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<u>Scottish Government Consultation Paper – Improving victims' experiences of the justice system. Draft response from the Senators of the College of Justice</u>

Chapter One: A Victims' Commissioner for Scotland

This chapter concerns the Scottish Government's intention to establish a Victims' Commissioner. The questions posed generally concern the nature of the role. In our view these are largely policy questions for the government, on which we would not propose to offer any views. We would however endorse the proposition set out at page 22 of the consultation paper that the Commissioner will not champion or intervene in individual cases and that the role should be restricted to identifying common or systemic issues. To that extent we would answer question 13 by saying that we strongly agree that the Victims' Commissioner should not have the power to champion or intervene in individual cases.

Chapter Two: Options to underpin trauma-informed practice and person-centred approaches

Question 15: Bearing in mind the general principles which are already set out in the 2014 Act, to what extent do you agree or disagree that a specific legislative reference to 'trauma-informed practice' as an additional general principle would be helpful and meaningful?

We strongly agree that specific reference to 'trauma informed practice' as an additional general principle would be helpful; it will be meaningful only if training is provided and undertaken, and if many of the steps referred to in the questions below are taken. It has to be borne in mind, though, that the purpose of many trials is to ascertain if the complainer has in fact been made subject to a traumatic event. The presumption of innocence is not merely a slogan. Furthermore, no matter what training is given to legal professionals, juries will not have had the benefit of it and consideration will have to be given as to how they might be better informed as to the possible results of trauma, without sacrificing the rights of accused persons. That having been said, anything which makes it less traumatic for witnesses to give their evidence can only be beneficial.

Question 16: To what extent do you agree or disagree that a specific reference to trauma-informed practice within the current legislative framework for the Standards of Service is useful and meaningful?

Please see answer to question 15.

Question 17: To what extent do you agree or disagree that a legislative basis for the production of guidance on taking a trauma-informed approach would be useful and meaningful?

We strongly agree that a legislative basis for production of guidance on taking a trauma informed approach would be useful and meaningful, in order to embed such an approach as the way in which all persons in the field of criminal justice are required to behave but please see the caveat to answer 15.

Question 18: To what extent do you agree or disagree that the Court should have a duty to take such measures as it considers appropriate to direct legal professionals to consider a trauma-informed approach in respect of clients and witnesses?

We agree that such a duty should exist. If a trauma-informed approach is set out in legislation then there should be a consistent approach from the court to reminding, and if necessary telling, participants to take such an approach whilst remaining mindful of the fact that trials are adversarial proceedings.

Question 19: Should virtual summary trials be a permanent feature of the criminal justice system?

We do not have personal experience of virtual summary trials but do have experience of virtual hearings in the High Court and in the Court of Session.

There are differing views about the effectiveness of leading evidence in this fashion. Some judges feel strongly that video evidence is often sub-optimal in a number of respects. There can be an unacceptable level of informality and lack of dignity; difficulty in evaluating credibility and poor quality interactions between the court and the lawyers. Whilst there may be benefits in terms of convenience and associated cost savings for witnesses in giving evidence remotely, these need to be balanced against the deficiencies identified. Other judges however have had different experiences and consider that evidence taken remotely is effective. They do not agree that it suffers from the deficiencies mentioned. It can also be the case that giving evidence in a court is stressful and may be less so if the court is a virtual court. Whilst it is recognised by all that the availability of remote evidence should be an option, the differing views held highlight the importance of there being judicial control over whether it features in a particular case.

Question 20: If you answered yes to the previous question, in what types of criminal cases do you think virtual summary trials should be used?

We would defer to the views of those who have conducted such trials and who have carried out research.

Question 21: To what extent do you agree or disagree with the recommendation of the Virtual Trials National Project Board that there should be a presumption in favour of virtual trials for all domestic abuse cases in the Scottish summary courts?

We consider that our colleagues in the Sheriff Courts are likely to be better placed to answer this question on an informed basis. We understand that a further pilot scheme of virtual summary trials is to take place imminently and the outcome of that scheme will no doubt also be informative.

Question 22: While removing vulnerable victims from the physical court setting is beneficial in the vast majority of cases, to what extent do you agree or disagree that virtual trials offer additional benefits to the ability to give evidence remotely by live TV link?

Please see answer to question 19. **Question 23:** The existing powers in the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 can be used to expand the categories of witnesses who are eligible under the Act to benefit from the presumption that their evidence be pre-recorded in advance of the trial. This includes evidence by commission and the use of a prior statement as evidence-in-chief, such as a Visually Recorded Interview.

To what extent do you agree or disagree that these existing powers are sufficient to expand the use of pre-recording of evidence of complainers of serious sexual offences?

We strongly agree that the existing powers are sufficient to enable the expansion of the use of pre-recording of evidence, if the decision is taken to effect that expansion.

Question 24: To what extent do you agree or disagree that Ground Rules Hearings should be extended to all child and vulnerable witnesses required to

give evidence in the High Court, irrespective of the method in which the evidence is to be provided to the court?

We agree that ground rules hearings should be extended to include all child and vulnerable witnesses who are required to give evidence in the High Court, although such a substantial expansion may have significant resource implications. We also consider that the effective conduct of Ground Rules Hearings, whether extended or not, may depend upon the extent to which defence statements provide meaningful information to the court.

Question 25: To what extent do you agree or disagree that the current legislative basis for court scheduling, as managed through the existing powers of the Lord President, is sufficient to inform trauma-informed practice?

We understand that most litigants, in which we include at least some accused people, would prefer that a date was set for a trial as soon as possible after the case is reported, and that the date was not changed. We also understand that witnesses in summary trials (and we would assume any trial) would prefer to attend shortly before they are required, with staggered times given.

We do not agree however that the element of certainty afforded by that measure necessarily outweighs the impact of potentially longer delays in getting to trial, and in finishing the trial.

We agree that court scheduling is complex and we do not think that a trauma-informed approach to the needs of witnesses can be the overreaching priority. That must be the overall fairness of the proceedings, which can involve a myriad of matters as well as the interests of witnesses. If the evidence of witnesses has been captured in advance then the problem will be mitigated. High Court judges are already aware of the trauma caused to complainers by being kept waiting and are sensitive to the necessity of, for example, granting adjournments near to the end of the day's sitting so that a complainer may be taken first thing in the morning rather than waiting for a lengthy period and not being taken, or sitting late so that the evidence of the witness may be completed. Ultimately, however, the reasons for delay are often outwith the control of the court and may be outwith the control of anyone. Adding a trauma informed practice requirement is unlikely to add anything of value.

Question 26: Are you aware of any specific legislative changes which would assist in addressing the issues discussed around information sharing? If so please detail these.

We do not find ourselves able to suggest any specific proposals for legislative content but do recognise the importance of a single point of contact for complainers and witnesses. We would observe that effective information sharing of this sort may well be resource intensive.

