevitably lead to adverse media comment in difficult cases. It creates the risk of public criticism of individual judges where they are perceived to have returned too many acquittals; or the publication of ‘league tables’; or pressure on judges to ‘improve’. It may also lead to political pressure being applied in sensitive cases.

Everyone is subject to the risk of unconscious bias. With groups, such as juries, the hope is that biases cancel each other out. With a single judge, that cannot happen. There is international evidence of the impact that unconscious bias can have, such as the research from the USA that showed harsher sentences were imposed in cities where the local sports team had just suffered a bad result. Sentencing decisions can, of course, be objectively reviewed in an appellate process; convictions – based on which evidence was accepted or rejected by the decision maker – are much more difficult to review.

The independence of our judicial system is a critical element of the rule of law. The proposed change would put that at great risk.

We note that the arguments for single judge trials include:

Juror understanding - It is often argued that jurors may not understand complex legal issues. We accept this is sometimes true and further note that this is a double edged sword that can also be to the detriment of an accused person. However, juries as an entity usually have 15 individuals who collectively can apply reason and logic in the assessment of evidence. This collective approach to determination outweighs any perceived benefit to be achieved by replacing them with a single judge who understands the law determine the facts of a case. We submit that in areas where jury understanding is a concern, perhaps further work can be undertaken to ensure that jury directions are given in a manner that is understandable.

Belief in rape myths – We submit that this issue is about education rather than reform

of the criminal justice system. If it is correct that the belief in such myths is informing jury verdicts then we propose that a proportionate response to this issue is to educate the public about the existence of such myths and why they should be disbelieved. For example, where the issue of delayed reporting or lack of physical resistance is raised in Scottish proceedings it is already incumbent upon the presiding Judge to inform the jury about these issues and why the delay or absence may not indicate falsehood on the part of the complainer. We note that the consultation makes reference to the 2020 review "What do we know about rape myths and juror decision making?" by Fiona Leverick , which states "Before suggesting anything as drastic as removing juries from criminal trials, however, it is worth considering whether the answer might lie in addressing problematic attitudes via juror education, such as trial Judge direction or expert evidence. The studies reported here give some limited cause for optimism in this respect, with evidence that juror education can have an impact. It is clearly not as simplistic, however, as simply telling jurors that they are wrong and expecting them automatically to change their views. Some views may be more difficult to shift than others and consideration also needs to be given to the timing of any intervention and to its content.

But this, it is argued here, is the way forward before more radical measures are considered, alongside well-founded research that can rigorously assess the effectiveness of such interventions.

Anecdotal accounts by senior Judges – Whilst we acknowledge the views expressed by senior Judges, we consider that proposing such a fundamental alteration to the Scottish criminal trial process should not be based upon such views. We disagree with the conclusion that any perceived disparity between the Judge's view and the jury's verdict is indicative of a failure by a jury to objectively assess the evidence. The function of a jury is to collectively determine which facts they are satisfied are proven and those which are not. We would caution that any perceived failure to accept evidence that a Judge alone would have accepted does not equate to the jury having failed in its task. We submit that without further evidence of this view, it is simply indicative of a difference of opinion. We are of the view that any proposal that "Judges know best" and that therefore this is a valid reason to remove jury trials in sexual offence cases is flawed. It could also be argued that this in itself is a reason to retain juries. Finally, this is an element of jury trials that will at times benefit an accused to the detriment of a complainer but the opposite will also occur.

Reason for verdicts – We note that the consultation documentation proposes that in judge only trials a reason for verdict could be issued. We see no reason why the same requirement could not be made of a jury. We are of the view that this proposal could assist the jury in its deliberations. We submit that this could be to set out a document which could be tailored to each case (not a pro forma) which when answered would lead the juries to a conclusion.

Reduction of disruption for jurors – We agree that it is of course correct that jurors should not be inconvenienced if they are not cited to attend court to act as jurors. We are of the view that this argument is outweighed by the benefits of diversity, civil engagement and the stronger legitimacy of a majority verdict.

The proposal for a single judge pilot was first recommended as Recommendation 5 in

Lady Dorrian's Review Report as referred to above.

'Recommendation 5:……. this is an issue on which the Review Group was strongly divided. Accordingly, the wording of the recommendation reflects that division. Consideration should be given to developing a time-limited pilot of single judge rape trials to ascertain their effectiveness and how they are perceived by complainers, accused and lawyers, and to enable the issues to be assessed in a practical rather than a theoretical way. How such a pilot would be implemented, the cases and circumstances to which it would apply to and such other important matters should form part of that further consideration'

Following on from this recommendation, a Lady Dorrian Review Governance Group reported on the Consideration of Single Judge Rape Trials on 12 December 2022 [https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2022/12/lady-dorrian-review-governance-group-consideration-time-limited-pilot-single-judge-rape-trials-working-group-report/documents/lady-dorrian-review-governance-group-consideration-time-limited-pilot-single-judge-rape-trials-working-group-report-november/lady-dorrian-review-governance-group-consideration-time-limited-pilot-single-judge-rape-trials-working-group-report-november/govscot%3Adocument/lady-dorrian-review-governance-group-consideration-time-limited-pilot-single-judge-rape-trials-working-group-report-november.pdf]. Its recommendations at Part 6 of the report were:

· Changes to existing rules and processes for rape cases should be kept to a minimum.

· There should be a clear set of objectives against which the pilot should be evaluated, recognising that these may need to change as proposals for the pilot develop.

