



Law Society
of Scotland

Consultation Response

Improving victims' experiences of the justice system

August 2022



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 and Civil Justice Committees welcome the opportunity to consider and respond to the Scottish Government consultation: Improving victims' experiences of the justice system. The committees have the following comments to put forward for consideration.

General comments on the proposals

We consider it important to preface our response to this consultation by noting that in a free and democratic state, the rule of law aims to protect the public and affords a mechanism of accountability. The legal system in Scotland has developed over hundreds of years 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 a reasonable doubt.

In our view, the presumption of innocence is the cornerstone of a civilised society that respects the rule of law. The principle that an accused person is innocent until proven guilty must be maintained and respected.

We recognise that those affected by crime are often reluctant participants in the justice system. It is correct that they are treated with respect and should not come to harm as a result of the state's due process. In our view, these rights must also be weighed against the rights of the accused person. We are supportive of efforts to examine and improve processes within the justice system as long as these proposals do not impinge upon the basic objectives and fundamental protections of the presumption of innocence and the right to a fair trial.

We are of the view that the language used in this consultation, in categorising a complainer as a victim prior to any conviction, dismisses the presumption of innocence and conveys the message that an allegation equates to guilt. We have therefore used the term complainer in our response to this consultation.

We consider it worthy of note that the use of the term victim in this context has been considered by the Appeal Court who observed that the term conveys an apparent bias stating "It is therefore important that in most aspects of the criminal process care is taken to avoid referring to a person making an allegation of

criminal conduct towards him or her as a "victim" other than in a context in which guilt is proved or is assumed for valid reasons"¹. Further, the Judicial Institute for Scotland's Jury Manual ² which provides guidance for Judges in criminal trials has been updated to remove reference to the word victim from its content and encourages Judges to refrain from its use on the basis of Appeal Court observations³ that the use of the term is inappropriate until guilt has been proven.

Consultation questions

Question 1: To what extent do you agree or disagree that the Victims' Commissioner should be independent of the Scottish Government?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Strongly agree - We are of the view that the Victims' Commissioner should be Independent. We consider that independence from political influence would be essential to the role of a Scottish Victims Commissioner.

Question 2: To what extent do you agree or disagree that the Victims' Commissioner should be a statutory role?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

¹ [MICHAEL WISHART v. HER MAJESTY'S ADVOCATE \(scotcourts.gov.uk\)](#) at paragraph 7

² [jury_manual.pdf \(judiciary.scot\)](#) at page 3.1 / 122 and page 5.5 / 122

³ [DAVID HOGAN v. HER MAJESTY'S ADVOCATE \(scotcourts.gov.uk\)](#) at para 34

Strongly agree - Transparency is a crucial component in defining the role of a Victims' Commissioner. We believe that a statutory definition should be the preferred method to achieve that.

Question 3: To what extent do you agree or disagree that the Victims' Commissioner should be accountable to the Scottish Parliament?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Strongly agree – We are of the firm view that accountability to the Scottish Parliament is vital.

Question 4: How do you think the Victims' Commissioner should be held accountable? Please select all that apply.

- a) annual report to be published and laid in the Scottish Parliament
- b) multi-year strategic plan to be published and laid in the Scottish Parliament
- c) other – please provide details

Please give reasons for your answer.

a – We believe that annual reporting to monitor how the role progresses would be of benefit and would maintain accountability.

Question 5: In your view, what should the main functions of the Victims' Commissioner be? Please select all that apply.

- a) raising awareness/promotion of victims' interests and rights
- b) monitoring compliance with the Victims' Code for Scotland, the Standards of Service for Victims and Witnesses and any relevant legislation
- c) promoting best practice by the criminal justice agencies and those providing services to victims, including championing a trauma-informed approach
- d) undertaking and/or commissioning research, in order to produce reports and make recommendations to the Scottish Government, criminal justice agencies and those providing services to victims
- e) other – please provide details

Please give reasons for your answer.

a, c and d - We are of the view that the functions listed in a, c and d above should all apply to the role of a Victims' Commissioner.

We consider that there is a vital need to offer a strong and clear definition of what the role is expected to deliver.

Question 6: What do you think should be within the remit of a Victims' Commissioner for Scotland? Please select all that apply.

- a) the experience of victims in the criminal justice system
- b) the experience of victims in the civil justice system
- c) the experience of victims in relation to the Children's Hearings system
- d) the experience of victims resident in Scotland, but where the crime has taken place outwith Scotland
- e) other – please provide details

Please give reasons for your answer.

e - We believe that all of the above options apply. We consider that all complainers have a right to access justice, regardless of forum. We consider it vital that the Victims' Commissioner strives to achieve consistency.

Question 7: What powers do you think the Victims' Commissioner should have? Please select all that apply.

- a) the power to carry out investigations into systemic issues affecting victims of crime
- b) the power to require persons to give evidence in the course of an investigation
- c) the power to make recommendations to the Scottish Government, criminal justice agencies and those providing services to victims
- d) the power to require persons to respond to any recommendations made to them (by the Victims' Commissioner)
- e) other – please provide details

Please give reasons for your answer.

e - We are of the view that all of the above apply. We consider that option d is of particular importance to effecting change.

Question 8: To what extent do you agree or disagree that the Victims' Commissioner should be required to consult with victims on the work to be undertaken by the Commissioner?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Strongly agree - The Victims' Commissioner should be tasked with ensuring that complainers are being heard; that they are able to access information; that they feel safe; and further that they experience compassion. We recognise that consulting with complainers is the right way to measure how these needs can be a met, in a tangible and meaningful way. It is the voices of complainers that matter and any organisational views are secondary.

**Question 9: How do you think that engagement with victims should take place?
Please select all that apply.**

- a) advisory board, including victim representatives
- b) victims' reference group
- c) focussed consultations with victims
- d) ad hoc engagement with victims
- e) other – please provide details

Please give reasons for your answer.

We are of the view that all of the above options apply. We consider that engagement should be at the discretion of the Victims' Commissioner and note that it may be of benefit to take note of the experiences of the various other Victims' Commissioners in this regard.

Question 10: Are there any specific groups of victims who you think the Victims' Commissioner should have a specific duty to engage with? If so, who are they and how should that engagement take place?

- Yes – please provide details
- No
- Unsure

Please give reasons for your answer.

We have no comment to make here.