Question 27: Are there any other matters relating to the options to underpin trauma-informed practice and person-centred approaches in the justice system you would like to offer your views on?

There are not.

Chapter Three: Special measures in civil cases

Question 28: To what extent do you agree or disagree that the courts should have the power to prohibit personal cross-examination in civil proceedings when the circumstances in a particular case require this measure to be taken?

We strongly agree with the suggestion that the courts should have the power to prohibit personal cross-examination in civil proceedings.

It is accepted that parties and witnesses ought not to be denied justice, or deterred from giving evidence, out of a legitimate fear of another party to the case. Nor should witnesses, particularly those who are vulnerable, be exposed to cross-examination of an inappropriate sort or which causes trauma or distress. The reasoning which underpins the prohibition against personal cross-examination in certain criminal cases, and that which will apply in cases arising out of children's hearings, can be just as valid in other civil cases if such issues arise. It is consistent with the court's duty to provide an appropriate level of protection to a witness, if necessary, that the court should have the ability to prohibit personal cross-examination in all civil cases if the exercise of that power is appropriate in the circumstances of the particular case.

Question 29: To what extent do you agree or disagree that special measures should be available when required for all civil hearings in Scotland, whether the hearings are evidential or not?

We somewhat agree with this suggestion. There is no reason why a vulnerable party to a case should not be provided with special measures, if they are required to assist that party in obtaining equal access to justice. However, it is not obvious to us that vulnerable parties are likely to be present in court for the sort of non-evidential hearings which are mentioned at page 42 of the consultation paper. We think that our colleagues in the Sheriff Courts are likely to be better placed to offer an informed view on this matter than we are.

Question 30: Are there any other matters relating to special measures in civil cases that you would like to offer your views on?

There are not.

Chapter Four: Review of defence statements

Question 31: Do you support undertaking a review of the use of defence statements?

We support such a review. As the Lord Justice Clerk's Review Group pointed out in their report at para 1.20, it can be inferred that Parliament intended that in defence statements;

> "... at least some detail of the nature of the defence, including (where a positive defence such as might found a special defence was not being advanced), should be provided to give an advance indication of the issues in dispute."

For the reasons given in the Review Group report, section 70A has not proved to be an effective measure in assisting the court to identify the real issues in dispute, which has important implications for case management, fettering the court's capacity to perform a vital obligation imposed by Parliament in section 72 of the 1995 Act as amended. In particular, subsection 6(f) requires that the court shall:

> "(f) ascertain, so far as is reasonably practicable–
>
> (i) the state of preparation of the prosecutor and the accused with respect to their cases; and
>
> (ii) the extent to which the prosecutor and the accused have complied with the duty under section 257(1) of this Act."

The particular importance of a meaningful defence statement is spelled out in the "Long Trial Protocol," Practice Note 1 of 2018, but the court has no more statutory power in such a case than in any other case. Para 5 of the protocol states:

> "It is important that a proper defence statement be provided as required by Section 70A of the Criminal Procedure (Scotland) Act 1995 Act. Each defence counsel should be asked to outline the defence for each accused."

The judges have recognised that addressing the backlogs in solemn prosecutions caused by the pandemic has rendered effective case management even more important, as explained in the Preliminary Hearing Bench Book at para 6.7. The less time each trial takes, the sooner the next trial can be reached. Effective case-management, and in particular reducing the need for witnesses to attend at court and take up time in trials giving evidence about matters which are not in dispute, would be enhanced by a more exacting requirement for defence statements. Such a requirement can only be effective if there is some consequence for an accused in failing to comply with the requirement to intimate a meaningful defence statement. The decision of the court in *Barclay v HM Advocate* has permitted a culture in which defence statements generally consist of little more than a bare denial and an assertion that all facts which the Crown seek to prove are disputed.

It is of particular relevance to the Lord Justice Clerk's Review Group report that a ground rules hearing can proceed on a much better footing when the judge knows in advance what the defence is. We already have ground rules hearings in commission applications and should review recommendation 1(a) concerning evidence on commission be followed we would have a ground rules hearing for all sexual offence complainers as they would be giving evidence on commission. We would have them for all sexual offence complainers who give evidence whether at trial or commission if recommendation 1 (c) is adopted.

Question 32: If you answered yes to the previous question, how do you think this should be progressed to address the issues identified by Lady Dorrian's Review?

We consider that this should be progressed by legislation.

We do not consider it attractive to permit inferences of guilt from silence, certainly not as a generality. Lord Carloway's analysis of what would be involved in his 2011 Review at para 7.5 is instructive and still holds good. He noted that in order to ensure convention compliance, permitting adverse inference from a failure to answer a police question would require a scheme of "labyrinthine complexity," at para 7.5.24 and concluded his analysis with the following recommendation:

> "no change is made to the current law of evidence that prevents inferences being drawn at trial from an accused's failure to answer questions during the police investigation."

Nevertheless, between section 70A, as enacted, and interpreted in *Barclay*, and drawing an inference of guilt, there is middle ground whereby Parliament could enact so that a jury might be permitted to have regard to a change of the line of defence from that in a defence statement or the development of a line not foreshadowed in a defence statement. This would be similar in some respects to what the courts have determined can be done regarding special defences, *Williamson v HM Advocate* 1980 JC 22, albeit the law surrounding such notices goes further because in the absence of a special defence, certain evidence cannot be advanced in the trial.

It would not seem problematic if Parliament legislated for a prosecutor's (and judge's) entitlement to comment on a change of position and for the prosecution to use a change of position as a means to impugn evidence advanced which did not conform to a defence statement and the jury to use it as a means to evaluate defence evidence.

In so far as concerned with defence statements, the provisions in part 1 of the Criminal Procedure and Investigations Act 1996 are very complex, but the essence of what is permitted in certain circumstances is set out in section 11(5):

> "(5) Where this section applies—
>
> (a) the court or any other party may make such comment as appears appropriate;
>
> (b) the court or jury may draw such inferences as appear proper in deciding whether the accused is guilty of the offence concerned."

There is a substantial difference between paras (a) and (b) and we would support adoption of a provision comparable to para (a) as representing an appropriate means of achieving the objectives of the Review.

Question 33: Are there any other matters relating to a review of defence statements that you would like to offer your views on?

No. We consider that the requirement that a defence statement must be intimated no later than 14 days before the preliminary hearing/first diet strikes an appropriate balance. Full disclosure will have commenced within a month of the accused appearing on petition and the accused will have 15 days following the service of the indictment to intimate a defence statement.