· The pilot should incorporate all cases of rape and attempted rape, whether that is rape under common law or under section 1 or section 18 of the Sexual Offences Scotland Act 2009, indicted on or after the commencement date of the pilot, in which there is a single complainer and the charge of rape or attempted rape is the only or principal charge on the indictment, (allowing for minor or evidential charges or dockets to also appear in addition to the principal charge). The pilot will not include indictments which also include charges of murder or attempted murder.

· The pilot should take place in the High Court.

· All procedural steps, questions and applications for determination shall proceed as normal, and within the timeframes currently prescribed by legislation and law.

· Parties should be given the opportunity to request at the Preliminary Hearing that a case should be excluded from the pilot although grounds for exclusion from the pilot should be specifically limited to whether or not the case meets the specified criteria.

· The trial should commence on the assigned diet with the leading of evidence. Any reference in any enactment or other rule of law to commencement of the trial or the swearing in of the jury shall mean this.

· The Court should possess all the powers, authorities and jurisdiction which it would have had if it had been sitting with a jury, including the power to determine any question and to make any finding which would otherwise be required to be determined or made by a jury. References in any enactment or other rule of law to a jury or the verdict or finding of a jury will require to be construed accordingly.

· Once the judge has arrived at their verdict, the Court shall reconvene to allow the judge to provide their verdict in open court in line with established practice.

· The trial court shall either pass sentence on the day, or as more commonly occurs, the court may continue the cause for sentence in open court to an assigned date to allow the collation of reports.

· The judge shall publish written reasons for their verdict in accordance with specific guidance within a designated period, the majority of the group support it being two weeks of the verdict being delivered.

· The procedural requirements for appeals from the decision of a jury trial shall remain and apply as they do currently.

· Should specific requirements be introduced placing a requirement on judges to return written reasons for verdicts within a specific timeframe, the timescale for appeals may need to be updated to reflect this.

It is noted, however, that section 65 leaves the detail of the single judge pilot to be dealt with by regulation following consultation with justice agencies including the Society and the Faculty of Advocates, detailing the scope and duration of this pilot, to be followed by an evaluation. Although the judge in the pilot must give written reasons for the verdict as outlined at section 65(5) and Section 62(2) provides that regulations must include provision for the making of representations by an accused to the court as to whether the specified criteria are met in relation to the accused's trial, there is no scope in the bill for, among other recommendations, request to be excluded from the pilot, or indeed whether the accused's consent should be required.

In particular, the Review Governance Group recommended that the pilot take place in the High Court, but Section 65(8) provides for the pilot taking place in either or both the High Court and the Sexual Offences Court. We have outlined our concerns regarding the creation of the setting up of the Sexual Offences Court earlier in this paper and consider the pilot being trialled in this court to be inappropriate.

In relation to Section 65 (5), we welcome the judge being required to provide written reasons, but question whether this will increase the likelihood of more appeals. A further question arises as to whether, in single judge trials, proceedings could be recorded and subsequent appeals could be based on both matters of fact and law.

Section 66 provides for a report on the section 65 pilot. We welcome detail on how long the pilot is intended to operate.

A briefing commissioned by the Time-Limited Pilot of Single Judge Rape Trials Working Group referred to above was produced by Scottish Government Crime and

Justice Social Research entitled Alternatives to Jury Trials [https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2023/01/alternatives-jury-trials-evidence-briefing-consideration-time-limited-pilot-single-judge-rape-trials-working-group/documents/alternatives-jury-trials-evidence-briefing-consideration-time-limited-pilot-single-judge-rape-trials-working-group/alternatives-jury-trials-evidence-briefing-consideration-time-limited-pilot-single-judge-rape-trials-working-group/govscot%3Adocument/alternatives-jury-trials-evidence-briefing-consideration-time-limited-pilot-single-judge-rape-trials-working-group.pdf] was published in January 2023. The Summary is reproduced:

• Research shows further evidence on the negative impact of rape myths and misconceptions on the complainer, but also raises concerns about perceived fairness by legal professionals when using single judge trials.

• Overall, there is a lack of empirical research comparing modes of trial for rape cases, which makes it difficult to draw any robust conclusions in relation to their impact on the complainer, rights of the accused, public confidence in the justice system and conviction rates.

• That said, there are some tentative indications that the complainer experience may be improved by a single judge trial model, but it might be more dependent on wider court procedures and approaches to (cross) examination than the mode of trial itself.

• Providing a written reason of verdict is seen as a clear advantage of single judge trials, both for the complainer and accused.

• Studies suggest that considering the rights of the accused should include agreeing on the justifications/criteria for single judge trials, establishing clear procedures to ensure consistency and transparency and addressing (implicit) bias and diversity in the judiciary.

• Significantly, where single judge trials for serious offences have been adopted, e.g. in countries such as New Zealand, Australia, Canada and the United States, it is by choice of the accused. There were no instances found of jurisdictions introducing alternatives to jury trials specifically for rape cases.

• There is no clear data on the effect of changing mode of trial on public confidence in justice system, although studies have shown a clear support of the public for the jury system. These studies however, did not ask directly about changing mode of trial in specific cases, such as for rape offences.

• The evidence is mixed on conviction rates, from lower, to no difference, to higher rates of conviction for cases tried by single judge, although, again, the evidence is limited and not specific to rape cases.

• Literature discussing mixed panels of professional and lay judges point to the possibility to mitigate concerns about the lack of community engagement and potential bias with one decision-maker, while preserving some of the advantages of a single judge trial such as clearer judicial direction and a reasoned written verdict.

