FACULTY OF ADVOCATES

RESPONSE ON BEHALF OF THE FACULTY OF ADVOCATES

IN RELATION TO

THE SCOTTISH GOVERNMENT CONSULTATION ON IMPROVING VICTIMS' EXPERIENCES OF THE JUSTICE SYSTEM

Foreword:

Faculty notes that a consistent difficulty which arises with terminology in this area is the tension between labelling people the 'victims of crime' and the fundamental legal concept of the presumption of innocence.

In some crimes the state of victimhood is undoubted, and it is simply a question of identifying the perpetrator(s). In many cases though, especially sexual charges, the assertion of criminality is itself in doubt until a court has issued a verdict. The courts refer to people who allege criminal treatment as 'complainers' because nominating them as 'victims' cannot lie alongside a genuine presumption of innocence.

It is the experience of members of Faculty that judges understand this perfectly well and choose their language appropriately. Politicians may sometimes exhibit a lack of appreciation of the important distinction, which perhaps gives rise to the sense that they wish to undercut or invert the presumption of innocence.

In those disputed cases, once a conviction is in place it is obviously correct to speak of victims and survivors. Premature status nomination can communicate the sense that mere lip service is being paid to the presumption of innocence, which is likely to be erosive of public confidence in our courts.

While the presumption of innocence remains a foundation of our system of criminal justice, Faculty expresses the hope that care is taken in terminological choices, in order that political respect is displayed to the criminal justice system itself.

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Throughout our response we respect the spirit of the consultation and use the terminology of 'victim' without further or repeated comment but we ask that our view is borne in mind.

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

    a. **Answer:** Strongly agree

    b. **Reasons:** Faculty considers that independence breeds public confidence and trust. The Victims' Commissioner ("VC") will have an important part to play in raising issues, supporting some government and non-government proposals and challenging others. A lack of formal independence from the Scottish Government ("SG") would undermine public confidence in the role, at a time when public confidence in politicians seems at a low ebb.

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

    a. **Answer:** Strongly agree

    b. **Reasons:** Faculty considers that a sound statutory footing will yield defined limits to the role, both in terms of scope and powers. That will allow for both predictability and accountability, both of which tend to deliver greater trust in an important office.

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

    a. **Answer:** Strongly agree

b. Reasons: The Scottish Parliament is the democratic representation of the public, whose interests the VC would serve. Faculty considers that it would be the appropriate forum in which the VC is to be held accountable.

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

   a. Whilst Faculty considers that the Scottish Parliament is the correct forum in which the VC is to be held accountable, we note that the decision on the manner in which the VC is to be held accountable is one which is properly for the legislature to make. It may, however, be thought appropriate to have an annual report laid before the Parliament. The validity and credibility of the appointment requires annual scrutiny by the country's legislature.

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

   a. Answer: Raising awareness/ promotion of victims' interests and rights

   b. Reason: Faculty considers that this should be the central aspect of the VC's work. Each of the remaining three functions suggested in the consultation document would have relevance, being either implicit in the central function or incidental to it. We have more to say about trauma-informed approaches later in this response, with our concerns about its practicability in uniform application.

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

   a. Answer: The experience of victims in the criminal justice system

   b. Reason: Faculty considers that, of the four categories, this one towers above the rest. People who have been victims of crime, especially violent and sexual crime, are likely to have endured the greatest hardship and upset. Prioritising their experience appears to make the most sense. It is the experience of

Faculty that identifying 'victims' within the civil justice system isn't straightforward, unless they come to that system following events which began in the criminal justice system, in which case they will be included above. Faculty considers that this too would apply to the Children's Hearing system. The last option- for overseas offending- seems least relevant since whatever the VC decides to say about it would likely have little practical effect on some other country's criminal justice system.

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

    a. **Answer:** (a) The VC should have power to carry out investigations into systematic issues affecting victims of crime; and

    (c) the VC should have the power to make recommendations to the SG, criminal justice agencies and those providing services to victims.

    b. **Reasons:** Faculty does not include the power to compel testimony nor the power to command response to recommendations because we suggest that the VC should report to Parliament and then it is for Parliament to consider the need for compulsion of response.