Question 11: To what extent do you agree or disagree that the Victims' Commissioner should be required to consult with organisations that work with victims, on the work to be undertaken by the Commissioner?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

We have no comment to make here.

Question 12: Are there any other relevant bodies or organisations that may have an interest in the work to be undertaken by the Victims' Commissioner?

We have no comment to make here but note that the Victims Commissioners throughout the UK⁴ as well as various victim representation and survivor support groups will have an interest in the work undertaken by any Victims' Commissioner in Scotland.

Question 13: To what extent do you agree or disagree that the Victims' Commissioner should not have the power to champion or intervene in individual cases?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Strongly disagree. We note that the ability to challenge any cultural or organisational standing is a necessary component in effecting change. In our view, if complainers feel the need to be heard and the Victims' Commissioner is created in order to meet that need, it consequently feels like somewhat of a disconnect between the intention behind the creation of the role, to then fail to provide a mechanism for the Commissioner to intervene when required. The mere ability to intervene can be a powerful tool in effecting change and influencing improvements in practice.

We are of the view that it is important to define the extent of any potential intervention from the Victims' Commissioner. It may be appropriate, for instance, for the Victims' Commissioner to engage with the authorities over the treatment of a complainer, such as where there has been a lack of access to information, or concern about the treatment of personal documents or records. But we are firmly of the view that the Victims' Commissioner's role should not extend to seeking to influence the trial process.

Question 14: Are there any other matters relating to the proposal to create a Victims' Commissioner for Scotland you would like to offer your views on?

We have no comment to make here.

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

⁴ [**Home - Victims Commissioner](#), [Victims' Commissioner | London City Hall](#), and [Commission for Victims and Survivors \(cvsni.org\)](#)

reference to 'trauma-informed practice' as an additional general principle would be helpful and meaningful?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Strongly agree – We note that the move towards trauma informed practice and the use of these words within the principles of the Victims and Witnesses (Scotland) Act 2014 will focus the minds of the Court users. The more the term is used, the more the public and the Court users will recognise the term and begin to deal with complainers in a trauma informed and person centred way. We encourage any attempts to minimise trauma for complainers and witnesses who are involved in the justice system. However, we have concerns that the term trauma informed is often used in a perfunctory way and without a full understanding of its meaning. On that basis we are of the view that a full and readily-understood definition of trauma informed practice must, however, be included.

We suggest that the Victims' Code for Scotland⁵ should be amended to ensure that the principles contained within it should be considered in a trauma informed manner.

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 would be useful and meaningful?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer

Somewhat agree – As above at Question 15. We consider that specific reference to trauma informed practice would be of benefit within the Standards of Service.

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?

- Strongly agree

⁵ [Victims' Code for Scotland - mygov.scot](https://www.mygov.scot/victims-code-for-scotland)

- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Somewhat agree - Solicitors are required to plan and undertake their Continuing Professional Development (CPD) annually and to subsequently reflect and build upon their learning. Solicitors – particularly those engaged in court advocacy - should consider to what extent they need to undertake CPD that deepens their understanding and awareness of trauma and then complete such CPD, as necessary.

Justice sector stakeholders can support solicitors, and others in the sector, by adopting a trauma aware approach and, also, by offering frequent, high-quality, easy to access, low-cost learning across various formats (remote, hybrid, in-person etc). The Society, as the professional body for solicitors, currently provides a variety of trauma informed training programmes for court practitioners⁶.

We note that the NHS has produced The National Trauma Training Programme⁷ which includes a section relating to witnesses which is specifically aimed at Justice sector professionals. We are of the view that this could form the basis of a trauma informed aid for the profession.

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?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Neutral – We refer to our answer at question 17 above. We recognise that trauma awareness and trauma informed practice are increasingly seen as central to a fair justice system. Professionals who engage with the system require to understand these concepts and adjust their practice accordingly. The Society, as the professional body for solicitors, currently provides trauma informed training programmes for court practitioners⁸.

⁶ [Trauma informed training | Law Society of Scotland \(lawscot.org.uk\)](https://www.lawscot.org.uk/trauma-informed-training) and [Trauma-Informed Lawyer Certification Course | Law Society of Scotland \(lawscot.org.uk\)](https://www.lawscot.org.uk/trauma-informed-lawyer-certification-course)

⁷ [Trauma – national trauma training programme | NHS Education \(scot.nhs.uk\)](https://www.nhs.uk/trauma-national-trauma-training-programme) and [nesd1334-national-trauma-training-programme-online-resources_0908.pdf \(transformingpsychologicaltrauma.scot\)](https://www.nesd1334-national-trauma-training-programme-online-resources_0908.pdf)

⁸ [Trauma informed training | Law Society of Scotland \(lawscot.org.uk\)](https://www.lawscot.org.uk/trauma-informed-training) and [Trauma-Informed Lawyer Certification Course | Law Society of Scotland \(lawscot.org.uk\)](https://www.lawscot.org.uk/trauma-informed-lawyer-certification-course)

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

- Yes
- No
- Unsure

Please give reasons for your answer.

Unsure - The Society supported the recommendations of the Virtual Trials National Project Board in December 2021, subject to a number of caveats. It was, and is, essential that any system which is implemented provides for the effective participation of the accused and allows confidential communications between the accused and their solicitor. These are basic, fundamental rights without which a fair trial cannot take place.

The Society's support was also conditional on the authorities recognising the additional responsibility placed on defence solicitors, in terms of investment in resources, additional preparation and the dedicated time required for the trial itself. That had to be reflected in an additional payment until the summary criminal legal aid scheme.

There remain real, practical issues with the operation of virtual summary trials, which were identified in Sheriff Principal Pyle's report to the Lord President. The pilot which concluded in 2021 only managed to run a handful of trials. A large scale implementation would require the identified issues to be addressed.

One of the main arguments for virtual summary trials related to accommodation. The removal of social distancing requirements has lessened the pressure on the court estate, and with it the necessity for virtual alternatives. The Project Board's recommendation for a virtual domestic court was predicated upon it being an additional resource, rather than a replacement for in-court trials.

Virtual trials create additional demands (and costs) for participants. A large scale implementation will have resource implications and will require appropriate legal aid provision.

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?

Please give reasons for your answer.

We have no comment to make here.

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?

- Strongly agree
- Somewhat agree
- Neutral

- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Somewhat disagree – the Board’s recommendation was presented on the basis that the virtual court would represent an additional resource, rather than a replacement for existing traditional summary courts. If the model was implemented as an additional resource, then it may be appropriate for a specific category of cases (such as domestic cases) to be the primary focus, while retaining the option of in-person trials where appropriate.