• Overall, the literature suggests that to understand the impact of a change in mode of trial, it is important to take into account how a new mode of trial interacts with already established procedures in the criminal justice system. To improve the complainer experience additional reflection would be required on pre-trial and cross-examination procedures and training given to legal professionals.

• Taking into account that the evidence presented is limited and not always specific to sexual offences, it is difficult to make a clear translation to the context of a Scottish pilot for rape offences. A pilot can offer valuable and much needed empirical data and insight on the effects of a change in mode of trial.

While the paper highlighted that a single judge pilot may be worth embarking upon, specific reference is made here to the limited data in relation to rape trials. More significantly, while a number of jurisdictions had introduced single judge trials as an option for the accused, other jurisdictions had increased citizen participation in their justice systems. Also, there were no examples identified in other jurisdictions introducing single judge trials specifically for rape trials.

# Additional submission from Tony Lenehan KC, President of the Faculty of Advocates Criminal Bar Association on Parts 5 (sexual offences court) and 6 (anonymity, ILR and juryless trials) – 11 January 2024

1. The Faculty of Advocates Criminal Bar Association (hereinafter referred to as 'FACBA') is comprised of all advocates in regular criminal law practice in the High Court, along with some advocates who are currently prosecutors in the High Court, and some sheriffs who were criminal specialists before becoming sheriffs.

2. The Society of Solicitor Advocates (hereinafter 'SSA') includes in its membership solicitor advocates who are regular criminal law practitioners in the High Court.

3. FACBA members and the active criminal law SSA members between them comprise the **ENTIRETY** of criminal lawyers currently accepting defence work in the High Court.

4. The following submissions are therefore agreed and advanced on behalf of both FACBA and the active criminal law members of the SSA.

5. **Outline**

    a. **Part 5 -Specialist sexual offences court**

        i. Were the specialist sexual offences court to be created within the High Court, such that the crime of rape retained the elevated importance it currently shares with murder, then we would **support** this proposal.

        ii. What is currently proposed effectively relegates rape trials to the sheriff court. That is a backwards step which clashes with modern society's appreciation of the life changing gravity of rape and serious sexual offending. In the result **we cannot support** this proposal.

    b. **Part 6**

        i. **Anonymity**

            1. We have no strong views for or against this proposal.

        ii. **Independent legal representation**

            1. We are **cautiously positive** about this proposal. There are some questions of practicability which will need thought through but as a generality, increasing complainers' understanding of, and engagement in the legal process through access to expert legal advice and representation is

to be welcomed. This is highly likely to improve their experience of the criminal justice system.

### iii. Juryless trials

1. We strongly **oppose** juryless trials, whether in pilot form or beyond. We view removing juries from High Court trials as an unjustified and retrograde change to our system of criminal justice.

2. It is opposed by the combined membership of FACBA and SSA.

3. The asserted justification does not reflect the experienced reality of the thousands of rape trials conducted by our combined memberships. The **Scottish Mock Jury Project** has little genuine evidential weight, being reliant upon people pretending to be jurors sitting in a case they know is fake.

4. The research done by **Professor Cheryl Thomas KC** with many hundreds if not thousands of **real jurors** does not support the Scottish Mock Jury Project's findings, and weighs strongly in favour of retaining citizen juries.

5. Since the drafting of the Bill, the landscape of rape trials has changed significantly with **the incorporation of mandatory directions on both rape myths and other potential misconceptions.** These are more clearly set out later in this document.

6. Both the Scottish Mock Jury project and Lady Dorrian's report were prepared **BEFORE** the introduction of these changes, and thus take no account of them. Where we have long trusted juries to follow directions from judges, the incorporation of these directions cures the ills of the sort the Bill contemplates.

7. Removing citizen jurors from all rape and sexual offence trials is **anti-democratic**. It abandons the combined wisdom of life experience of fifteen independent citizens, with their varied lived experiences, ages, ethnicities and genders. However intelligent the professional judges replacing the fifteen, they will not be able to provide gender, ethnicity and age balance. They will all share similar socio-economics, likely far removed from the witnesses whose evidence is to be assessed.

8. The verdicts of independent citizen juries **are immune from allegations of partiality**.

**9.** The reduction in conviction rates in single incident rape and sexual crime allegations is experienced by our lawyers as a **consequence of the evidential problems usually existing in those cases**, rather than any defect in the jury process.

**6. <u>Evidence base</u>**

**a.** All or nearly all rape trials in recent years will have involved representation by either FACBA lawyers or SSA lawyers. This amounts to thousands of trials, within which there will have been many thousand if not tens of thousands of individual events charged as rape or serious sexual assault.

**b.** The entire FACBA membership and the active criminal lawyers within the SSA have been canvassed for their views in advance of these submissions being provided to the Justice Committee.

**c.** Our shared experience is that juries routinely display intelligence and insightful discrimination in their verdicts. It is NOT our experience that the picture presented by the Scottish mock jury research is representative of the reality of these trials.

**d.** Our shared experience is that where the evidence suggests a conviction, juries ordinarily convict. Where it doesn't, they don't. If the mock jury research represented reality then we would have observed anomalous verdicts as a matter of routine. We have not.

**e.** While we are familiar with Professor Thomas KC's research with real jurors, we understand that she is to give evidence in person to the Committee and it is better that we do not attempt to speak for her.

**7. Autumn 2023 mandatory rape myth directions etc-**

**a.** The Judicial Institute for Scotland provides education for Scottish Judges, and is responsible for the Jury Manual, issued to all sheriffs and judges and available online.

