Law Society of Scotland

Scottish Parliament Criminal Justice Committee Call for Written Evidence

Victims, Witnesses, and Justice Reform (Scotland) Bill

September 2023

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Parliament call for evidence about the Victims, Witnesses, and Justice Reform (Scotland) Bill. The committee has the following comments to put forward for consideration.

General Comments

Over hundreds of years, the Scottish legal system has developed with the aim of ensuring that those who are guilty of a crime are convicted and acquitting those against whom guilt has not been established beyond reasonable doubt. For achieving this purpose, Scotland has an adversarial criminal procedure that sometimes is hostile with complainers and witnesses. The provisions of the bill look for improving the experiences of victims and witnesses within the criminal justice system, safeguarding the rights of the accused[1].

The Policy Memorandum accompanying the bill acknowledges at paragraph 4 that there are differences in the terminology used to describe those who have experienced crime, particularly sexual offences. The Policy Memorandum uses a mix of terms, with the choice influenced by the context. The bill itself uses both ‘victim’ and ‘complainer’, with ‘victim’ defined in section 23(1) for the purposes of Part 1 of the bill as a person against or in respect of whom an offence or harmful behaviour by a child has been or is suspected to have been committed or carried out.

We recognise that the term ‘victim’ is widely used and understood in ordinary language. We also recognise that the term is already in use in legislation, for example on the context of the Human Rights Act 1998 and in the Bail and Release from Custody (Scotland) Act 2023. We further recognise that the rights and experience of those who have experienced crime must be treated with respect.

The term ‘complainer’ is the language used in legal settings. This choice of terminology is intrinsically linked to the presumption of innocence, which in our view is the cornerstone of a civilised society that respects the rule of law. The principle that an accused person is presumed innocent until proven guilty must be maintained and respected. We are concerned that in a legal context and in legislation,

[1] Victims, Witnesses, and Justice Reform (Scotland) Bill policy memorandum.

categorising a complainer as a ‘victim’ prior to any conviction runs the risk of dismissing the presumption of innocence and conveys the message that an allegation equates to guilt. In our view the term ‘complainer’ is the language of the court, and must continue to be used as such.

Throughout our response, we have mirrored the language used in the bill but we reiterate the importance of correct terminology, particularly in the legal context and in legislation.

We welcome many provisions of the bill that could impact positively in the public perception of our criminal justice system and the victims and witnesses’ experiences. Overall, that is the case of the establishment of the Victims and Witnesses Commissioner for Scotland, the implementation of the principle of trauma-informed practice and special measures in civil cases, and the establishment of independent legal representation for complainers when section 275 of the Criminal Procedure (Scotland) Act 1995 operates.

However, the provisions related to the change in the number of jurors, the creation of the Sexual Offence Court, and the implementation of the single-judge pilot for rape and attempted rape cases, raised significant concerns within the profession. We identify in some of the provisions potential threats to judicial independence and the rights of the accused.

Questions

Question 1: What are your views on Part 1 which establishes a Victims and Witnesses Commissioner for Scotland?

We support the establishment of the office of Victims and Witnesses Commissioner for Scotland as outlined in Section 1 and agree with the Commissioner's general function at Section 2 to promote and support the rights and interests of victims and witnesses. We note that the proposed role has been extended from that set out in the consultation to include witnesses. In view of the broad range of activities which the Commissioner will have this role will need significant resources to be effective. The Scottish Ministers should confirm that the Commissioner will receive sufficient support to carry out the job.

In terms of Schedule 1 to the bill which makes further provision about the office, the Commissioner will be appointed by the King, following nomination by the Scottish Parliament, for a single term of up to 8 years.

The Commissioner will be independent of the Scottish Government, but accountable to the Scottish Parliament.

It is anticipated that the Commissioner's role will be extended by regulations to cover people involved in civil proceedings in terms of Section 3. This would cover a case where a person may initially be a victim in a criminal case and where a prosecution was unsuccessful, a civil action followed. On the basis that the role is extended by regulations under Section 3, we suggest that the definition of victim as set out at section 23 will require to be amended. We also suggest that before Scottish Ministers amend the Commissioner's general function by regulations to include the civil function, they should consult with persons who have knowledge and experience of civil proceedings.