Chapter 5: Anonymity for complainers in sexual offence cases

Question 34: Which one of the following best describes your view on the point in the criminal justice process when any automatic right to anonymity should take effect?

a) when an allegation of a sexual offence is made
b) when a person reports an alleged sexual offence to a police constable
c) when an accused person is formally charged by the police with a sexual offence
d) when criminal proceedings for a sexual offence first call in court
e) other – please provide details

In our view, an automatic right to anonymity should take effect when an allegation of a sexual offence is made.

Section 1(1) of the Sexual Offences (Amendment) Act 1992 provides for England, Wales and Northern Ireland that:

> "Where an allegation has been made that an offence to which this Act applies has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed."

This provision appears to have worked well and to be well understood. The provisions of the Act apply in Scotland to prevent publication here of information relating to complainers alleging contravention of the law of England and Wales or Northern Ireland. We think it would be sensible if the same legislative prohibition applied throughout the whole of the United Kingdom. The Lord Justice Clerk's Review Group recommended that legislation should be introduced granting anonymity to those complaining of rape, or other sexual offences, along the same lines as the 1992 Act. We support that recommendation.

Question 35: Which of the following options describes the offences that you consider any automatic right of anonymity should apply to?

a) offences contained at section 288C of the Criminal Procedure (Scotland) Act 1995
b) intimate images offence contained at section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016
c) offences contained in the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005
d) other

We consider that an automatic right to anonymity should apply in relation to the matters listed at each of a), b) and c) for the reasons given in the consultation paper.

Question 36: Which one of the following best reflects your view on when any automatic right of complainer anonymity should end?

a) upon the death of the complainer
b) no automatic end point
c) other

We suggest that the right to anonymity should cease on the death of the complainer. As observed in the consolation paper, this has the advantage of simplicity and certainty for the complainer and represents a natural end point which is consistent with approaches in other areas of law in relation to privacy and personal data protection.

Question 37: To what extent do you agree or disagree that the complainer should be able to set their anonymity aside?

We strongly agree that a complainer should be able to set their anonymity aside. The reasoning set out in the consultation paper in support of this proposition is persuasive.

Question 38: If complainers are to be given the power to set their anonymity aside, which one of the following best reflects your view on how they should be able to do this?

a) unilaterally by consent of the complainer
b) following an application to the court by the complainer
c) other

In our view, it ought to be a matter for the individual complainer to decide whether to set their anonymity aside and there should be no barrier of cost or procedure placed in the way of doing so.

Question 39: To what extent do you agree or disagree that children should be able to set any right to anonymity aside?

We somewhat disagree with this proposition.

In our view, it would be inappropriate to permit a child to set aside a right of anonymity in relation to allegations of conduct directed towards him or her which would otherwise attract such a right, until a point in time when it was clear that the waiving of anonymity was truly a reflection of informed, free and mature decision making. It seems to us that such a point would not be reached until the person was of an age where it was no longer appropriate to think of them as a child. We do not consider that it would be practicable to permit the waiving of a right to anonymity before this point subject to the approval of the court.

Question 40: If children are to be given the power to set any right of anonymity aside, to what extent do you agree or disagree that additional protections should be required prior to doing so, for example an application to the court to ensure there is judicial oversight?

This is addressed in our answer to question 39 above.

Question 41: If children are to be given the power to set any right of anonymity aside, to what extent do you agree or disagree that there should be a minimum age below which a child cannot set their anonymity aside?

We have answered the principal point raised in this question in our answer to question 39 above. At what age a young person might be said to be capable of making such a decision is a less straightforward matter. The age at which a young person might be able to make a free and informed decision of this nature may vary from person to person according to a range of circumstances. All that the law can do is to select an almost arbitrary point at which a sufficient level of maturity is likely to be present. For the purposes of the English statutory prohibition the age selected is 16 years. In the Scottish criminal justice system a child is defined as someone who is under 16 years of age. Despite this, the children's hearing system can in some circumstances consider cases involving young people up to the age of 18 years and there are restrictions on the reporting of cases involving those who are under 18 years of age. Various other obvious restrictions apply to young persons, such as the age at which a driving licence can be obtained and the age at which alcohol may be purchased.

Given the importance of a decision to waive the right to anonymity under discussion we consider that consent to doing so ought not to be available until the person concerned has reached 18 years of age. We note that in the relevant English legislation the consent of the person concerned is a defence to any charge of a breach of the prohibition against identifying the complainer's identity but that the consent requires to be in writing. We consider that a similar requirement would be appropriate in this jurisdiction.

Question 42: To what extent do you agree or disagree that the court should have the power to override any right of anonymity in individual cases?

We somewhat disagree with this suggestion.

The availability of a power to override what would otherwise be an unfettered right to anonymity plainly erodes the level of certainty which would be available to complainers. The relevant English legislation permits the court to remove the prohibition on application made to it by the accused person in specified circumstances. There is also what appears to be a general right to remove the prohibition if the judge is satisfied that the effect of the prohibition is to impose a substantial and unreasonable restriction upon the reporting of proceedings at the trial and that it is in the public interest to remove or relax the restriction.

We would find it difficult to envisage circumstances in which an application of the sort mentioned might be granted. We find it equally difficult to envisage circumstances in which the court might give effect to the general right given to it. We therefore doubt whether there is a need for a dispensing provision, the presence of which would inevitably undermine, to some extent, the benefit of a prohibition. That having being said, we acknowledge that it has been recognised for England, Wales, and Northern Ireland that there could be exceptional circumstances where it would be in the public interest for anonymity to be lifted by order of the court. It might be informative to obtain

information on the extent to which the English courts have been asked to exercise the dispensing power or have done so.

Question 43: To what extent do you agree or disagree that any right of anonymity should expire upon conviction of the complainer for an offence against public justice?

We strongly agree with this suggestion.

We would understand that the proposition set out in this question is that a right to anonymity granted to a complainer would expire if that complainer should be convicted of an offence involving the false making of the original complaint. In such circumstances the underlying rationale for permitting anonymity would not apply. We would not support a suggestion that such a right to anonymity should expire merely on account of a complainer being charged with or prosecuted for such an offence.

Question 44: Which of the following best reflects your view of the level of the maximum penalty that should apply to breach of any right of anonymity?

a) up to 2 years imprisonment and/or an unlimited fine
b) an unlimited fine
c) up to 12 months imprisonment and/or a fine of up to £10,000
d) other

We consider that the appropriate maximum penalty should be up to 2 years imprisonment and/or an unlimited fine.

As we understand it, the proposition is that a right to anonymity with an associated sanction for breach of that right ought to be reflected in legislative provisions. If this were to happen there would be no need for a court to impose an order under section 11 of the Contempt of Court Act 1981 prohibiting the publication of the name of the complainer in any proceedings. In these circumstances it would seem inappropriate for the proposed legislation to provide for a sanction which was any different from that currently available in respect of breach of an order made under the Contempt of Court Act.

Question 45: To what extent do you agree or disagree that there should be statutory defence(s) to breaches of anonymity?