**b.** In explanation of what is said at subparagraph 5(b)(iii)(5) above about the changed legal landscape, from the Autumn of 2023 onwards specific directions were added by the Judicial Institute for Scotland to the core instructions given to each and every juror to counter the risk of 'rape myths' and these are printed in the Jury Manual for every sheriff and judge.

i. These additional directions were not incorporated into the Scottish mock jury project, and they were not in place at the time of Lady Dorrian's report. They were not in place at the time this Bill was drafted.

ii. In particular, jurors in rape and serious sexual assault trials are told by a High Court judge both in writing and orally at the end of the evidence, before they begin their deliberations, the following:

1. *That delay in making a report of rape or sexual assault by itself can matter little or not at all when deciding if it is true. It is very common for a person who has been sexually assaulted or abused not to tell anyone about it for a long time and some sexual crimes are never reported. There can be good reasons for delay.*

2. *Different people react in different ways. There is no standard way in which people should react. Some may tell someone straight away but others do not feel able to do so. This can be out of shame, shock, confusion or fear of getting into trouble, not being believed, or causing problems for other people.*

3. *When children are abused they are often confused by what is happening and why. If it is a family member who is abusing them, to whom can they complain?*

4. *Child sexual abuse will usually occur in secret. A child may have some idea that what is happening is wrong but very often children feel that they are to blame in some way, even though they are not.*

5. *A child may find it very difficult to speak out. They may fear disbelief, when their word is compared to an adult's. They may be scared of the consequences, or fearful of the effect upon relationships.*

6. *There is* ***no need for an accused to have used violence or force*** *in committing rape/ sexual assault. The jury must bear in mind that there can be good reasons why unwanted sexual activity can take place without someone using physical force to overcome the will of the complainer or without physical resistance from the complainer. The absence of violence or force, or the absence of physical resistance does not necessarily mean that the allegation is false.*

7. *Experience has shown that different people respond to unwanted sexual activity in different ways. Some may protest and resist. Others may not. This may be out of fear, or because they are not a very forceful person, or for other reasons*.

8. *(**specifically addressing rape myths)***

9. *What the courts have learned through experience about rape and sexual offences generally is that:*

a. ***there is no typical crime of rape*** *(or sexual offences)*

b. ***there is no typical rapist*** *(or sexual offender)*

c. ***there is no typical complainer*** *(who is raped or abused).*

d. *Rape (or sexual crime) can take place in almost any circumstance, and between all different kinds of people, quite often when the people are known to each other or related.*

e. *There is* ***no typical response*** *to rape (or sexual crime). People react in different ways and may do so in a way which you might not expect or as you think you would do. They may tell someone straight away or may not feel able to do so, whether out of shame or fear or other reason.*

f. *There is no typical response from a complainer who is asked about rape (or sexual crime). People who have been raped may present in many different ways when they are asked about it. They may be visibly emotional or show no obvious emotion.*

g. *Each juror is to be told that they must make* ***sure that they do not let any false assumptions or stereotypes about rape and sexual offending affect their verdict****.*

10. We are aware of no assessment yet of the effect of these changes on jury conviction rates. It is likely too early to do so.

11. It seems absurd that this bold new system of jury instructions is to be abandoned without assessment of its efficacy.

8. **Suggestions for increasing the number of cases resolved by pleas of guilty**

i. The resolution of criminal trials by guilty pleas has a large number of benefits:

1. Trial court time and resources are saved.

2. Witnesses are spared giving evidence.

3. Appeals against conviction do not arise.

4. Honest recognition of wrongdoing by an accused is an important starting point for rehabilitation.

ii. Markedly fewer accused people plead guilty to rape and serious sexual offending.

iii. It is accepted that not all categories of offending enjoy equal rates of agreed pleas of guilty. Murder, for example, is experienced as having lower rates of pleas of guilty, versus higher rates in non-lethal violence, assault and robbery and drugs offences. But rape and serious sexual offences must have the lowest guilty plea rate of all offence types.

iv. Where rape and other serious sexual offences now represent the majority of High Court criminal trials, and guilty pleas therein are rare, a process could be initiated whereby the barrier to guilty plea based resolution in such cases is examined and new ways found to deliver resolution without the need for trial. This would maximise the benefits identified above and could be of great importance when looking at the resources required for criminal justice more generally.

v. Other jurisdictions have processes which seem to increase the rate of plea resolution, but there remain arguments **against** some options like “pleading no contest” or agreeing sentences in advance (plea bargaining) which will require examination.

9. **Revised timescale for return to pre-covid situation.**

a. If we interpret the most recent information from SCTS (November 2023) is that by March 2024 the High Court will be back to, and even improve upon pre- COVID levels of trial delay. In particular, if the current 22 trial court resourcing continues, by March 2024 the projected period between pleading diet and trial of 44 weeks (had COVID not happened) will have fallen to 42 weeks- an IMPROVEMENT on that 44 week projection.

b. The suggested justification for juryless trials based on backlog is without real substance against those figures.

10. **General concluding comments**

a. The removal of juries from rape and serious sexual offence trials is the proposal to which our objection is strongest.

b. To give it a practical context, the proposal to strip the democracy out of these criminal trials by removing citizen jurors would be akin to Westminster abolishing the Commons and trusting all to individual members of the House of Lords.

c. Or it would equate to the complete removal of the Justice Committee, and the balance that members from different sides of Parliament, different genders, different specialities and experiences bring to the refinement of bold ideas into decisions- and instead leaving it all to one unelected person, probably male, definitely university educated, middle class and aged over fifty, living in the Central Belt.

d. The public would have little or no faith in either development, regardless of the honesty and intelligence of those individual decision makers.

e. Where our rape trials have moved forwards to give every affected jury direct and clear instructions about rape myths, preconceptions and misconceptions, and where soon the courts will have fought back not only to clear the COVID backlog but overtake where we were in 2019, no convincing justification exists for juryless trials.

f. Forcing such an unwelcome change through will serve only to accelerate the existing outflux of defence lawyers from that branch of the profession. It is those defence lawyers who are relied upon to populate the ranks of High Court prosecutors, and provide seasoned sheriffs and judges in criminal trial courts. The High Court's hard won recovery from COVID-19 delays will have been for naught.