In terms of Section 4 (1), the Commissioner, in exercising the general Section 2 function by engaging with victims and witnesses, may establish such groups as the Commissioner considers appropriate and must pay particular attention to groups of victims and witnesses who do not have other adequate means by which they can make their views known.

While we welcome this provision, we are unsure as to whether the focus at Section 4 (1) (b) should solely be on "adequate means". We are unclear as whether this meaning is confined to financial means or it has a wider meaning. We believe that this would be an overly cumbersome process in determining which groups the Commissioner must pay particular attention to. We suggest that regard could be given to victims of particular offences. We refer to the latest Scottish Government statistics on recorded crime in Scotland 2022 – 23. The total number of crimes recorded by the police in Scotland in 2022 – 23 was 289,352. Crimes of dishonesty was the largest group accounting for 36%, non-sexual crimes of violence accounting for 24%, crimes against society accounting for 21%, damage and reckless behaviour accounting for 15%, and sexual crimes accounting for 5%. Consideration could be given to classification of groups of victims and witnesses on this basis.

With reference to the establishment of groups at Section 4 (1) (a), we make reference to our comments

above. Factors such as the potential for duplication of effort with, for example, the Children and Young People's Commissioner Scotland (CYPCS) will have to be considered where the interests of children and young people as persons against whom offences have been committed may have been up until now separately represented.

We welcome the provision at Section 8 (1) which restricts the Commissioner in the exercise of any individual case. If the Commissioner exercised the function in that way, this could adversely affect the trial process.

We are content with Section 9 which sets out the detail for the preparation and publication of a 3-year strategic plan and the laying that plan before the Scottish Parliament.

Sections 10 to 13 of the bill deal with the Commissioner's investigatory powers.

Section 12 gives the Commissioner powers to collect evidence during an investigation. The Commissioner can require persons to give evidence or produce documents relevant to the investigation.

Section 12 restricts that power when the person would be entitled to refuse to answer or produce in proceedings in a Scottish court (subsection (3)) or where the person is a member of the Crown Office and Procurator Fiscal Service (COPFS) (subsection(4)). We question why there is no similar exemption for defence agents in relation to subsection (4).

Sections 14 and 15 deal with information gathering.

Section 14 gives the Commissioner power to require a criminal justice agency (see Section 23) to supply information to determine if the agency complies with the Victims and Witnesses (Scotland) Act 2014 (the 2014 Act) section 2 standards of service or the Victims' Code for Scotland under the 2014 Act.

Standing the exemptions to provide information at section 14(3) and (4), there is no enforcement mechanism for situations where the exemptions do not apply and the criminal justice agency refuses, or delays providing the information.

Section 15 makes it an offence for the Commissioner, the Commissioner's staff or an agent of the Commissioner to disclose information which is not authorised under section15(3). We note that these provisions appear to be in line with offences of unauthorised disclosure in respect of other regulators.

Section 21(2) obliges criminal justice agencies to comply with a request under Section 21(1) to co-operate with the Commissioner in any way considered necessary for the purposes of the Commissioner's functions. Like Section 14 there is no enforcement mechanism provided in the event of non-compliance.

In our general comments above, we have raised concerns regarding the definition of a 'victim' for this Part of the bill as including those against whom is it suspected a crime has been committed. In our view, the appropriate terminology for someone who has experienced crime prior to any conviction is 'complainer'. Consideration should be given to revising the name of the Commissioner as established under Part 1 of

the bill to the “Victims, Complainers and Witnesses Commissioner”.

Also, if a person is initially identified in criminal proceedings, but whose name does not subsequently appear either in the complaint or indictment, we question whether that person is a victim for the purposes of this bill.

Question 2: What are your views on Part 2 of the Bill which deals with trauma-informed practice in criminal and civil courts?

Part 2 introduces measures which are aimed at better supporting vulnerable victims and witnesses by seeking to embed the use of trauma-informed practice in both criminal and civil proceedings.

The Society is actively involved in promoting trauma informed practice. In this respect we collaborate with Scottish Government and others to develop trauma-informed training in practice areas such as criminal law, family law, child law and personal injury.