We strongly agree that there should be a defence to breach of anonymity and that such a defence should be set out in statue. If the right to anonymity is to be enshrined in statute, and if breach of that right is to constitute a criminal offence, again as provided for by statute, it seems appropriate that the circumstances in which a defence to a charge of breaching anonymity would be available should also be set out in that same statute.

Question 46: If you agree that there should be statutory defence(s) to breaches of anonymity, which of the following best reflects your view of the defence(s)s that should operate?

a) adopt the model of the 1992 Act in England, Wales and Northern Ireland
b) a 'reasonable belief' defence
c) other

In our view, it would be appropriate to adopt the model of the 1992 Act in England, Wales and Northern Ireland. This approach provides for a greater degree of certainty and simplicity of understanding than would be the case if a 'reasonable belief' defence were to be adopted. It is also appropriate that the same approach is taken throughout the whole of the United Kingdom.

Question 47: Are there any other matters relating to anonymity for complainers in sexual offence cases that you would like to offer your views on?

There are not.

Chapter Six: Introduction of independent legal representation for complainers in sexual offence cases.

Question 48: To what extent do you agree or disagree that there should be an automatic right to independent legal representation for complainers when applications under section 275 to lead sexual history or character evidence are made in sexual offence cases?

We strongly agree that there should be an automatic right to independent legal representation for complainers when applications under section 275 are made. We would include any application under section 275, some of which relate to behaviour by the complainer which is not 'sexual history or character'. In particular many are about sexual behaviour said to have taken place at the time of the allegation in the indictment, but which is not libelled as the Crown has no reason to libel it as part of the charge. It is also possible that an application is made under the section that does not relate to conduct by the complainer but rather to a condition or predisposition to which they are subject, under section 274(1)(d).

The court has determined that the complainer should be told about any application made under section 275 of the Act – *RR v HM Advocate* 2021 JC 61. The complainer may have personal and otherwise unknown information which assists the court in deciding if the proper administration of justice test in section 275 is met. Advance notice of a line to be taken may assist a complainer in preparing to give evidence, because without notice, the complainer may have forgotten matters about which they could give evidence if prepared. Complainers should be entitled to know what the evidence in the case is. They can listen to witnesses called after they have given evidence, though not all will feel able to do that. They should have advance notice of matters likely to be raised with them. It is also likely to be of advantage to the court to receive submissions from the complainer's perspective on the grant or otherwise of any application made under section 275 of the Act.

Question 49: To what extent do you agree or disagree that the complainer should have the right to appeal a decision on a section 275 application?

We strongly agree that complainers should have the same rights as the Crown and defence, that is a right to seek leave to appeal. We do not support the complainer having a right to appeal without leave. We take this view because once a complainer has a right to representation, they should have a right to seek to appeal a decision made after making representations, as do the Crown and the defence. There is a strong public interest in limiting clearly unarguable appeals and therefore we believe the complainer should have to seek leave. We appreciate that the accused person could appeal such a decision without leave at the end of the trial. We do not think that the complainer should have such a right. It would amount to an appeal against acquittal which the Crown does not have.

Question 50: To what extent do you agree or disagree that a right to independent legal representation for complainers should apply during any aspect of criminal proceedings in respect of applications under section 275 (including where an appeal is made)?

We strongly agree that a complainer should have the right to representation in respect of an application under section 275 including when a grant or refusal of an application is appealed. We understand this question refers to applications under section 275, and not to the questioning during the trial which may follow if an application is granted. Thus we do not support independent legal representation throughout the trial.

Question 51: In exceptional cases, section 275B(2) provides that an application may be dealt with after the start of the trial. To what extent do you agree that independent legal representation should apply during this aspect of the proceedings?

If a complainer is to have the right to independent representation in respect of timeous applications then there is a strong argument that they should have such a right even if an application is made after the start of the trial. Any application made outwith the statutory time period of (currently) 7 clear days before the preliminary hearing can only be considered by the court if it meets the test of special cause shown. Accordingly, any application for the purposes of subsection (1) of section 275 made after the trial has commenced will only rarely even be capable of being considered by the court. If the court was prepared to consider such an application and then had no option but to adjourn the proceedings to allow the complainer an opportunity to obtain independent legal representation, regardless of the apparent merit or weakness of the application, the consequence may well be a disproportionate level of delay, disruption and distress. We therefore suggest that the trial judge should be entitled to exercise a discretion as to whether to allow independent representation in relation to any applications made after the commencement of the trial.

Question 52: To what extent do you agree that independent legal representation for complainers in respect of the applications under section 275 should be funded by legal aid?

We strongly agree that independent legal representation should be funded by legal aid. Failure to do so will result in most complainers having no representation. It is not feasible to suggest that complainers should represent themselves. Therefore the right will be illusory unless legal aid is provided.

Question 53: If you agree that independent legal representation for complainers in respect of the applications under section 275 should be funded by legal aid, how should this be provided?

We do not have a view to offer in response to this question.

Question 54: To what extent do you agree or disagree that these time periods should be adjusted to provide additional time for the complainer to consider the application and effectively implement their right to independent legal representation prior to trial?

We strongly agree that an extension of time will be needed. At present the 7 day period is calculated with reference to the date of the preliminary hearing which date is in turn calculated according the date of service of the indictment. The provisions in the 1995 Act for prevention of delay in trials set out a statutory framework. Any attempt to increase the time required for notice of an application could have an effect on other time limits and will require careful attention. It may be that an increase to 14 days would permit sufficient time to allow the complainer to obtain and instruct representation and thus avoid the need for a motion to adjourn the preliminary hearing to allow time for this. This should not impose any undue burden on the accused as the solicitors acting ought to have received disclosure of the relevant statements and other material a number of months before service of the indictment. It is undesirable that the number of preliminary hearings held in a case should increase. That may have the effect of lengthening the time between the preliminary hearing and the trial. If a time limit of the order which we have suggested is to be workable the system for granting legal aid will have to be suitably resourced and applications fast tracked so as to ensure that disruption and delay are minimised.

Question 55: Are there any other matters relating to independent legal representation for complainers in sexual offence cases that you would like to offer your views on?

There are not.

Chapter Seven: Specialist court for sexual offences

Question 56: To what extent do you agree or disagree that a specialist sexual offences court should be created to deal with serious sexual offences including rape and attempted rape?

We strongly agree that a specialist court should be created to deal with serious sexual offences including rape and attempted rape.

The recommendations of the Lord Justice Clerk's Review Group are persuasive and we accept the arguments in favour, as set out in the consultation document, which we need not repeat. A specialist court with specially trained personnel can be expected to develop best practice in the treatment of issues arising pre-trial and during the taking of evidence, leading to greater efficiency and reducing trauma.