## Extract from submission from Faculty of Advocates

**Question 6 – What are your views on Part 5 of the Bill which establishes a Sexual Offences Court?**

Faculty is strongly of the view that solemn cases should be tried in solemn courts. Serious sexual offences should continue to be prosecuted as solemn cases. Serious sexual cases should not be prosecuted before a judge sitting alone.

Modern solemn criminal practice and procedure recognises the needs of vulnerable witnesses. This is reflected in the modern approach to the early capture of evidence and special measures to support vulnerable witnesses.

Modern solemn procedure recognises and reflects modern informed understanding of the impact which serious sexual offences may have. By way of illustration, jury directions now better inform the jury's understanding of a failure to disclose, a delay in disclosure, partial disclosure, apparently counter-intuitive conduct by a victim (e.g. continuing to live with an abuser). Jury directions are constantly updated.

Faculty considers that the public understand and appreciate that the most serious crimes in Scotland are prosecuted in the High Court of Justiciary. Faculty has concerns about the proposals to remove such cases from the High Court of Justiciary. The first of these concerns is practical. Given the current difficulties in the criminal justice system in relation to backlogs, funding, and the number of practitioners available to

conduct trials, it is not clear to Faculty how establishing a new court, which will presumably require to be staffed and resourced, with suitable accommodation, can be achieved. Further, it is the experience of Faculty that serious sexual offences trials are the most gruelling for judges, practitioners, and court staff alike. Creating a court in which the caseload is entirely composed of such cases may have adverse consequences in attracting staffing.

Faculty notes that the High Court of Justiciary has the capability to deal with cases alleging the most serious sexual offending. Faculty considers that the public understand that the most serious matters are dealt with in the High Court. It may be that removing the most serious allegations of sexual offending such as rape from the High Court and placing them in a new court along with matters which may otherwise have been dealt with on summary complaint risks portraying the justice system as cheapening the allegation of rape and undervaluing the importance of this most terrible crime to those who have experienced it. Faculty considers that there is no single feature of the proposed court which could not be delivered rapidly by introducing specialism to the existing High Court and Sheriff Court structures, without forcing a devaluation of their experiences and expectations onto rape victims and complainers.

Faculty has concerns about the reach of section 39. Subsection 39(2) allows a judge in the Sexual Offences Court to try an indictment containing very serious non-sexual charges (e.g. charges of terrorism, multiple charges of murder) provided the indictment contains one sexual offence charge, even if that charge is then withdrawn after the start of the trial. Section *39* would allow a sheriff rather than a judge to preside over murder trials. It provides a mechanism for removing very serious non-sexual charges from the High Court of Justiciary.

Faculty notes the terms of section 40(7) of the Bill, which provides that the Lord Justice General may remove a Judge of the Sexual Offences Court from office. The Lord Justice General does not appear to require a reason to remove a judge from the court. Faculty is aware of the concerns raised by those such as Lord Hope of Craighead and Lord Uist in relation to the threat these provisions pose to judicial independence. Faculty echoes these concerns.

**Question 7 – What are your views on the proposals in Part 6 of the Bill relating to the anonymity of victims?**

Faculty has no difficulty in principle with the proposed provisions under section *63* of the Bill**,** though clearly the introduction of an automatic right to anonymity for complainers in sexual offence cases, and how such anonymity should operate, are policy matters which are properly for the legislature to decide.

There is, however, one observation that Faculty wishes to make. It is noted that the prohibition of the publication of information likely to lead to the identification of a person who is 'the victim of certain sexual and related offences' applies to 'a person against or in respect of whom an offence has been, or is suspected to have been, committed'. Faculty has some concern that this definition lacks clarity over precisely to whom, and when, the prohibition applies.

At what stage is an offence 'suspected to have been committed'? For instance, does the legislation envisage that the prohibition will become applicable when suspicion crystallises against an accused person during police investigation, in the same respect as an accused person's right against self-incrimination in terms of *Chalmers v HM Advocate* 1954 JC 66? If so, how are the public to be aware of the point at which suspicion has crystallised? It is recommended that the point at which the prohibition applies should be clarified either in the body of the legislation or the explanatory notes.

It is also not clear from the current framing of the provisions whether there is a prohibition on the publication of information about a complainer at a point after an accused person has been found 'not guilty' at trial. This is because of the proposed definition of 'victim of an offence' as being, 'a person against or in respect of whom an offence **has been,** or is suspected **to have been,** committed' (emphasis added). This suggests that suspicion must be present at the time of the publication for the prohibition to apply, which seems to contradict the legislature's apparent intention for anonymity to apply during the lifetime of the person to whom the information relates, until death.

If the intention of the legislature is to afford anonymity to those complainers of a relevant offence which has at some point been suspected to have been committed, even if that suspicion no longer applies by the time of publication, then Faculty recommends an alternative definition of 'victim of an offence' as being, 'a person against or in respect of whom an offence has been, or at any point in time is suspected to have been, committed'. As suggested above, the meaning of 'suspected to have been committed' ought to be clarified.