We also commented on trauma-informed practice during the consultation stage.

Section 24 amends the 2014 Act to include the principle of trauma-informed practice as an additional principle. Placing this principle on a statutory footing should better focus court users. As this principle attracts recognition and respect, society should begin to deal with victims in the terms of the bill in a more trauma-informed and person-centred way. We encourage any measure which attempts to minimise trauma for those involved in the Scottish criminal justice system.

We are pleased that “trauma -informed practice” is defined in section 69 as “*a means of operating that:*

- *recognises that a person may have experienced trauma.*
- *understands the effects which trauma may have on a person.*
- *involves adapting processes and practices, based on that understanding of the effects of trauma, to seek to avoid, or minimise the risk of, exposing the person to any recurrence of past trauma or further trauma”.*

This new duty to have regard to trauma-informed practice will extend to justice agencies including COPFS, Scottish Courts and Tribunals Service (SCTS), Scottish Prison Service, the Parole Board for Scotland and Police Scotland.

Sections 25 and 26 of the bill allow for criminal court rules (section 25) and civil court rules (section 26) to be amended to allow both criminal and civil proceedings to be conducted in a way that accords with trauma-informed practice. We support these provisions and we believe that appropriate rules of court will focus the minds of court users to ensure that proceedings are conducted in a way that accords with trauma-informed practice.

Sections 27-29 would amend existing provisions to ensure that when arrangements are made for the efficient disposal of court business it should be done in a way that accords with trauma-informed practice. While we support this approach, the Scottish Government should explain how this will operate in practice.

We have supported the principle of trauma-informed practice, but the extent to which this principle will transform hearings and scheduling remains unclear. Examples considered in the policy memorandum (paragraphs 165-178) include reducing but not prohibiting the number of floating trials (trials due to commence either on the stated date or within four court days). We supported the measures included in Part 2 in previous responses, though expressed some concern around the detail.

Overall, we support the objective of embedding the concept of trauma-informed practice in the justice system. It is important, however, to recognise the following points:

- The definition of trauma-informed practice set out at Section 69 is (perhaps necessarily) vague. There is a risk that the term will be interpreted in different ways by different judges, giving rise to uncertainty.
- While all those who come before the courts should be treated with respect and dignity, the court process is an adversarial one. An entirely justified focus on trauma-informed practice should never divert courts from the proper pursuit of justice: establishing guilt or innocence on the basis of the evidence.
- Achieving a properly trauma-informed system requires much more than legislative change. It also requires resources and changes in practice. The experiences of court users are just as likely to be improved by judicial consistency (having pre-trial hearings conducted by the same judge), effective communication (such as having a dedicated point of contact for complainers to be informed about the progress of a case) and avoiding delay (such as by ensuring early disclosure of evidence to the defence, thereby avoiding postponements).

Question 3: What are your views on Part 3 of the Bill which deals with special measures in civil cases?

Part 3 introduces new provisions around the use of special measures in civil cases, including prohibitions on self-representation in particular types of case (Section 31), and the establishment of a register of solicitors to represent instead in such cases. (Section 32).

We supported these measures in our previous responses, although there remain issues around how the register will operate: who will administer the register, what criteria will be required for inclusion, whether the register will for civil cases generally, or sub-divided into categories of work, how solicitors will be paid for this work etc. We note that solicitors in this new register will be appointed by the court. We agree that the court should have the power to appoint a solicitor in such circumstances as parties may struggle to find their own legal representation. Accordingly, we agree that such a register should exist where self-representation is precluded, although we acknowledge that a potential pitfall may come down to funding.

There is a duty on Scottish Ministers to consult with both the Society and with the Faculty of Advocates before making regulations to establish this registration process. We believe that Scottish Ministers should be under an obligation to report on the outcome of the consultation.

Section 32 (4) inserts a new Section 22E in the 2004 Act. Section 22E provides for Scottish Ministers establishing and maintaining a register of solicitors who may be appointed by a court under Section 22B of the 2004 Act (prohibition on personal conduct of case) as inserted by Section 4 (5) of the Children (Scotland) Act 2020.