We do not agree with the arguments that this would lead to a downgrading of sexual offences. On the contrary, they would be treated in a court which was able to give them specialised attention which would demonstrate the seriousness with which they are treated. While the High Court could simply continue to deal with these cases, with perhaps particular judges allocated for a period of time, a change of that sort would be merely cosmetic and unlikely to produce any lasting benefits.

Question 57: To what extent do you agree or disagree that, if a new specialist sexual review court is created, it should be – as recommended by Lady Dorrian's Review – a new court for Scotland, separate from the High Court or the Sheriff Court?

We strongly agree that any new court should be separate from the existing courts. See our answer to question 56.

Question 58: If you disagree at the specialist court should be a new separate court for Scotland, where do you consider it should sit?

We support the suggestion set out in the Lord Justice Clerk's Review Group report that the specialist court should be able to sit in the venues currently available to the High Court, in the Sheriff and Jury Centres throughout the country and in other courts where this was appropriate. The advantage of being able to draw on technical and other specialist facilities, such as vulnerable witness suites, which have already been installed in such locations is obvious. Flexibility would be important so that the access needs of communities across the country could be met without inconveniencing those involved.

Question 59: To what extent do you agree or disagree that, if a specialist court is to be created, it should have jurisdiction to hear cases involving charges of serious sexual offences including rape as well as non-sexual offences which appear on the same indictment (for example, assault)?

We strongly agree with the proposition that a specialist court should have jurisdiction to try non-sexual offences as well, where these are charged on the

same indictment. There are a number of indictments where only a sexual offence is charged but a great many where there are charges, for example, of physical violence, statutory breaches of the peace, stalking, unlawful communications, breaches of the Misuse of Drugs Act 1971,and breaches of section 1 of the Domestic Abuse (Scotland) Act 2018, to name but a few. It would in large measure defeat the purpose of the reform if these could not be tried in the new court. Charges of murder would still have to be tried in the High Court. It would be appropriate that charges of attempted murder still be dealt with in that court and also cases where an Order for Lifelong Restriction was reasonably anticipated. The choice of forum would, we anticipate, be a matter for the Crown and a decision would have to be made whether the charges were predominantly sexual or otherwise.

Question 60: If a specialist sexual offences court distinct from the High Court or the Sheriff Court were to be created, to what extent do you agree or disagree with Lady Dorrian's Review that it should have a maximum sentencing power of 10 years' imprisonment and the ability to remit cases to the High Court for consideration of sentences longer than 10 years?

We agree with the suggestion that the sentencing powers of the new court should be limited to ten years and that there should be an ability to remit to the High Court where necessary. The maximum power of the court would capture the vast majority of cases but it would not mean that only that sentence could be passed.

We recognise the force of the concerns expressed about creating a two tier system but we are not in favour of creating a system where two courts with equal jurisdiction sit in parallel.

Question 61: If you disagree that a specialist court should have a sentencing limit of 10 years imprisonment, what do you consider the limit should be?

Not applicable

Question 62: If a specialist sexual offences court distinct from the High Court or the Sheriff Court were to be created, to what extent do you agree or disagree that it should be presided over by sheriffs and High Court Judges?

We strongly agree that the court should be presided over by High Court judges and sheriffs. The Lord Justice General should decide what training would be required.

Question 63: If you answered disagree to the previous question who do you think should preside over the court?

Not applicable

Question 64: If a specialist sexual offences court distinct from the High Court and Sheriff Court were to be created to what extent do you agree or disagree that the requirements on legal practitioners involved in the specialist court should match those of the High Court?

We strongly agree that the requirements on legal practitioners should match those in the High Court.

Question 65: To what extent do you consider that legislation should require that legal professionals working in a specialist court should be specially trained and trauma informed?

One of the purposes of the reform is to ensure that cases are dealt with by people who are properly trained so that the benefits of new system will be maximised. We agree therefore that the legal professionals should be specially trained and trauma informed. We have no difficulty with the principle of this being enshrined in legislation but the content of any training and the standards to be reached should be a matter for the Lord Justice General.

Question 66: Are there any other matters relating to the potential creation of a specialist court serious sexual offences you would like to offer your views on?

There are none.

Chapter Eight: Single judge trials

Like the members of the Lord Justice Clerk's Review Group, the judges hold differing views on the issues raise in this chapter. We have therefore provided two sets of answers to the questions raised. The first sets out the views of the judges who have concerns about the suitability of the existing procedure of trial by jury for the prosecution of serious sexual offences and the second sets out the views of those who do not support the suggestion of trial by single judge.

First set of answers.

Question 67: To what extent do you agree or disagree that the existing procedure of trial by jury continues to be suitable for the prosecution of serious sexual offences including rape and attempted rape?

We strongly disagree.

Although different jurisdictions may provide different judicial systems within which the determination of criminal charges takes place, the underlying purpose in each will be to provide justice as between those complaining of criminal conduct and those accused of that conduct. In the context of those jurisdictions which are signatories to the European Convention on Human Rights any such system will require to meet the minimum requirements of a fair trial, as defined in article 6 of the convention. As with other comparable jurisdictions, in Scotland there is more than one judicial system within which criminal charges are determined. Many thousands of trials take place each year in the summary courts before sheriffs sitting alone. Such trials are plainly article 6 compliant.

The issue which is raised in this question is whether the system of trial by jury achieves the underlying aim of doing justice in prosecutions for serious

sexual offences and, in particular, those of rape. As set out in the Lord Justice Clerk's Review Group report at paragraph 5.2:

> "The fact that the system has been sanctified by usage may make it difficult to change but it should not make it exempt from a thorough examination of its suitability".

An examination of the suitability of the system of trial by jury for ensuring justice in cases of serious sexual offences can be informed by drawing on available sources of evidence. By first looking to the available data, obvious questions which require to be considered are identified. Cases in which the accused is charged with rape are far more likely than any other type of case prosecuted in the High Court to proceed to trial. Secondly, after trial, rates of acquittal for cases of rape or attempted rape are far higher than for any other crime. At the time of the Lord Justice Clerk's review the figures which were available were for the year 2018/2019 and disclosed a conviction rate of 47% for rape and attempted rape as against 87% for all other crime. The consultation paper quotes from the figures available for the year 2019/2020 showing the conviction rate for rape and attempted rape of 43% as opposed to 88% for all other crime. The most recent figures published for the year 2020/2021 disclosed a conviction rate of 51% for rape and attempted rape and 91% for all crime.

This is not a new phenomenon, concerns about this disparity have been present over many years – see eg LJC Gill *MM v HM Advocate* 2005 JC 1 at para 7. As noted in the report of the Lord Justice Clerk's Review Group at page 91:

> "The disparity is such that it cannot simply be explained away by poor prosecutorial decision making, rogue cases or the like".