**Question 8 - What are your views on the proposals in Part 6 of the Bill relating to the right to independent legal representation for complainers?**

Faculty supports the right of independent legal representation for complainers in relation to Section 275 applications. Faculty considers that independent legal representation is likely to improve a complainer’s understanding of how things are done and why. Improving that understanding is likely to lead to a realistic and informed appreciation of the probable outcome, and should facilitate greater levels of satisfaction and confidence in the court process.

Faculty does, however, have some observations in relation to the practical aspects of the Bill as currently drafted. Firstly, Faculty notes that Section 64(4) of the Bill seeks to amend Section 275B of the Criminal Procedure (Scotland) Act 1995 which sets out the time limits for the lodging of an application under Section 275 of that Act. At present, an application under Section 275 shall not, unless on special cause shown, be considered by the court unless made, in the case of proceedings in the High Court, not less than 7 clear days before the preliminary hearing.

Faculty can understand the logic of extending the time limits: a complainer is unlikely to have legal representation. After having received an application under Section 275, he or she will likely have to instruct a solicitor and, most likely counsel. Those representatives will require to consider the terms of the application and any supporting evidence . They will require to provide advice to the complainer. They will require to take the complainer’s instructions. These matters are time consuming.

Faculty has concerns, however, that the adjusted time limits take no account of the stresses on the reduced defence Bar, both in the Sheriff and High Courts, and the difficulties experienced in complying with the existing time limits. In recent years there has been increased recruitment by the Crown for Procurator Fiscal and Advocates Depute, alongside an increase in the number of cases calling before the courts as attempts are made to clear the backlog caused by the pandemic. Put short, on the defence side of the bar there are fewer people trying to do more work. That in itself places pressure on practitioners in complying with the strict time limits in relation to Section 275 applications.

Extending the time limit for the lodging of a Section 275 application does not appear to take into account the reasons for the existing difficulties in complying with the statutory time limits: disclosure by the Crown may only be made in the weeks before the Preliminary Hearing; the need to consult with the accused and the difficulties experienced by counsel and agents in visiting accused people in custody, where often the only available times to consult are during the court day; and the pressure of business mentioned above. Faculty has concerns in relation to the well-being of its members should they be obliged to comply with ever more stringent time limits.

Faculty suggests that Parliament may wish to consider, if it wishes to amend Section 275B of the 1995 Act, to leave the time limits in place but provide for an administrative adjournment of the next diet should a complainer wish to obtain independent legal representation. It is the experience of Faculty that there are occasions when an application under Section 275 of the 1995 Act requires to be made during the course of the trial diet. It is not clear to Faculty from the terms of the Bill what, if any, consideration has been given to the effect on trial diets if there requires to be a delay for a complainer to obtain independent legal representation.

**Question 9 - What are your views on the proposals in Part 6 of the Bill relating to a pilot of single judge rape trials with no jury?**

Faculty is strongly opposed to the pilot of single judge rape trials with no jury.

In March 2021, the final report from the Lord Justice Clerk's Review Group on Improving the Management of Sexual Offence Cases was published. A stated aim of the report was "To improve the experience of complainers within the Scottish Court system without compromising the rights of the accused…". It is Faculty's position that the abolition of trial by jury and any pilot scheme not involving a jury are at odds with that stated aim and would undoubtedly compromise the rights of the accused.

Faculty notes that report further states "Not surprisingly the Review Group was not able to reach a concluded view on the continued use of juries. The content of the discussions clearly suggests that there would be merit in a wider debate on this issue given its far reaching implications on the Scottish criminal justice system together with further research into jury decision-making in Scotland. However, on the assumption that juries would continue to play a critical role in these cases the review group examined these steps which might be taken to better equip jurors before their task which resulted in numerous improvements to the general functioning of the current system". It is Faculty's position that if a pilot scheme is to be introduced, it is premature

to do so without conducting further research and giving time for the recommendations for improvements to be implemented.

The report recommended that consideration should be given to the development of a pilot scheme involving single judge rape trials to ascertain their “effectiveness”. The question to be asked is, what is the purpose of such a pilot scheme and how is its effectiveness to be measured? The report sets out a series of pros and cons for the abolition of jury trials in general. The pros are said to be, amongst others, the speed at which trials will be completed, the avoidance of disruption which jury service causes, the provision of written reasons and the ability of judges to focus on the evidence and disregard collateral matters. However, these are factors which could be said to apply to any crime and not specifically sexual crimes.

Further, the report cites in potential support for the abolition of juries, a suggestion that advocacy would be briefer, more focussed, more courteous, and less confrontational than when the same evidence is led before a jury. Again, this as a factor which could be said to apply to any crime and not specifically sexual crimes. Is the complainer in a case of attempted murder any less traumatised by giving evidence in a jury trial than a complainer in a rape case? More importantly, judges routinely control the conduct of counsel should they consider that their questioning is in any way improper.

The report also cites Scottish Mock Jury Research regarding the jury’s inability to understand and to properly apply the principle of corroboration and to disregard so called rape “myths”. It is said that trial by judge alone would resolve these issues. Yet how can this be, given the apparently low conviction rates in other jurisdictions where there is no requirement for corroboration. In so far as rape “myths” are concerned, the evidence for the assumptions made in sex cases is limited at best and flawed at worst. The research in Scotland has been restricted to mock trials. These trials cannot properly replicate the length and complexity of a trial, provide full directions from a judge, and involve actors following a script. Critically, there are no consequences to the verdict. Contrast this with the research of Professor Cheryl Thomas in the jurisdiction of England and Wales, using real juries who had deliberated in real trials. Her findings suggest that rape myths were themselves “myths.”