We note that when making these regulations Scottish Ministers must include the detail of the requirements a person must satisfy to be included on the register (including training and qualification requirements) and the processes for including and removing a person from the register (including appeal rights).

However, Scottish Ministers have a discretion to include in the regulations a. that the register may be divided into parts by reference to type, subject matter or category of civil proceedings, b. the remuneration of solicitors appointed under Section 22B(6) including expenses and outlays such as counsel's fees and c. the conferring the duty of maintaining the register on a person.

We believe that regulations setting out of both solicitors' remuneration and conferring the duty of maintaining the register on a person should not be discretionary but should be mandatory. We would also welcome some detail regarding the operation of payments and who it is anticipated will be responsible for maintaining the register.

Section 33 repeals amendments made by the Children (Scotland) Act 2020 and substitutes provisions extending the availability of special measures in non-evidential hearings to civil cases generally. We agree that special measures should be extended to non-evidential hearings. It is wholly inappropriate for special measures to apply only in evidential hearings. Parties should be afforded protection by way of special measures throughout the civil process.

Question 4: What are your views on the proposal in Part 4 of the Bill to abolish the not proven verdict and move to either a guilty or not guilty verdict?

Section 35 abolishes the not proven verdict in solemn trials by providing for a jury returning either a verdict of guilty or not guilty (abolition of the not proven in solemn trials) and for a qualified majority in favour of a guilty verdict being 8 jurors in the case of a jury of 11 or 12 jurors and 7 jurors in the case of a jury consisting of 9 or 10 jurors.

Section 36 abolishes the not proven verdict in summary trials.

These provisions, if enacted, would constitute a profound change to the balance of a criminal trial.

We opposed the abolition of the not proven verdict in our response to the Scottish Government consultation on the not proven verdict and related reforms in March 2022, as did our members in our survey in 2021. We adhere to that position on the basis that the criminal justice process is a complex

system and the availability of the not proven verdict at present provides an important safeguard against wrongful convictions.

If the not proven verdict is removed in terms of Sections 35 and 36, then the simple majority verdict cannot be maintained.

Question 5: What are your views on the changes in Part 4 of the Bill to size of criminal juries and the majority required for conviction?

Section 34 reduces the size of a jury from 15 to 12 jurors and reduces the quorum required from 12 to 9 jurors.

Section 33 provides for a qualified majority in favour of a guilty verdict being 8 jurors in the case of a jury of 11 or 12 jurors and 7 jurors in the case of a jury consisting of 9 or 10 jurors.

While we support the removal of the simple majority verdict (currently 8 out of 15 jurors) we do not consider that the proposed move to a qualified majority verdict would strike the correct balance in safeguarding the delivery of justice and fairness for all.

The proposals to reduce the size of the jury and increase the majority appear to be based in the mock jury research commissioned by Scottish Government in 2018 and undertaken by Professor James Chalmers (University of Glasgow) and others. While we acknowledge that this research was a comprehensive and much valued piece of work, it was further acknowledged by the researchers themselves that it has its limitations. Lady Dorrian's Report at paragraph 5.31 notes that although the mock jurors took the exercise extremely seriously, they were all aware they were playing a role. Also, self-selection bias was identified in that the mock jurors chose to be involved as opposed to real jurors who are randomly selected. Rather than conducting a trial in real time, jurors watched a pre-recorded film. While the use of a single scenario for the rape trials enables them to say how jurors reacted to some aspects of the evidence, it is not possible to say what difference these aspects make in the absence of similar studies without these specific features. Also, the scope of the case and the issues considered would clearly be constrained compared to those which might arise in a real trial. A one-hour trial is unheard of in practice.

The overarching finding of this research was that juror verdicts were affected by how the jury system was constructed. The research found that the number of jurors, the number of verdicts available, and the size of majority required do influence verdict choice.

In our response to the Scottish Government consultation on the not proven verdict and related reforms as referred to above, we referenced the mock jury research which suggested that 12 may be the optimal number for jury size. On the one hand, the larger the jury, the greater the spread of background and experience that can be drawn upon. However, with a jury of 15 there was also a greater risk of more dominant jurors meaning other jurors were less likely to effectively contribute to deliberations.