The experience of the pilot which concluded in 2021 was that virtual trials generally required greater preparation and time than the in-person equivalents. It is simply not possible to run a virtual court with the sort of loadings that are regularly seen in summary trial courts.

As levels of business increase, solicitors often require to cover a number of summary cases on a single day. That is feasible when hearings take place in one or two courts in a specific building. Where one of those hearings is scheduled to take place virtually, and the solicitor is expected to participate from their office, matters are complicated enormously. An alternative would be for the court to provide rooms with appropriate facilities which would allow solicitors and their clients to participate in virtual hearings; but few court buildings are likely to have space for this.

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?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Neutral - Please see our answer to question 21 above.

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 the pre-recording of evidence of complainers of serious sexual offences?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer, including, if you disagree, what legislative change you consider is necessary.

Strongly agree – section 3 of the 2019 Act includes powers to extend the rules and if this is available, it should be utilised and the powers should be extended.

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 their evidence is to be provided to the court?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Somewhat disagree – We consider that Ground Rules Hearings (GRH) are, in theory, a useful tool however in reality they can become impractical. This is on the basis that practitioners have an agreed set of questions to use in the cross examination of a witness but, if the witness does not answer the questions in the manner expected or does not understand the question, things can quickly be derailed. We note from practice that during cross examination, practitioners may have to ask the same question in a few different ways for the witness to understand the meaning. We would submit that taking evidence necessarily requires a degree of latitude. At the GRH it may be more appropriate to “ring fence” the nature of the questioning e.g., questions relating to the specifics of what happened in a particular location or questions relating to the examination of reasonable belief (rather than the specific questions to be asked) so that practitioners remain focused on the line of questioning and do not stray into other areas.

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?

- Strongly agree

- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer. If you disagree, what legislative provision would you like to see?

Neutral – Trials are very difficult to schedule. There is always a risk that an accused person or essential witness will not attend. The focusing effect of the trial can lead to last minute changes of position. When trials start, they can take unexpected turns. Estimates of duration can turn out to be wrong. All of these considerations mean that courts are often heavily loaded. It is not uncommon for Sheriff summary courts to have ten or more trials allocated each day, even though there is little chance of actually hearing more than two or three.

During the pandemic, different arrangements had to be made. Fewer trials were listed in each court, with staggered start times. Witnesses were asked to attend only at the appointed time. Difficulties could arise – defence solicitors were often not made aware of the start time, and if an essential witness failed to appear, the court was unable to deal with any other business.

It is in nobody's interest for the court experience to be unpleasant. Trials should, ideally, start without delay. Adjournments due to a lack of court time should not happen as a matter of routine. Reducing the number of summary trials allocated to each court room would be a useful start.

In respect of solemn court cases, we are of the view that moves towards Visual Recorded Interview (VRIs) and Joint Investigative Interviews (JIIs) for complainers will assist in trauma informed practice as it will allow them the opportunity to give evidence prior to the trial diet. We note that all parties, but particularly complainers, will want cases to be progressed expeditiously.

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 are not aware of any legislative changes that would help to address the issues identified.

- In our view, a single point of access on the web from the start of the case being reported to Police until an appeal is finished would be best practice. There would, however, be challenges around the implementation of such a system. Additionally, the court process often appears complicated and confusing to complainers – without actual human interaction, there may be a risk of complainers misunderstanding information.
- We are of the firm view that allowing access to witness statements via this system would not be a good idea as there is no practical mechanism to restrict who can access them. This could provide an avenue of exploitation and manipulation of a complainer.
- The system as it presently exists provides for the COPFS to notify complainers where certain types of cases will not be prosecuted. We note that the complainer is advised by COPFS under the

Victims Right to Review scheme that they have a right to review this decision, however it is worthy of note that this scheme does not currently cover all types of cases⁹.

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?

We have no comment to make here.

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?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Somewhat agree - We believe the criminal position should be replicated within the civil courts. We consider that certain categories of case should only be pursued or defended if a solicitor is instructed i.e., removing the ability to self-represent. However, we are of the view that this should be a clearly defined list where there is a track record of problems arising due to the nature of the proceedings and the difficulties suffered by witnesses or opponents.

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

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

⁹ [Victims' Right to Review: report, Complaints Handling and Feedback: follow-up - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/documents/2018/06/20180613_Victims_Right_to_Review_report_Complaints_Handling_and_Feedback_follow-up.pdf)

Strongly agree - We can draw attention to a case where the victim of repeated rape was opposing the rapist's claim for contact with a child. Both had to appear in person at a Child Welfare Hearing without special measures. This should not happen and steps should be taken to ensure that it does not recur. See our answer to Q67.

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

We are of the view that it may be of benefit to place the onus on solicitors or in self representation cases, the parties, to notify the court at the outset (i.e., as soon as defences are lodged) that there may be a need for special measures, and if so, what measures may be most appropriate. Such notification (which should be capable of being made by email or, in due course, via Civil Online) may then prompt a procedural hearing to:

- a) deal with any self-representation issue and,
- b) deal with special measures that may be needed.

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

- Yes
- No
- Unsure

Please give reasons for your answer.

Yes - The requirement to lodge a defence statement was introduced by the Criminal Justice and Licensing (Scotland) Act 2010, as part of the statutory disclosure framework. That legislation codified the obligation on the Crown to disclose information that formed part of the evidence in the case, materially undermined the Crown case, or materially supported the defence case. To determine whether information met that test, it was necessary to know what the defence case actually was; hence the need for a defence statement following the service of an indictment.

The purpose of the defence statement is seen in s.128 of the 2010 Act, which permits the accused to apply to the court for a ruling on disclosure. That can only happen where a defence statement has been lodged (and therefore only after an indictment has been served). The court will then make a ruling based on the grounds specified in the application but informed by the terms of the indictment and the defence statement.

In the Dorrian review of 2021, the Lord Justice Clerk commented that 'defence statements tend to be vague, anodyne, and often lodged late'. We consider that there can be considerable advantage in submitted a detailed and comprehensive defence statement. It can support legitimate complaints about failures in disclosure, arguments made in preliminary minutes and submissions about further procedure.