Faculty considers that the pilot scheme will be an experiment. The only person who can be adversely affected by the experiment in the trial process is the accused. The accused in such cases is being used as a “guinea pig” where the potential consequences are grave. The scheme proceeds largely on the basis of the effect of so-called rape “myths” on jury decisions. In so doing it operates on the assumption that juries are both prejudiced and do not return verdicts in accordance with the oath taken by them and the directions given by the judge. This assumption is not made for juries in any other category of case. Juries are routinely complimented by judges as to the care and attention given to their deliberations. Objections in cases involving pre-trial publicity rarely succeed because judges time and time again state that juries will follow their directions to ignore adverse publicity and will return a verdict based on their oath and on the evidence.

Faculty considers that the irresistible conclusion is that the sole purpose of the pilot scheme must be to determine whether a single judge will increase conviction rates in sexual offences. Such a scheme whose raison d'être is to increase conviction rates is

fundamentally at odds with our system of justice. If the purpose of the scheme is other than that, applying as it does to sexual offences only, those advocating for it should specify in clear and unequivocal terms what that purpose is. In trying to promote the interests of one side (complainer) above the other (accused), it seems intended to create an imbalance, rather than balancing competing interests with the overall interests of justice.

Those working at the "coal face" at the criminal defence bar have vast experience of conducting these cases. They are, almost without exception opposed to the scheme. The most senior female member of the Scottish criminal bar, Frances McMenamin KC, has spoken publicly of her fierce opposition to the abolition of juries. She has decades of experience in conducting rape trials. She has likened the abolition of juries to the measures taken in Nazi Germany in the 1930s where juries were abolished. The criminal bar is not alone in that view. Lady Hale and Lord Hope, former President and Deputy President of the UK Supreme Court as well as many other leading lawyers have voiced their opposition to such a scheme.

Faculty considers that there is a paucity of detailed information regarding low conviction rates in rape and attempted rape cases. Although a global figure is given for conviction rates there is no breakdown of that figure. What is the data in relation to conviction rates for cases involving:

- multiple complainers
- historical allegations
- children
- single complainer

Until there is proper information about which type of case is said to have low conviction rates, how is it possible to determine what problem is sought to be rectified? How is it possible to determine whether rape "myths", if they exist, affect each category of case?

The report and the experience of High Court practitioners would suggest that the first three of these categories are unlikely to have significantly lower conviction rates than any other cases. If there is a perception that the conviction rate for single complainer cases is lower, then there are perfectly valid reasons why that should be so.

In such cases, it is often the word of the complainer against that of the accused. There are rarely eyewitnesses independent of the parties involved as sexual activity ordinarily occurs in private. These cases are therefore intrinsically difficult to prove. Unlike many other cases such as murder, assault or robbery, sexual activity is an act which can be consented to. Although corroboration of the sexual activity is required, in the vast majority of cases the accused's counsel agree that sexual intercourse has taken place. However, this cannot assist the jury in assessing the critical issue namely whether this was with or without consent.

In most cases the corroboration of whether consent was absent comes from observed distress of the complainer at some point after the alleged event. This distress can be as a consequence of an absence of consent, or may be as a result of other factors such as regret or remorse depending on the evidence in any given case. A standard direction is given to juries to that effect by the trial judge. It is the function of the jury

using their collective experience and properly directed, to assess the competing versions.

It is therefore obvious that in such cases it can be difficult for a jury to determine beyond reasonable doubt, the necessary standard required for a conviction, where the truth is likely to lie. In such cases, where it is essentially the word of one person against the other, it is hardly surprising that a jury may find it difficult to convict. How is it that a single judge would be in a better position to determine the issue of consent than fifteen members of the public from diverse backgrounds and with varied life experience?

Unlike England and Wales where a guilty verdict cannot be returned unless there are at least ten out of twelve jurors voting for that verdict, a simple majority is required for conviction in Scotland. If eight people from a jury of fifteen, that is a majority of only one, cannot return a guilty verdict then it is obvious the case has not been proved beyond reasonable doubt. In that respect the threshold for conviction in Scotland is already very low.

Having regard to the rights of the accused, as the report does, there are concerns by those practicing at the criminal bar that the “direction of travel” in relation to sexual offences is one way and that is overwhelmingly against the interests of the accused and in favour of the complainer.

The perception of members of Faculty is that the judicial interpretation of sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 and the common law in relation to relevancy of evidence, is such that the accused’s right to fair trial is being undermined. It has become almost impossible to explain to accused persons and to the lay members of the public why evidence is being excluded from a jury’s consideration.

Examples include the exclusion of evidence of consensual sexual intercourse immediately after the alleged rape has taken place when by contrast, the prosecution rely on evidence of distress during that same time period, and text messages in which the complainer has spoken in positive terms about their sexual encounters with the accused. There are so many more examples. There is a real sense that the “pendulum has swung” too far in favour of the complainer and that this approach from the judiciary is most likely to be replicated in their approach to juryless trials.

Whilst there is fundamental objection to any scheme to remove juries, if the pilot scheme is to be conducted, as previously indicated, it is our position that any such scheme is premature. Other options include:

- Further research on real juries in Scotland could be facilitated by legislation or by authority of the Lord Justice General.
- Time requires to be given to consider the effect of the new jury directions on so called rape myths.
- Data should be collected on the conviction rates in judge-only cases to determine whether there is a bias in favour of guilty verdicts.