There must therefore be another reason for this stark disparity. The findings and analysis of the recent Scottish Mock Jury Trial research may provide an insight into what lies behind the disparity. As quoted at page 95 of the Lord Justice Clerk's Review Group report:

> "… the research found considerable evidence of jurors expressing false assumptions about how 'real' rape victims react, both during and after a rape. The belief was frequently expressed that a lack of physical resistance on the part of the complainer is indicative of consent. There was also a lack of clarity over the extent to which relatively neutral testimony from a medical expert, which did not exclude the possibility of alternative explanations for the complainer's injuries, could support the complainer's account. In addition, jurors also gave credence to the idea that rape allegations are often unfounded and easy to make."

> "The finding of the review is that there is overwhelming evidence that rape myths affect the way in which jurors evaluate evidence in rape cases. The quantitative research demonstrates that jurors' scores on rape myth attitude scales designed to measure prejudicial attitudes towards rape victims are significantly related to judgments in individual cases, both in terms of the degree of blame attributed to a rape victim and – more importantly – views about what the verdict should be. The qualitative research shows that false and prejudicial beliefs about rape victims are commonly expressed during jury

> deliberations and that even jurors who do not score highly on scales that measure attitudes in the abstract can express highly problematic views when discussing a concrete case."

These findings did not come as a surprise to some judges, as they chimed with the experience of some of those who, individually and collectively, had experience over many years of prosecuting and defending in such cases, as well as presiding over them. In the view of these judges, juries have repeatedly returned verdicts of acquittal over the years in cases of rape, attempted rape and the like, despite what appeared to be a body of acceptable and credible evidence. This experience is particularly rooted in cases involving single complainers where the defence is consent and in circumstances which are sometimes referred to as "acquaintance rape". Some of these acquittals have been returned in the face of what seemed like quite overpowering evidence. Such outcomes led these judges to conclude that, on too many occasions, jurors have allowed sympathy for the accused, disquiet at the consequences of conviction or other inappropriate considerations to influence their decision making process.

For the judges in this group there are three reasons for disagreeing with the view that the existing procedure of trial by jury continues to be suitable for the prosecution of cases such as rape and attempted rape. The first is that the available data has consistently highlighted a significant disparity in the conviction rate for such offences as opposed to others. The second is that the available research findings demonstrate the continued presence of rape myths in the minds of jurors which, when present, are incompatible with the duty to assess the evidence dispassionately and return a verdict which reflects justice in the case. The third is that their own experience of involvement in such cases has led them to see that prosecutions regularly fail despite the presence of apparently credible and reliable evidence and thus to conclude that a process is at work in such cases which is not replicated in other types of prosecutions and which is not conducive to justice.

Question 68: If you have answered 'neutral' to the previous question, what further evidence, research or information would assist you?

N/A

Question 69: To what extent do you agree or disagree that trial before a single judge, without a jury, would be suitable for the prosecution of serious sexual offences including rape and attempted rape?

We strongly agree that trial before a single judge, without a jury, would be suitable for the prosecution of serious sexual offences including rape and attempted rape.

In the Sheriff Courts across the whole of Scotland there is an entrenched history of criminal cases being determined by a single judge. Civil cases of all types are determined by a single judge, both in the Sheriff Court and in the Court of Session. There is no obvious reason why any particular type of case should not be suitable for trial before a single judge. Either mode of criminal trial used in Scotland, single judge or judge and jury, is plainly compatible

with article 6 ECHR. The fact that particularly serious crimes have historically been tried before a judge and jury does not of itself demonstrate that such case are not suitable for trial by a judge or judges without a jury. The case of the largest mass murder in British legal history was tried before three Scottish judges.

Given that either mode of trial would be suitable at a strictly legal level, the question posed comes into focus on the hypothesis that there is an issue of valid concern about the current process of trial for cases involving serious sexual offences.

In the view of some judges, some of the concerns which have been identified about the issues which fall to be determined in serious sexual offences make such cases particularly suitable for determination before a judge alone. Judges are familiar with the need to make decisions on the credibility and reliability of witnesses on a dispassionate and reasoned basis. This is an exercise which is part and parcel of the process of conducting cases as a practitioner and is an ordinary component of the judicial function.

Targeted judicial training is also available after appointment. The Lord Justice Clerk's Review Group report made it clear that there is a need for training in the understanding of the sorts of issues which can arise in serious sexual cases. Trauma informed training and other guidance particular to the treatment of sexual cases can easily be provided to and monitored within what is a relatively small group of individuals. It can be assumed that the rape myths identified in the research conducted with mock juries would not contribute to the decision making process engaged in by judges. Furthermore, the requirement that a judge provides reasons for his or her decision would resolve one of the particular concerns arising out of the disparity in conviction rates mentioned above. The data discloses that a significant number of complainers in cases of rape or attempted rape are left without any understanding of the explanation for the verdict of acquittal returned, be it not proven or not guilty. This is not an issue which is replicated to any real extent in other types of cases. Written judicial reasons would remedy this concern.

Question 70: If you have answered 'neutral' to the previous question, what further evidence, research or information would assist you?

N/A

Question 71: What do you consider to be the key potential benefits of single judge trials for serious sexual offences?

Removal of potential bias of the jury and removal of concerns around rape myths would be obvious potential benefits of single judge trials for such cases, in the ways set out in the answer to question 69.

It can realistically be expected that such trials would take less court time than they presently do. The consistent experience which emerges from taking evidence on commission is that questioners adopt a more focussed, less confrontational approach and take far less time to ask their questions than happens in the traditional trial context. The same can be expected from

closing submissions before a judge. The view set out in the report by the Lord Justice Clerk's Review Group was that trials before a single judge would likely take half as long as they currently do. That is a view which we endorse. The consequence would be that the backlog of trials could be reduced significantly and the experience of the complainer would be improved in the sense that the lengthy wait currently experienced would be shorter. Not having to give evidence before a jury would also likely improve the discomfort and embarrassment associated with this process, either in court or through CCTV. That outcome could also of course be achieved through taking the evidence of the complainer on commission in advance of the trial.

It can reasonably be anticipated that the provision of written reasons for a decision by a judge would add to public confidence in the decision making process. Certainty in the application of legal principles would be achieved through this requirement allied with the ability of the Court of Appeal to address challenges to any decision arrived at upon an undisputed understanding of the approach taken by the decision maker.

Question 72: What do you consider to be the key concerns and challenges of single judge trials for serious sexual offences?

If members of the public understand that judges are appointed from the ranks of successful practitioners with many years of experience in conducting litigation, and that appointment follows on from an open and rigorous appointment process, then it is difficult to understand the basis for a concern that trial by single judge would reduce public confidence in the justice system. It might reasonably be assumed that the public expect such judges to be able to perform the task of determining cases and to do so effectively, as they do when hearing civil cases of many different kinds. A requirement to provide written reasons would serve to reinforce this expectation and enhance public confidence.