The Lord Justice Clerk argues for a 'more exacting requirement on the accused to provide a meaningful defence [statement],' which would 'enhance the court's current case management powers.' That is to be encouraged. It is in the interests of all participants in the court process for the court to focus on the issues and avoid unnecessary delay.

The statutory disclosure regime anticipates, however, that the Crown will discharge its disclosure obligations. The court is empowered (under s.128) to rule on whether a particular piece of information meets the disclosure test. But that is only likely to arise where the defence has been supplied with a disclosure schedule, listing all available information. Often that is not forthcoming, at least until later in the process. In some respects, at least, the ability to present a comprehensive defence statement will depend upon disclosure having been completed by the time the indictment is served.

We do not support, however, any suggestion that the English rules on defence statements should be imported. It is understood that the English legislation allows adverse inferences to be drawn where a defendant fails to lodge a defence statement timeously or leads a defence not anticipated therein. Such provisions have no place in the Scottish criminal justice system.

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 are of the view that it would be useful to consider the defence statement requirements as part of a wider review of the operation of disclosure in criminal cases. As things stand, there is no statutory right to apply for a disclosure ruling until after service of an indictment, despite the disclosure obligation starting at the point of first appearance. Greater clarity on the stage at which disclosure schedules should be intimated would also assist.

The current legislation (s.70A of the Criminal Procedure (Scotland) Act 1995, as amended) already sets out the required content of defence statements:

- (a) the nature of the accused's defence, including any particular defences on which the accused intends to rely,
- (b) any matters of fact on which the accused takes issue with the prosecution and the reason for doing so,
- (c) particulars of the matters of fact on which the accused intends to rely for the purposes of the accused's defence,
- (d) any point of law which the accused wishes to take and any authority on which the accused intends to rely for that purpose,
- (e) by reference to the accused's defence, the nature of any information that the accused requires the prosecutor to disclose, and

(f) the reasons why the accused considers that disclosure by the prosecutor of any such information is necessary.

A compliant defence statement should not, therefore, be 'anodyne' or 'vague.' Preliminary hearing Judges could be more exacting in their expectations of those appearing before them, while understanding the practical difficulty that can be caused by difficulties in disclosure and, in some cases, securing detailed instructions.

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

No. Reference is made in the answers to questions 31 and 32 above.

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

Please give reasons for your answer.

a – We are of the view that all complainers of sexual offences should be afforded the automatic right to anonymity. We consider that this should apply from the initial allegation regardless of whether this takes the form of a formal report made to a police officer or an informal disclosure made to another individual.

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

- 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 – please provide details

Please give reasons for your answer.

a, b & c – The purpose of anonymity is to remove some of the barriers which dissuade complainers from reporting allegations of a sexual nature. These barriers arise due to the specific nature of the offending itself, not the alleged act. It is the sexual nature of the offending which leads to complainers feeling

retraumatized and, in turn, prevents them from reporting. Sexual offending encompasses a wide range of crimes. We contend that all complainants of sexual offending should be afforded the same protection. In our view it would seem nonsensical to afford anonymity to only one category of persons when the issue it is seeking to address affects complainants across the sexual offences spectrum.

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

- a) upon the death of the complainant
- b) no automatic end point
- c) other - please provide details

Please give reasons for your answer.

b - There does not appear, in our view, any strong justification as to why the right to anonymity should automatically end upon the complainant's death. We consider that if the principle behind anonymity is to preserve the complainant's dignity, anonymity should therefore exist in perpetuity. If a person wishes to name a complainant of a sexual offence following their death then an application should be made to the court outlining the justification for setting aside that right and seeking approval from the court to do so.

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

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Somewhat agree – We are of the view that failing to allow complainants of sexual offences to unilaterally waive their right to anonymity would disadvantage them in comparison to complainants of non-sexual offending.

Question 38: If complainants 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 complainant
- b) following an application to the court by the complainant
- c) other – please provide details

Please give reasons for your answer.

Unilaterally by consent of the complainer – We consider that an application to the court to waive anonymity would be an unduly cumbersome process which complainers for non-sexual offending are not subject to.

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

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Somewhat agree – We consider that children of 16 and above should be able to set aside the right to anonymity. The preference would be for only those over the age of 18 to waive their right to anonymity however given the age of consent is 16 it would make sense for the ages to align.

Question 40: If children are to be given a 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?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Strongly agree – As stated at question 39 above, we are of the view that children under the age of 16 should not be able to waive their right to anonymity. However, if the legislation ultimately permitted those under 16 to do so, there should be judicial oversight to ensure the child fully understands what waiving the right to anonymity means and can appreciate the potential consequences of that action. Children of 16 and over should be able to unilaterally waive their right to anonymity without judicial oversight.

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

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree

- **Strongly disagree**

Please give reasons for your answer, including (if you agree) what you think this age should be.

Strongly agree - The minimum age for children to set aside their right for anonymity should be 16 to align with the age of consent.

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

- **Strongly agree**
- **Somewhat agree**
- **Neutral**
- **Somewhat disagree**
- **Strongly disagree**

Please give reasons for your answer, including (if you agree) your view on the circumstances in which this power should be available.

Somewhat agree - Whilst it is difficult to envisage this being a regular occurrence there may be circumstances in which it is thought to be in the public interest to waive the right to anonymity. The power should be exercised if it is in the public interest do so and having considered the possible impact upon the complainer the balance is tipped in favour of the public interest.

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?

- **Strongly agree**
- **Somewhat agree**
- **Neutral**
- **Somewhat disagree**
- **Strongly disagree**

Please give reasons for your answer.

Somewhat agree, assuming that what is anticipated by the question is the complainer being convicted of an offence that implies their original complaint was knowingly false.

In such cases, it will generally be in the public interest for their anonymity to expire. However, we consider the final decision should be for the sentencing judge. There may be factors (such as mental illness, evidence of coercive abuse, etc.) which, exceptionally, justify the continuation of the anonymity. The sentencing judge will be best placed to determine the issue.

Question 44: Which one of the following best reflects your view of the level of maximum penalty that should apply to a 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 - please provide details

Please give reasons for your answer.

Up to 2 years imprisonment and/or an unlimited fine – A deliberate breach of the right of anonymity can amount to a serious attack on the administration of justice. It may also have a far reaching impact on a complainant, and the victims of crime more generally. In such circumstances, prosecution on indictment may be appropriate. The court should have the ability to mark the seriousness of such conduct with a meaningful custodial sentence.