8. **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?

    a. **Answer:** Somewhat agree

    b. **Reasons:** It is taken as read that the VC would be well informed and positively intentioned towards the plight of victims. It seems unlikely that there should need to be any formal requirement that they pay such attention. If there is a palpable failure in that regard then that will have consequences for the tenure of the VC in the ordinary course of events.

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

    a. **Answer:** (c) focused consultations with victims; and

    (d) *ad hoc* engagement with victims

    b. **Reasons:** Faculty considers that if we are to have a VC who is shielded from direct engagement with victims by intervening groups such as those referred to in (a) and (b) in the consultation paper, the public's trust and confidence in the VC could be compromised by the perception that vocal special interest groups dictate the agenda of this new public body. Direct interaction with victims promotes confidence in the views of the VC, since they would be seen to speak for victims themselves, rather than for special interest groups. The special interest groups would have an important role to play, but should not be seen to dominate the VC's role.

10. **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?

    a. **Answer:** No

    b. **Reasons:** Faculty considers that if certain groups are prioritised, the corollary is a diminution of importance of the remaining victims. This again risks public trust being diminished in the VC, if one or more special interest groups attain dominant status.

11. **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?

    a. **Answer:** Somewhat agree

b. **Reasons:** Faculty considers that it should be implicit in the role of the VC that they pay attention to important and well informed voices which exist in this sector. It is absurd to think that they would not, and that measures of compulsion are needed. As suggested in the afterword to the question, it should be left to the VC to determine how and with whom such consultation takes place.

12. **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?

    a. **Answer:** Faculty has no doubt that the relevance of other entities will be apparent to a well informed and positively intentioned VC.

13. **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?

    a. **Answer:** Somewhat agree

    b. **Reasons:** Faculty considers that, if individual case intervention was the norm, it would rob the role of VC of the important reassurance that they are motivated by the interests of the general public. They cannot become the champion of each and every victim, because that would render their task impracticable. As is recognised in the wording of the consultation paper, they should focus on systemic failings and promote general improvements. Such failings might be exemplified by particular cases but they plainly could not be defined on a case by case basis.

14. **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?

    a. **Answer:** Faculty notes that this is perhaps an opportune invitation to raise the importance of what we say in the foreword about recognising where the terms ‘victim’ and ‘complainer’ are most appropriately used in political discourse. Formal recognition within the publicity surrounding the creation of the VC would

help victims and complainers alike understand why and when the terms are used.

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

    a. **Answer:** Somewhat disagree

    b. **Reasons:** It is the experience of members of Faculty that within the confines of the criminal justice system, sheriffs and judges can be trusted to strike the correct balance in their courtrooms, once they have achieved an appreciation of what the term means. As understanding of these issues evolves, the governance of professionals who play a part in criminal trials will benefit from organic developments in professional regulation and appeal court guidance. There are issues of practicability in strict trauma-informed practice, most obviously where it conflicts with a legal system founded on the presumption of innocence. There is also a substantial issue with the not uncommon position of accused persons who are trauma-experienced themselves. A formulaic approach derived from statutory imposition would be very hard to create and deploy. Faculty considers that it is better that the professionals are allowed education in this field, corrected or improved by judicial intervention either at first instance or by the appeal court.

16. **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?

    a. **Answer:** Neutral

    b. **Reasons:** This is not a matter which directly affects Faculty and we consider that others are better placed to comment.

17. **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?

    a. **Answer:** Somewhat disagree

    b. **Reasons:** Faculty refers to the reasoning set out in our answer to Question 15.

18. **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?

    a. **Answer:** Somewhat agree

    b. **Reasons:** Faculty notes that our concern about practicability expressed in answer 15 again applies here. There exists a common law power for every judge to regulate the conduct of matters in their court. What is proposed here seems to us to be less a revolution and more an evolution of courts' existing attention to the wellbeing of witnesses and accused people. As such a formal requirement in the form of a 'duty' need not have expression in a statutory form. The judiciary can be trusted to modify and improve practitioners' approaches as required.