It is correct to observe that judges occupy a certain age group and are all university educated. There is also currently a gender and ethnic imbalance. These factors do not reduce the ability of individual judges to engage in a reasoned assessment of evidence. Judges are also well equipped to assess and take advantage of any relevant research concerning issues which arise in connection with the prosecution of sexual offences and are therefore well placed to take advantage of any training which may be apposite.

The introduction of single judge trials need not undermine the use of juries for non-sexual cases as the discussion only arises in the context of evidence which can be seen as pointing towards the view that sexual violence, as a form of criminal offending, may not be well-suited to fact finding by a jury. For the same reason the obvious reduction in the level of civic participation in the criminal justice system which would follow ought not to be a concern.

Question 73: If you highlighted concerns and challenges in the previous question, which of the following safeguards do you think could be put in place to mitigate these?

This question concerns safeguards which might mitigate any of the challenges thought to arise out of a system of single judge trials for serious sexual offences. These have been addressed in the answer to the previous question.

Question 74: What additional evidence and information do you think would be useful to assess the question of the role of juries in the prosecution of serious sexual offence cases?

As noted earlier, the data collected over many years has identified a consistent disparity in the conviction rate for such cases. The Scottish Government commissioned the mock jury trial research project in light of the conclusion of the publication of the final report of the The Post-Corroboration Safeguards Review chaired by Lord Bonomy. It recommended that:

> "the time is right to undertake research into jury reasoning and decision-making".

That research has strengthened the view of those judges who had concerns about the basis upon which acquittal verdicts were regularly returned in particular types of rape cases. The research was in turn considered by the Lord Justice Clerk's Review Group and fed into its conclusion as set out at paragraph 5.52 of its report:

> "The traditional arguments in favour of juries are met by equally compelling arguments for trial by judge alone, which cannot be left unexamined and ignored. They are summarised or illustrated throughout this chapter. This is a question which ought to be examined in much greater depth, with further jury research, and a fully evaluated pilot scheme to support an evidence based approach, assessing any longer term changes to trial procedure introduced following this Review. This would enable the issues to be assessed in a practical rather than a theoretical way."

Further mock jury research could no doubt be commissioned and undertaken but the information already available points towards the importance of taking steps to address the issues raised rather than attempting to obtain additional evidence and information seeking to further assess the role of juries in such cases. The recommendation of the Lord Justice Clerk's Review Group was to develop a time-limited pilot scheme of single judge rape trials. This is a constructive suggestion which would provide a practical method of examining whether there is a better method of determining such cases than that presently utilised.

Question 75: Lady Dorrian's Review recommended consideration of a time limited pilot of single judge trials for offences of rape, do you have any views on how such a pilot should operate?

It would be necessary for any such pilot procedure to apply to all cases of the type selected. A scheme within which participants required to volunteer or to agree to participate would be of no value. Any pilot procedure will of course require to be set up in such a way as to ensure that it will provide a firm evidential basis for a rigorous and objective evaluation of the fairness and effectiveness of the scheme. Careful consideration will require to be given to a range of important practical issues, such as the length of the pilot and the

training of the judges, staff and lawyers who are to participate in it. The arrangements for evaluation of the pilot will also have to be carefully devised. The criteria for evaluating its success or lack of success will have to be the subject of close consideration.

Question 76: Are there any other matters relating to single judge trials that you would like to offer your views on?

Some further matters may be mentioned.

Issues arising out of statistical information were addressed above. A further point of interest can be drawn from the Justice Analytical Services Safer Communities and Justice Statistics Monthly Data Report published 30 June 2022. On page 5 of that report it is noted that sexual crimes recorded by the police increased by 15% in 2021/22 and that such crimes are now at the highest level seen in the last 50 years. This may go to highlight the relevance and importance of the issue under discussion.

If the suggestion of a pilot scheme of single judge trials were to be given effect to consideration would require to be given to the need for the provision of written reasons. In our view, written reasons would be needed regardless of the verdict. That would be consistent with the general requirement to provide reasons for judicial decision-making and if the requirement was limited to verdicts of guilty then complainers in other cases would be left in an unsatisfactory situation.

Consideration may also need to be given to the question of appeal rights. It may, for example, be appropriate to consider whether a right of appeal, automatic or otherwise, not only points of law but on the factual conclusions reached and inferences drawn by the single judge ought to be available.

Second set of answers

Question 67: To what extent do you agree or disagree that the existing procedure of trial by jury continues to be suitable for the prosecution of serious sexual offences including rape and attempted rape ?

We strongly agree

The arguments against trial by Jury for serious sexual offences and, in particular, rape, are set out clearly in the Lord Justice Clerk’s Review. Nevertheless, there is a body of Judges who are of the view that trial of such offences by a Jury remains appropriate. Some of the arguments in favour of trial by Jury are helpfully set out in the Lord Justice Clerk’s Review:

> ‘5.2 Trial by jury is long established for serious crimes in Scotland and seems to have the general support of the public, prosecution, defence lawyers and the Judiciary. The accumulation of knowledge and experience of life across wide sections of the community in the jury as the decision-making body is seen as one of the main advantages of trial by jury…..’

The Review states however, later in paragraph 5.2

> 'In general it was felt that for almost all types of crime, trial by jury generally works well in Scotland with verdicts almost always having a reasonably obvious and logically justifiable basis. That general public confidence, however, would seem to be lower in respect of sexual offences.'

The Review concludes that rape trials by judge alone should be the subject of a time limited pilot.

Other more detailed arguments in favour of retaining trial by Jury are set out persuasively at pages 91 and 92 of the present consultation paper.

The final point on page 92, that the difficulties and concerns identified by the Review Group might be mitigated by better education of jurors, can be developed specifically to include the recent introduction and continuing development of written directions on the law delivered to the Jury at the outset of the trial, as well as expanded directions delivered by the Judge prior to the Jury retiring to consider their verdict. These include mandatory directions on matters such as delayed reporting of offences and any lack of physical resistance not being necessarily consistent with a lack of credibility. Such developments are capable of addressing, at least to some extent, some of the 'rape myths' about which concern has rightly been expressed.

However the very fact that the full impact of improved written directions and judicial directions to the Jury on addressing rape myths has yet to be assessed, or indeed whether such directions could be improved still further to address concerns such as fragmented memory, would support the view, held by some Judges, that removing trial by Jury at this stage goes too far, too fast.

In this context it is of interest to note that in her research paper prepared for the Ministry of Justice in 2010 'Are Juries Fair?' Professor Cheryl Thomas noted that where a random selection of Juries was provided with a one page summary of the Judge's legal directions more who received the written summary (48%) than those who heard only oral instructions (31%) were able correctly to identify the two specific questions the Judge said needed to be answered in the particular case. The written directions currently provided to Scottish Juries are considerably more detailed than those used in this study.