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

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Somewhat agree – We consider that placing the defence(s) on a statutory basis would provide clarity regarding the situations in which a defence can be proffered. For example, in cases where the complainant had waived their right to anonymity.

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) that should operate? Please select all that apply.

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

Please give reasons for your answer.

Adopt the model of the 1992 Act in England, Wales and Northern Ireland - The defences contained at section 5 of the 1992 Act¹⁰ place the onus on the person who breaches the complainant's right to anonymity to obtain written consent waiving that right, prior to the publication. Given that in our view, complainants

¹⁰ [Sexual Offences \(Amendment\) Act 1992 \(legislation.gov.uk\)](https://legislation.gov.uk)

should be allowed to waive their right to anonymity without judicial intervention, we suggest that the requirement for written consent should not be required here.

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?

We have no comment to make here.

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?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Strongly agree - There are two strands of argument that support the introduction of Independent Legal Representation (ILR) for complainers in section 275 hearings. In the first instance, whilst not every section 275 application will engage a complainer's Article 8 right to private life under the European Convention on Human Rights, it is fair to say that most applications are likely to do so^{11 12}. It does not follow that there should be an automatic entitlement to representation as a result¹³ as set out in the judgment of RR against Her Majesty's Advocate (HMA) and LV but given that this is an area of practice that has frequently led to difficulties at first instance, in so far as the proper application of the law is concerned for example as set out in Macdonald v HMA¹⁴ and CJM (no 2) v HMA¹⁵, it therefore seems reasonable to amend criminal procedure in the relatively minor manner envisaged, to ensure that all those who participate in the criminal process have their rights protected (in this respect see too the Victims and Witnesses (Scotland) Act 2014).

The second argument is premised on the fact that it is evident that the potential introduction of sexual history and character evidence causes witnesses in sexual offence trials a considerable degree of distress. The introduction of ILR could go some way to ensuring that complainers and witnesses are informed independently and accurately of their rights under section 274¹⁶ and 275 of the Criminal Procedure (Scotland) Act 1995¹⁷, and of other matters relating to the subsequent trial. The suggestion that COPFS can and should perform this function has some weight, but equally we would note that the role of the COPFS is to prosecute crimes in the public interest and thus there are other considerations they quite

¹¹ [Microsoft Word - ILR Report Final Version June .docx \(ed.ac.uk\)](#)

¹² [Improving-the-management-of-Sexual-Offence-Cases.pdf \(scotcourts.gov.uk\)](#) at page 7, 19 and 81

¹³ [2021hcjac21.pdf \(scotcourts.gov.uk\)](#)

¹⁴ [Macdonald v HM Advocate - Case Law - VLEX 851140242](#)

¹⁵ [C.J.M. v. HER MAJESTY'S ADVOCATE \(scotcourts.gov.uk\)](#)

¹⁶ [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#)

¹⁷ [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#)

rightly need to bear in mind when it comes to an application under section 275. Further, it should be acknowledged that the COPFS also requires to seek the court's permission to introduce evidence prohibited under section 274 including evidence relating to character and sexual history of the complainer. There is, in our view, the potential for a clear conflict of interest in such instances following the procedure introduced in RR against HMA¹⁸ where the COPFS require to take a complainer's views on a section 275 application and convey these views to the court. We consider that ILR for complainers would alleviate this problem.

Finally, we answer this question on the understanding that a section 275 hearing is a discrete part of the criminal process at which the court operates within set parameters, to reach a decision on a question of law (whether evidence and or cross-examination is relevant at common law and whether it satisfies the tests outlined in section 275 of the 1995 Act). We consider that introducing ILR in this context and not as a free standing right would not in any significant degree impugn the adversarial system of proof. Indeed, this mirrors what already occurs in practice at commission and diligence hearings in Scotland when a complainers' sensitive records are sought such as in WF v Scottish Ministers & JR¹⁹. Further, the present situation whereby a complainer is entitled to legal advice and representation in respect of commission and diligence hearings concerning a specification of documents seeking sensitive records but not section 275 hearings can lead to a degree of professional difficulty for those acting. Often the two processes are closely related (and call at the same time in court), complainers naturally receiving advice in respect of the former, wish to ask questions relating to the latter. We propose that the introduction of ILR in respect of section 275 hearings would alleviate this difficulty.

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?

- **Strongly agree**
- **Slightly agree**
- **Neutral**
- **Slightly disagree**
- **Strongly disagree**

Please give reasons for your answer.

Strongly agree – In our submission, it follows logically that if one wishes to introduce a legal right at first instance for complainers to be heard and make submissions on whether a section 275 hearing is granted, that such a party should also be granted the right to appeal. This is especially true given that as far as the complainer is concerned, any right of appeal post-trial is redundant as the evidence in question has already been led. The provisional framework mapped out by Keane and Convery²⁰ and by Lady Dorrian in her March 2021 report²¹, appears to us to make sense. In respect of solemn matters, we consider that leave

¹⁸ [2021hcjac21.pdf \(scotcourts.gov.uk\)](#)

¹⁹ [WF FOR JUDICIAL REVIEW OF A DECISION OF THE SCOTTISH MINISTERS TO REFUSE TO MAKE A DETERMINATION FOR LEGAL AID UNDER SECTION 4\(2\)\(C\) OF THE LEGAL AID \(SCOTLAND\) ACT 1986 \(scotcourts.gov.uk\)](#)

²⁰ <https://www.law.ed.ac.uk/sites/default/files/2020-09/ILR%20Report%20Final%20Version%20June%200%20-%20Acc.pdf>

²¹ [Improving-the-management-of-Sexual-Offence-Cases.pdf \(scotcourts.gov.uk\)](#)

should be sought from the trial Judge in the first instance by way of oral motion, in a manner consistent with any appeal concerning a preliminary matter under section 74 of the Criminal Procedure (Scotland) Act 1995 and para 9A_6 of the Act of Adjournment (Criminal Procedure Rules) 1996. Where leave is refused at first instance by the presiding Judge, then the complainer should also be entitled to seek leave to appeal from a superior appellate court (the Sheriff Appeal Court of the High Court sitting in an appellate capacity).

Leave in this respect should be sought expeditiously but again there is likely to be a significant period of time between the calling of the section 275 hearing (calling in most instances at a Preliminary Hearing) and an assigned floating trial diet in which evidence shall be led, in order to determine any such appeal.