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

    a. **Answer:** No

    b. **Reasons:** Faculty acknowledges that summary trials are less our specialist business than solemn trials. Nonetheless we express an opinion. Faculty considers that convenience should not trump justness of outcome. Our general experience is that disassembling the solemnity of an appearance in court into a number of remote computer screen viewings tends to have the effect of reducing the appreciation of participants that this is a serious procedure with

grave consequences for untruthfulness or disobedience. In addition, evidence given remotely is rarely as powerful as evidence heard in person. During COVID, SCTS did very well in bringing back trials into a constrained public health arena. The public health backdrop tipped the balance of convenience in favour of these hearings but as it recedes, so the balance tips back in favour of 'in-person' courts.

20. **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?

    a. **Answer:** Not applicable

21. **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?

    a. **Answer:** Faculty acknowledges that others have more direct experience and input into this question, but subject to that and in line with what is said at 19 above, we strongly disagree.

22. **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?

    a. **Answer:** Strongly disagree

    b. **Reasons:** Faculty considers that the premise in the question requires comment. We understand that vulnerable witnesses and complainers often feel benefit from the reduction in stress that physical removal from court brings. The reduction in stress seems likely to improve the manner in which they can deliver their evidence. Beyond that, we would repeat the concerns that, in our substantial experience, removing people from the presence of the decision maker (whether judge or jury) tends to diminish the impact of their evidence. A

sense of unreality can creep in, as if we are watching a program about something, rather than feeling the power of live testimony. That tends to reduce impact, and logically must affect outcomes. Whether in the round the reduced stress of the witnesses yields more *effective* evidence, when set against the dilution of impact that remoteness brings is open to debate. The certainty of the opening line in the question seems to us questionable. With all of that said, Faculty identifies no additional benefits.

23. **Question 23:** The existing powers in the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 can be used to expand the categories of witnesses who are eligible under the Act to benefit from the presumption that their evidence be pre-recorded in advance of the trial. This includes evidence by commission and the use of a prior statement as evidence-in-chief, such as a Visually Recorded Interview. To what extent do you agree or disagree that these existing powers are sufficient to expand the use of pre-recording of evidence of complainers of serious sexual offences?

    a. **Answer:** Strongly agree

    b. **Reasons:** In practice, members of Faculty have encountered no situation in which the existing powers have thwarted an otherwise sensible adoption of special measures.

24. **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?

    a. **Answer:** Somewhat agree

    b. **Reasons:** Faculty considers that there is no obvious disadvantage to considering any variation of normal procedures required by that witness's individual requirements where they are known to exist. It is the experience of members of Faculty that it would be usual for the party whose witness it is (usually the Crown) to alert the court and the defence to the existence of

particular communication requirements, and that would be taken on board. That process could be adopted under the GRH banner at preliminary hearing stage without a great deal of modification.

25. **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?

    a. **Answer:** Strongly agree

    b. **Reasons:** It is the experience of Faculty that court scheduling must be appreciated as a demanding task in which perfection in the eye of every beholder is most often impossible to achieve. In the present situation of an ever shrinking defence Bar, both in the Sheriff Court and High Court, it will be increasingly common for displeasing scheduling problems to occur, often because there is no one available to take the case on at the prescribed date. Judges are well able to strike the balance between the competing interests and should be left to do so. We cannot see how it could be improved by legislation. It must remain the priority that justice is done and seen to be done, and where several parties have competing views on scheduling, it must remain a balancing exercise carried out with the skilled eye of a judge. Our appreciation is that the interests of accused and complainer often align in having an early trial, but courtroom, witness and professional availability will remain important issues.

26. **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

    a. **Answer:** We have no specific legislative proposals regarding the sharing of information. The current arrangements are adequately managed in practice.

27. **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?

a. **Answer:** Not at this point.

28. **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?

    a. **Answer:** Strongly agree

    b. **Reasons:** It is the experience of members of Faculty that this approach has served the criminal courts well and we identify no particular reason why it should not be transmitted to civil courts.