Many common law jurisdictions, including England and Wales, Ireland, Australia, Canada, New Zealand and many US states have 12 jury members.

Section 34 (3) repeals Section 90 of the Criminal Procedure (Scotland) Act 1995 Act (the 1995 Act) and provides for the court in its discretion, to determine that a trial should proceed before the remaining jurors where a juror has died during a trial or is discharged because it is inappropriate for that juror to continue to serve. We note that, while the court must give the prosecutor and the accused an opportunity to make representations on whether the trial is to proceed, this is a departure from Section 90 of the 1995 Act where the court considers an application from either the prosecutor or accused to proceed in the event of the death or illness of a juror.

Section 35 inserts a new Section 99A into the 1995 Act which removes the not proven verdict. This will mean that a jury will have a choice to deliver a verdict of either guilty or not guilty. Section 99A (4) also provides for a weighted majority of at least 8 jurors in favour of a guilty verdict where there are 11 or 12 jurors and at least 7 jurors in favour of a guilty verdict where there are 9 or 10 jurors, otherwise a verdict of not guilty must be returned.

There is no doubt that the current simple majority verdict is unsatisfactory. It is incompatible with the criminal standard of proof beyond reasonable doubt. It exists in no other comparable jurisdiction. Its traditional justification is that it acts in balance with other features of the Scottish system, including the not proven verdict. Removal of the not proven verdict inevitably requires removal of the simple majority.

In terms of our previous response, we outlined that most other jurisdictions require unanimity in reaching in guilty verdicts or something close to unanimity. This is a consequence of the standard of proof being one beyond reasonable doubt, the presumption of innocence and the burden of proof and the view that a jury verdict should be a collective decision of the jury as opposed to simply the result of counting votes in a ballot. Although most other systems allow qualified majorities in recognition that one or two jurors may not have effectively participated in the process, this has allowed for the principle of the qualified majority not to interfere with the collective decision of the jury.

Scotland has stood apart from most other systems which have adopted unanimity or near unanimity of either 10 or 11 out of 12 jurors as we have a distinctive system of a 15-person jury, a simple majority in favour of a guilty verdict otherwise the accused must be acquitted, three available verdicts of guilty, not guilty and not proven, and the requirement for corroboration. This approach has been justified as the proper approach to the aim of the criminal trial to convict the guilty and acquit the innocent. It is an approach, albeit distinctive, with which we have previously agreed.

On the basis that we move to a 12-person jury and two available verdicts, then unanimity comparable to other common law jurisdictions should be considered.

In this respect we note the United States of America Supreme Court case of Ramos v Louisiana decided on 20 April 2020. In 48 out of the 50 states and federal courts, unanimity is required to convict and therefore a single juror's vote will result in acquittal. The two states where a 10-2 majority was permitted were Louisiana and Oregon. Evangelisto Ramos was convicted of second-degree murder a on a 10-2 majority verdict in a Louisiana state court. This would have resulted in a mistrial almost anywhere else, but he was sentenced to life imprisonment without the possibility of parole. The U.S. Supreme court agreed

and overturned his conviction, holding that the Sixth Amendment which guarantees among other things the right of the accused to speedy and public trial, by an impartial jury, also guarantees a unanimous jury in order to convict.

Overall, the Society is of the view, that a jury of 12 should require a unanimous verdict. Although this may result in the possibility of hung juries and re-trials, research conducted by professor Cheryl Thomas K.C. indicates that the number of re-trials in England is exceptionally low at around one per cent.

Question 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).

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 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 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.

Question 7: What are your views on the proposal 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.

Question 8: What are your views on the proposal 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.

Question 9: What are your views on the proposal 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. 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 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.

Question 10: Are there provisions which are not in the Bill which you think should be?

While we welcome some of the aspects of the bill in terms of vulnerable witnesses, we question why the bill provides no scope for improving the treatment of vulnerable accused. This is a matter upon which we reported in 2019, and which has been subject of extensive academic and third sector interest: see for instance, the Equality and Human Rights Commission's inquiry paper, '*Inclusive Justice: A System Designed for All*" published in 2020. We still believe that review of this area is required.

Question 11: Do you have any additional comments on the Bill?

We have no comments to make.