We consider the position in respect of summary criminal procedure is less straightforward. The appellate infrastructure in that respect is ill defined. We would suggest that thought should be given to a clear statutory framework for appeals in this context in summary matters, which could largely mirror the process followed in respect of section 74 appeals²². Leave should be sought at first instance from the Sheriff determining the application (which in the usual run of things should be at an intermediate diet) and thereafter from the Sheriff Appeal Court.

In both instances, section 275 applications should rightly be determined in the vast majority of cases at pre-trial stage. In both instances the test for granting leave should mirror pre-existing criminal appellate jurisdiction thresholds in Scotland i.e., whether the grounds advanced are arguable.

The grounds of appeal for complainers should mirror those available to the COPFS and Defence generally in so far as section 275 applications are concerned²³, namely, where the appeal relates to an exercise of discretion by the trial Judge, it would require to be shown that the exercise of discretion was unreasonable, not merely that another decision could have been reached on the application. Where the appeal relates to an error of law, it should require to be shown that the first instance Judge has erred in law.

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)?

- Strongly agree
- Slightly agree
- Neutral
- Slightly disagree
- Strongly disagree

Please give reasons for your answer.

Slightly agree - The complainer should have a right to Independent Legal Representation (ILR) at an appeal by any party in respect of a decision on a section 275 application, where that appeal is argued in

²² [Criminal Procedure \(Scotland\) Act 1995 \(legislation.gov.uk\)](#)

²³ [BARRY JAMES DUNNIGAN v. HER MAJESTY'S ADVOCATE \(scotcourts.gov.uk\)](#)

advance of the trial and evidence being led. The logic of this approach follows from our answer to question 49 above given that the decision made is likely to have a clear effect on their Article 8 rights.

In respect of a post-conviction appeal by the appellant premised on a miscarriage of justice arising as the result of a judicial determination of a section 275 application, there is in our view a much less compelling case for the complainer to be represented. The court will determine the appeal on the basis of an analysis of the appellant's and Crown's submissions in light of a report from the first instance Judge and any prior interlocutors and evidence relating to the matters pertinent to the appeal. In this context, the complainer's position relating to the section 275 application should be adequately recorded in the paperwork. It would seem to be unnecessary that they are given standing in respect of the defence appeal as a result. There is a clear distinction in our view between pre and post-trial appellate proceedings in so far as the complainer's interests are concerned.

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?

- Strongly agree
- Slightly agree
- Neutral
- Slightly disagree
- Strongly disagree

Please give reasons for your answer.

Strongly agree - Whilst we suspect such instances are limited, there is no rational basis to argue against introducing ILR in this context. All of the above arguments re the introduction of the right generally apply to late applications after the start of the trial. Thought would require to be given as to how representation could be expeditiously organised in this context, and it is true that the introduction of a right here may somewhat delay the progression of trials. However, that is not a sufficient reason to curtail the right, in our view.

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?

- Strongly agree
- Slightly agree
- Neutral
- Slightly disagree
- Strongly disagree

Please give reasons for your answer.

Strongly agree - It is essential that those who require independent legal representation are able to access it. That requires the availability of public funding to ensure compliance with the European Convention on Human Rights.

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?

- a) under civil ABWOR
- b) under criminal ABWOR
- c) other – please provide details

Please give reasons for your answer.

Other - The likelihood is that most solicitors offering independent legal representation to complainers will be those who ordinarily practice in the criminal courts. Funding such work under the civil ABWOR scheme may create issues around registration and insurance. Our view is that it should come under the umbrella of criminal legal assistance. That may require legislative change, as criminal legal assistance is generally only available to accused persons. We consider that there should not be an eligibility threshold pertaining to matters such as the inability to present submissions without legal assistance, dependent upon a grant of legal aid in this area. This is a complex area; we consider that complainers would not be able to adequately understand the legal framework governing the grant or refusal of a section 275 application without legal assistance.

Ideally, ILR could be funded through a bespoke scheme, akin to that recently introduced for police station advice. Cover (with a sensible cost limit, beyond which advance authority would be required) would be available immediately, without the need for a complicated application process. Given the very tight timescales that would apply, avoiding delay will be critical.

Such cover should not be means tested. Means testing would build in delay; act as a disincentive to complainers seeking advice; and may well cost more to administer than it would save.

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?

- Strongly agree
- Slightly agree
- Neutral
- Slightly disagree
- Strongly disagree

Please give reasons for your answer.

Slightly disagree - Complainers clearly need to be given sufficient time to contact and engage an independent solicitor, and where appropriate have representations prepared and lodged on their behalf. At a practical level, however, it is difficult to see how the time limit for lodging section 275 applications can be accelerated, dependent as it is on the service of the indictment (and, practically, on the disclosure process being completed). In our view, a potential solution in this respect appears to be the guarantee of an appropriate pool of legal professionals undertaking this work, within the parameters of an efficient system of intimation of applications, backed up by appropriate funding. We do note however that there are clearly wider structural issues relating to the legal aid sector generally that impinge upon whether that is possible.

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?

We are of the view that thought requires to be given in respect of the introduction of a system which ensures that section 275 applications are appropriately intimated upon complainers along with information informing them of their right to assistance. In our view, either COPFS or SCTS needs to have clear responsibility for the intimation of such information to complainers. We consider that SCTS could perhaps take the lead here as they have done in sensitive records cases.

Solicitors providing advice to complainers will need to see certain documents, including the indictment (including any docket), section 275 application and the complainer's statement. The complainer is unlikely to have at least some of these. COPFS needs to be in a position to quickly respond to requests for these documents to be provided.

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?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Neutral – We disagree with the proposal for an all-Scotland specialist sexual offences court which sits outwith the existing court structure. We note that specialist courts already exist within the justice system. Many jurisdictions across the country currently operate specialist courts within the existing framework of the justice system. For example, the domestic abuse court (in Glasgow and Edinburgh Sheriff Courts) and the youth courts (in Hamilton Sheriff Court and elsewhere) operate within the sheriff courts. On the civil side, many sheriff courts operate specialist family, children's referral and commercial courts. There are similar examples in the Court of Session. 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 downside 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.

Question 57: To what extent do you agree or disagree that, if a new specialist sexual offences 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?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Strongly disagree – see question 56 above. Our firm view is that if a specialist sexual offences court is created it should exist within the framework already in place.