- Data should be collected on the percentage of cases involving an examination of facts in sex cases to determine whether in these judge-only cases the facts are established.
- Data should be collected on the conviction rates of individual judges to determine whether there is significant disparity in decision-making depending on the individual judge.
- Time requires to be given to determine the effect of any legislation abolishing the not proven verdict.
- Consideration should be given to whether, vetting in jury selection might address these so-called “myths”.

As Lady Dorrian’s report states, “Jury service is an example of participatory democracy…The random nature of jury selection brings together people who, collectively, have broad experience of life across society, marginalising extreme or unrepresentative views, and ensuring diversity amongst decisionmakers”. This would be lost in any system of judge-alone trials for serious sexual offences, given, as one Review Group member put it, that judges will be “drawn exclusively from the top one percent of earners, still predominantly male, always university educated and most likely aged between fifty and seventy”.

Single complainer rape cases most frequently require an examination of the sexual lifestyles and practices of persons in their teens and twenties who have grown up in a world of easily accessible internet pornography, sex texting (sexting) sharing of still and moving intimate images, and dating websites and apps. The proposed single judge pilot will cast the decision maker into examination of lifestyles, sexual practices and attitudes which are as remote to him or her as their own lifestyles would have been to judges from the 1890s and 1900s. It is essential that a justice system remains contemporary to command true respect. That is why a jury containing as it inevitably does, a wide cross section of society is immeasurably a better decision-making body than a white, exclusively middle class, university educated person in his or her fifties, sixties or seventies. An experiment to test a lesser system of delivering justice really does require the closest examination of the true motives.

Accordingly, Faculty asks how can judge-alone trials whether in a pilot scheme or otherwise enhance the interests of justice?

# Extract from submission from Faculty of Advocates Criminal Bar Association

**Question 6 – What are your views on Part 5 of the Bill which establishes a Sexual Offences Court?**

FACBA has read and endorses the response provided by the Faculty of Advocates.* In addition, FACBA would wish to raise two matters- the justification for a sexual offences court; and the mechanism by which 'judges' are appointed and removed.

Our concern is that the proposed new court is substantially motivated by cost concerns, rather than improving the system of justice for complainers and witnesses. In essence what will be achieved is downgrading rape and serious sexual offence trials from the High Court to a sheriff and jury level, given what is proposed for the make up of the bench.

Cost arguments are plainly relevant but if we are correct in our understanding, that should be brought into the open for a full argument to take place. Downgrading rape and serious sexual offence trials from the High Court otherwise seems a wholly retrograde step, both in terms of its practical effect (removing High Court judges, by and large, and widespread removal of the use of specialist experience lawyers both prosecuting and defending) and in its negative messaging to those affected by sexual offending.

In the consultation process we suggested that the route towards a genuinely improved criminal justice process for charges of rape would be the adoption of specialism within the existing High Court framework, as already seen in Family and Commercial actions. That would ensure the highest quality of management of such trials, by High Court judges, whose existing high level of ability would be enhanced by specialised training to equip them for the dedicated role in such a specialised court.

If the lower court suggestion goes ahead, we suggest that the mechanism for appointing and removing 'judges' in that court would benefit from reconsideration. If you centralise that important power into one office holder, you run the obvious risk that the public confidence brought by (for example) the Judicial Appointments Board's independence is eroded, and the holder of the office could be perceived as populating the sexual offences court bench according to his or her personal criteria. Public confidence in the administration of justice is the engine room that powers that important system. It is administered FOR the people, and the people's confidence that it is in safe hands is what breeds respect for and confidence in outcomes. If the population of the bench spends their time worrying about immediate removal at the hands of that central office holder, the public would be forgiven for thinking that the independence of those judges is curtailed by that fear of deselection, and their decisions and actions are motivated by pleasing that office holder rather than proudly and independently adhering to their judicial oath. Among many others, Lord Hope and Lord Uist have made public their concerns about this aspect of the Bill.

Finally, there is the question of practicability. Finding lawyers to appear when required in the existing High Courts and Sheriff Courts is proving increasingly difficult. Adding a further layer of timetabling with an extra court resource will not be workable with the existing workforce. This proposal is thus not deliverable.

*[*See above for Faculty response*]

**7. What are your views on the proposals in Part 6 of the Bill relating to the anonymity of victims?**

**FACBA** has the advantage of having read the response of Faculty and would adopt it in its entirety.

[*See above for Faculty response*]

**Question 8 - What are your views on the proposals in Part 6 of the Bill relating to the right to independent legal representation for complainers?**

**FACBA** has the advantage of having read the response of Faculty and would adopt it in its entirety.

[*The FACBA submission reproduces the Faculty of Advocate's response to question 8 of the consultation– this can be found above in full but is not duplicated here for reasons of space*]

**Question 9 - What are your views on the proposals in Part 6 of the Bill relating to a pilot of single judge rape trials with no jury?**

FACBA is opposed to the pilot, and adopts the detailed response provided by Faculty on the matter. The pilot seems to offer the sole metric of conviction rate increase. For the reasoning set out below, we cannot discern the validity of such analysis, and consider it to be without forensic merit. The pilot relies on forcing citizens accused of serious crimes to take part in a life altering experiment whether they like it or not, and that brings to mind some very unhappy historical resonances. Taken along with the proposal for jury size and majority change discussed above in **question 5**, that would have Scotland ranked dead last in the world for citizen protection, allowing this pilot would signal a more general parliamentary contempt for our citizens, whether as fact finders or as accused people presumed to be innocent.

[*The FACBA submission reproduces the Faculty of Advocate's response to question 9 of the consultation– this can be found above in full but is not duplicated here for reasons of space*]