On the question of conviction rates, some argue that attempting to increase the rate of convictions is not a legitimate aim of law reform. We assume in all trials including the most serious for murder, that juries pay heed to the judge's directions. We do not have material to entitle us to decline to make that assumption in sexual offence trials. The mock trial research is useful and informative but has limitations. The trials lasted for about one hour. The participants of course knew that it was a mock exercise. Many judges would argue that care must be taken in relying on this work. Even if that argument is not accepted, it may be disproportionate to remove sexual offences from jury trials rather than to improve the quality of the jury trials to enable best decision making by juries.

The view held by some Judges is that the factual circumstances surrounding many rape cases mean that any decision maker, whether that be a Jury or a

Judge sitting alone, may find it difficult to conclude that there is no reasonable doubt about precisely what occurred and, more fundamentally, whether a crime has been committed. That being so, it is perhaps unsurprising that the conviction rate in such cases is lower than in cases such as speeding in which proof is achieved by scientific evidence. In many rape cases the subject matter is sexual relations between adults. The most common defence is consent, and so forensic evidence showing that penetration took place is usually not disputed. Not many cases are rapes by strangers with no previous contact with the complainer. In most cases the question is whether sexual intercourse occurred without consent. Thus decision makers are asked to decide on the credibility of evidence about intimate matters. The nature of the evidence means that knowledge of current mores and personal behavioural norms is relevant. No doubt Judges are accustomed to at least attempting to put their personal views aside and to decide cases in an impartial way, but one decision maker as opposed to fifteen does increase the risk of the decision making being less balanced. Concerns have been expressed that the majority of Judges are in late middle age, male, from a white Scottish ethnic background, and are educated to university level. Many would argue that a number of people of differing backgrounds and ages combining to reach a decision is preferable to one person deciding alone. A single decision maker from a background often very different from that of the accused person and the complainer and other witnesses is no better qualified to determine issues of fact than a Jury drawn from a wide cross section of modern Scottish society. It is acknowledged that Judges have the advantage of training in the existence of rape myths while juries before being directed do not. Therefore Judges can be expected to ignore rape myths. So should properly directed juries.

It is recognised that many countries function well without juries for the most serious offences, but these tend to have criminal justice systems that are inquisitorial rather than adversarial and that the training and recruitment of lawyers and Judges is different from that in the United Kingdom jurisdictions.

Many of the arguments for and against trial by Jury in serious sexual offence cases were examined in detail by Sir John Gillen in his 2019 review of the prosecution of such offences in Northern Ireland. A number of the concerns around trial by jury that are raised in the present consultation mirror those examined in Sir John's review. Whilst recognising that trial by jury ought not to be considered as sacrosanct in the modern era, and equally recognising legitimate concerns around rape myths and the potential influence of social media on jurors, Sir John noted that there was a paucity of empirical evidence that juries cannot be trusted to follow judicial directions in such trials. He also pointed out that if the model of judge only trials, with a right of appeal, were followed, this could conceivably lead to greater stress on the complainer, as well as increased delay. Ultimately Sir John concluded that trial by jury ought to remain the default position, save perhaps in the rare case where an accused persuaded the court that a fair trial was no longer possible with a jury.

In summary, the body of Judges who favour retaining trial by Jury consider firstly that the disparity in conviction rates does not in and of itself justify departing from the principle of trial by Jury for such offences; and secondly that a move away from Jury trials for such offences is premature in the absence of evidence as to whether or not the concerns identified in the Lord Justice Clerk's review have been addressed, and if so to what extent, by the provision of detailed written and improved oral directions.

Question 68: If you have answered 'neutral' to the previous question, what further evidence, research or information would assist you?

N/A

Question 69: To what extent do you agree or disagree that trial before a single judge, without a jury, would be suitable for the prosecution of serious sexual offences including rape and attempted rape?

This has been addressed in our answer to question 67.

Question 70: If you have answered 'neutral' to the previous question, what further evidence, research or information would assist you?

N/A

Question 71: What do you consider to be the key potential benefits of single judge trials for sexual offences? Please select all that apply.

While those judges who do not favour judge only rape trials do not see such trials as having benefits, it is accepted that such trials may be shorter, and it is accepted that some complainers would prefer only one judge to hear their evidence, even if they give it in advance on commission, rather than knowing that 15 jurors will have it played to them and will discuss it. These potential benefits do not outweigh the disadvantages.

Question 72: What do you consider to be the key concerns and challenges of single judge trials for serious sexual offences ? Please select all that apply.

a) Less public confidence in the justice system. We are concerned that some members of the public will maintain, and broadcast, a lack of confidence in any judge who acquits. In many cases the reasons given by the judge for the acquittal will comprise a reasonable doubt about the credibility of the complainer. It may be difficult to give reasons which explain why a complainer was not credible other than that evidence taken as a whole did not meet the test of proof beyond reasonable doubt. Such reasons may be entirely sufficient for the Court of Criminal Appeal, but disappointed litigants may feel that they are no better informed once the reason are given. Especially if there is an expectation that judge only rape trials will result in more convictions, any acquittals may be seen as unsatisfactory.

b) Lack of diversity reflected in the pool of decision makers. Most complainers and most accused people are from a different background and age group from most judges. The existence of a jury, properly instructed in the law by the judge, presents a much better chance of the facts being decided

by people at least some of whom are more similar in age and background then is the judge.

c) Removal of civic participation in the criminal justice system. Most people will have no involvement in the system but having the chance of being a juror brings very important involvement which we would prefer to retain.

d) Undermining the use of juries for non sexual offences. There is at least a possibility that those aggrieved by a jury verdict, whether conviction or acquittal, will feel that had the case been heard by a judge alone a different result would have ensued.

Question 73: If you highlighted concerns and challenges in the previous question, which of the following safeguards do you think could be put in place to mitigate these. Please select all that apply.

a) Evaluation of requirement for written judgments to be prepared. We are not certain what is meant by this safeguard. Evaluation by whom? If judge only trials are to be done, we would be in favour of a requirement for written reasons.

b) Specific training for judges. We are in favour of training and currently conduct regular training for judges. Training specifically directed to sitting alone in serious cases and providing written reasons will be provided, under the approval of the Lord Justice General.

Question 74: What additional evidence and information do you think would be useful to assess the question of the role of juries in the prosecution of serious sexual offences?

It would be useful to be able to ask juries why they decided as they did. This is prohibited, and we can see good reason for the prohibition. It may also be useful to hear from witnesses how they felt about the experience of giving evidence. While such questioning is not prohibited it may be unwelcome.

Chapter Nine: Impact Assessments

We do not have any views to offer on the questions posed in this chapter of the consultation paper.