In the Society's view, there is no justification for the introduction of a completely new forum. It would add an additional layer of complexity and bureaucracy. It would involve considerable cost. Money would be far better spent on practical improvements which would improve the experience for all court users – such as investment in centres like Atlantic Quay in Glasgow, where complainers can have their evidence pre-recorded.

One issue not addressed by the consultation document is who would have rights of audience in the separate court. Given that the court would take sexual offence cases that would otherwise be prosecuted in both the sheriff court and the High Court, the implication is that only advocates and solicitor advocates would be permitted to appear. That would remove the ability of solicitors without extended rights being able to represent their clients in cases currently prosecuted at sheriff and jury level. Given the current pressures on the criminal justice system, there has to be real doubt over whether it could cope with such a fundamental change. A streamlined system would have no chance of working effectively if there were not sufficient prosecutors and defence counsel to participate in it.

There would also be concern about the message that would be sent to complainers if cases were taken out of the High Court (with unlimited sentencing powers) and moved to a separate court (restricted to

sentences of ten years' imprisonment or less). It would suggest that sexual crimes are less important than others.

Some cases involve a mix of sexual and non-sexual offending. Existing specialist courts (such as domestic or commercial courts) are well used to dealing with hybrid cases. Cases can be moved in or out of the specialism without great difficulty, as they are conducted under the umbrella of a single court. That process would be more difficult with an entirely separate forum.

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

- a) within the High Court
- b) within both the High Court and the Sheriff and Jury Court
- c) other – please provide details

Please give reasons for your answer.

N/A – We query whether this question has been worded incorrectly and should, in fact state, “if you agree...”

We disagree with the proposal for an all-Scotland specialist sexual offences court which sits outwith the existing court structure.

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)?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

The principle of *ne bis in idem* requires, where possible, all related matters to be dealt with in a single process. Splitting an indictment would increase cost and complexity. It would introduce unnecessary uncertainty and delay. It would create the risk of public confusion. Charges may in any event be closely related, meaning separation was impractical, or leading to evidence being replicated (with the possibility of different conclusions) in different processes. None of that is appropriate.

A specialist court operating within the existing court framework could determine whether the whole indictment was better dealt with inside or outside the specialism. A test could be developed to inform that decision. Courts are used to dealing with such issues: see, for instance, the test for whether an action

should be dealt with by the commercial court as set out in the Court of Session Rules at 47.1²⁴. There would be no reason why non-sexual charges could not also be dealt with in the specialist court. That would be considerably more problematic in the case of an entirely separate forum.

We are of the view that indictments and cases should not be divided between two processes. We are of the view that there would be practical issues arising from doing so.

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?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

N/A – see question 59 above.

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?

- a) unlimited
- b) other – please provide details

Please give reasons for your answer.

N/A – see question 59 above.

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?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

²⁴ [CHAPTER 47 \(scotcourts.gov.uk\)](http://scotcourts.gov.uk)

N/A – see question 59 above. Further we are of the opinion that this proposal should not lead to a de facto increase in the sentencing powers of Sheriffs.

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

- a) sheriffs only
- b) High Court judges only
- c) other – please provide details

Please give reasons for your answer.

N/A

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?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Strongly disagree – See answer 57 above.

As the professional body for over 12,000 Scottish solicitors, we have concerns that placing mandatory additional training on legal practitioners is straying outwith the bounds of policy in this area which could have significant practical implications for the profession which have not been fully considered. We would request clarification on whether the proposed restriction is intended to apply only to the advocates who appear, or whether this proposal is also intended to cover those instructing them. We would caution that these proposals would have a direct impact on resources which are already significantly stretched.

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?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer, including any specific training requirements that you think should be introduced.

Strongly disagree – As the professional body for over 12,000 Scottish solicitors we have concerns that placing mandatory additional training on legal practitioners is straying outwith the bounds of policy in this area which could have significant practical implications for the profession which have not been fully considered. We note that solicitors are required to plan and undertake their Continuing Professional Development (CPD) annually and subsequently reflect upon their learning. Solicitors, particularly those undertaking court advocacy roles, should consider to what extent they need to undertake CPD that deepens their understanding and awareness of trauma and then complete such CPD as necessary.

Justice sector stakeholders can support solicitors, and others in the sector, by adopting a trauma aware approach and, also, by offering frequent, high-quality, easy to access, low-cost learning across various formats (remote, hybrid, in-person etc.)

We are of the view that issues relating to training and professional standards are a matter for the Society. The proposals set out in this area have implications that would apply much more widely than to sexual offences only. We would further state that proposals in this regard should set out in clear detail what they will involve.

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

N/A

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?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

Please give reasons for your answer.

Strongly agree – 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 US, 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*²⁵).

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 judiciary 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 US that showed harsher sentences were imposed in cities where the local sports team had just suffered a bad result. Sentencing decisions

²⁵ [18-5924 Ramos v. Louisiana \(04/20/2020\) \(supremecourt.gov\)](#)

²⁶ [2021--diversity-stats-scotland.pdf \(judiciary.scot\)](#)

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
- Belief in rape myths
- Anecdotal accounts by senior judges
- Reasons for verdicts
- Reducing disruption for jurors

We will set out our views in relation to each of these issues below.

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 Leverick²⁷, 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.

²⁷ [What do we know about rape myths and juror decision making? - Fiona Leverick, 2020 \(sagepub.com\)](#)

But this, it is argued here, is the way forward before more radical measures are considered, alongside well-funded research that is able to rigorously assess the effectiveness of such interventions.²⁸

We would echo this considered view.

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.

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

N/A, however we welcome further research in this area before changes are made to the justice system.

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?

- Strongly agree
- Somewhat agree
- Neutral
- Somewhat disagree
- Strongly disagree

²⁸ [What do we know about rape myths and juror decision making? - Fiona Leverick, 2020 \(sagepub.com\)](#)

Please give reasons for your answer.

Strongly disagree - See answer 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 serious sexual offences? Please select all that apply.

- a) removal of potential bias of the jury
- b) removal of concerns around rape myths
- c) greater efficiency of court process including reduced trial length
- d) improved court experience of the complainer
- e) greater public confidence in the decision making, including the application of legal principles
- f) other – please provide details
- g) I do not believe that judge-only trials convey any benefits for serious sexual offences

Please give reasons for your answer.

g – We do not believe that judge only trials convey any benefits for serious sexual offences. A jury trial process is designed to diminish the risk of prejudice by increasing the number of persons involved in the decision making process. This is a strong argument against single judge trials in any serious case.

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
- b) lack of diversity reflected in the pool of decision makers
- c) removal of civic participation in the criminal justice system
- d) undermining the use of juries for non-sexual offences
- e) other – please provide detail
- f) I do not have any concerns

Please give reasons for your answer.

Please read the following with reference to answer 67.

a, b, c, d & e – In our view, all sections of society are represented in juries – sex/genders, racial groups, socio economic backgrounds, varying levels of education and training, ages, life experience, etc. That is not reflected by the judiciary in Scotland, which 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%)²⁹.

We also submit that the removal of juries for sexual offences may lead to people questioning why juries are still being utilised in other cases. This in turn may lead to less engagement from potential jurors when they receive a citation to appear for jury duty. We would also strongly caution that removing juries in sexual offences cases may also lead to those cases being perceived as less serious than other matters tried by solemn procedure.

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
- b) specific training for judges
- c) other – please provide details
- d) none, I don't think there are any safeguards that could be put in place

Please give reasons for your answer.

a and b - Specific training for Judges may mitigate the risk of unconscious bias however that does not address the other issues noted in the answers given previously.

Written judgments would, in our view, be essential in judge-only trials for compatibility with Article 6 of the European Convention on Human Rights. We submit that the absence of reasons from a jury seems only to be compatible with article 6 because it is inherent in the system in a way that is not true for judge-only trials³⁰.

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?

We note that here is the potential for additional research further to that undertaken. Mock jury research is possible (but expensive) and subject to the criticism that it does not accurately reflect the trial process. Research with real jurors (which has its own limitations) would add to our collective knowledge about how juries operate in serious sexual offence cases but would require legislative amendment. There is recent research by Professor Elisabeth McDonald in New Zealand³¹ which provides a potential model for how such a research project could operate.

Consideration could be given to carrying out research in which a jury and a Judge are asked to hear the same case. Both would then be asked to provide a verdict and reasons for that verdict. The limitation of

²⁹ [2021---diversity-stats-scotland.pdf \(judiciary.scot\)](#)

³⁰ [European Convention on Human Rights \(coe.int\)](#)

³¹ [In the absence of a jury \(online\)-G10.pdf \(canterbury.ac.nz\)](#)

this however is it would require to be carried out using mock cases and so some of the criticisms of existing jury research would remain.

We note that Lady Dorrian's review³² refers (at para 5.7) to some judges having concerns about certain acquittals in rape cases.

One possibility here is research into what is sometimes referred to as "split verdicts," which has been carried out in the US and (to a very limited extent) in Scotland before. It is possible in principle to carry out research where Judges are asked for their views on cases they have presided over – either by being asked to record their own view on the verdict before the jury returns theirs, or by being asked subsequently if they agreed with the verdict. That view would of course have to remain completely confidential; only aggregate data could be analysed. Research of this sort could quantify the extent to which juries are returning verdicts which Judges doubt and identify whether this is a particular problem in certain types of cases; that could in turn potentially lead to reforms targeted at those specific cases short of moving to judge only trials.

This sort of research avoids many of the problems with mock jury research, but still has limitations: the Judge knows, of course, that their view on the case has no consequences for the actual disposal. They therefore would not be engaging in the type of reflection and consideration they ordinarily would in producing a written verdict, in the course of which their views might change. If it were undertaken, it would have to be framed in such a way as trying to identify the types of cases which were particularly problematic rather than as trying to establish the "correct" conviction rate.

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 could operate?

We express significant concerns about whether it is ever proper to run a pilot in such circumstances. The point is surely to test whether such a system would be a fair and appropriate way to deal with criminal trials; yet by running real trials in this way fairness is assumed.

This system would necessarily require to be "opt in" for the accused and we would query whether solicitors would advise their clients to participate in such a pilot.

Regardless of the selection process there would, in all likelihood, be opposition from both sides in the criminal justice system - those involved in the pilot cases, and those involved in jury trials for rape during the pilot, that there has been unfairness which in turn may affect public perception. This position is, in our view, contrary to the objectives of the proposals.

Given this position, we consider any proposed pilot to be unworkable.

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

³² [Improving-the-management-of-Sexual-Offence-Cases.pdf \(scotcourts.gov.uk\)](#)

We submit that if there is a concern that juries are failing in their duties, a valid solution here would be for the COPFS to implement an appeal on the basis of a miscarriage of justice in that “no reasonable jury properly directed would have returned a verdict of acquittal.” The appeal would have to be lodged within the usual statutory time frame. The remedy would be the quashing of the acquittal and an order for a re-trial. There would be a restriction that the appeal could only be made once i.e., an acquittal at re-trial could not be appealed on this ground as effectively a second jury has confirmed the original verdict. We recognise this potentially prolongs the criminal justice process but note that this process could resolve the concerns over “rogue” jury decisions unless there is a basis to suggest that two juries in succession would likely return the same “rogue” verdict.

Question 77: Do you have any views on potential impacts of the proposals in the chapters of this consultation on human rights?

- Yes
- No
- Unsure

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

We have no comment to make here.

Question 78: Do you have any views on potential impacts of the proposals in the chapters of this consultation on equalities and the protected characteristics set out above?

- Yes
- No
- Unsure

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

We have no comment to make here.

Question 79: Do you have any views on potential impacts of the proposals in the chapters of this consultation on children and young people as set out in the UN Convention on the Rights of the Child (UNCRC)?

- Yes
- No
- Unsure

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

We have no comment to make here.

Question 80: Do you have any views on potential impacts of the proposals in the chapters of this consultation on socio-economic equality?

- Yes
- No
- Unsure

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

We have no comment to make here.

Question 81: Do you have any views on potential impacts of the proposals in the chapters of this consultation on communities on the Scottish islands?

- Yes
- No
- Unsure

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

We have no comment to make here.

Question 82: Do you have any views on potential impacts of the proposals in the chapters of this consultation on privacy and data protection?

- Yes
- No
- Unsure

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

We have no comment to make here.

Question 83: Do you have any views on potential impacts of the proposals in the chapters of this consultation on businesses and the third sector?

- Yes
- No
- Unsure

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

We have no comment to make here.

Question 84: Do you have any views on potential impacts of the proposals in the chapters of this consultation on the environment?

- **Yes**
- **No**
- **Unsure**

Please provide details, making reference to the specific proposal or proposals to which your comments relate.

We have no comment to make here.