29. **Question 29:** To what extent to 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?

    a. **Answer:** Somewhat agree

    b. **Reasons:** Faculty appreciates that civil actions can give rise to high emotions in participants, such that minimizing the stress that comes with confrontation in such circumstances will have value to participants. It is the experience of Faculty, however, that unless a party is representing themselves, they may not always attend a procedural hearing.

    Faculty notes that reparation actions are increasingly being raised in the civil courts by complainers of rape, domestic abuse, or historic child abuse, and often child and family law proceedings will be inextricably linked with those types of criminal allegations. Hearings in civil matters - whether evidential or not - may require two parties who have been involved in criminal proceedings as complainer and accused to be in present in the same room. The availability of measures to alleviate stress of parties in such situations would be welcomed. Faculty considers that the enforcement of the pending Children (Scotland) Act 2020, ss-4-8 would go some way to addressing these concerns, though it is

noteworthy that those provisions are limited in that they only apply to certain Children's Hearings.

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

    a. **Answer:** Yes

    b. Faculty considers that there is scope for the definition of "deemed vulnerable" witnesses (rendering those witnesses automatically entitled to certain special measures), which is currently only applicable to criminal proceedings, to extend to other types of civil cases which involve - either directly or indirectly - similar types of alleged crime. Whilst it is acknowledged that this is a consideration reflected within the pending Children (Scotland) Act 2020 provisions, those would only be applicable to certain Children's Hearings and parental responsibility hearings involving allegations of specific crimes. Parties in other types of civil proceedings involving particularly sensitive or violent criminal allegations, such as reparation claims based on allegations of sexual offences, should be afforded the same entitlement to special measures as those in criminal proceedings. This would guard against arbitrary outcomes and unfairness to parties.

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

    a. **Answer:** Yes

    b. **Reasons:** Faculty considers that there is room for improvement in the amount of detail included in defence statements, and in sexual offence cases it may be helpful to have a question which asks whether (in consent defence cases) it is contended that there is 'a reasonable belief in consent' rather than or alongside an assertion of the existence of consent. This has an impact on the trial judge's role, and it seems likely that specification would be welcomed. Set against this is the difficulty arising from the decreasing numbers of defence practitioners in complying with the curiously demanding timescale for lodging these

documents. We suspect that they are most often lodged with the Written Records, which is two days before the preliminary hearing. This doesn't seem to cause any obvious problems, and it might be that moving the timescale towards the modern reality would make sense.

32. **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?

    a. **Answer:** Faculty suggests forming a working group composed of Crown, defence and the judiciary, with a view to proposing variations to the time limits (which would require legislation) and to the content (which would not).

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

    a. **Answer:** No.

34. **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. **Answer**: (d) when criminal proceedings for a sexual offence first call in court

    b. **Reasons:** While the question of whether to introduce an automatic right to anonymity for complainers in sexual offences cases, and how such anonymity should operate are policy matters which are properly for the legislature to decide, Faculty seeks to provide the benefit of its experience to those considering these matters.

    Faculty notes that practicability is important. The situation at c) represents a definite and identifiable point in time, recorded most likely by verifiable means, at which the police investigation has reached a meaningful conclusion. That makes it superficially attractive. Set against that is the limited ability of the public to know of this since it takes place in private, which is the factor which favours (d), the first appearance in court. That is a public event, identifiable with

some checking by would-be-publicists, and would thus allow the imposition of an obligation to be sure that such a point had not been reached before committing to publishing.

35. **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. **Answer:** Faculty does not express any views on this matter.

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

    a. **Answer:** b) Upon death

    b. **Reason:** This is an easily ascertainable point in time.

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

    a. **Answer**: Strongly agree

    b. **Reasons**: It is assumed that a complainer is in charge of their own life affairs, and this decision is theirs to make.

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

    a. **Answer:** Unilaterally by consent of the complainer

    b. **Reason:** As for 37 above.

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

    a. **Answer**: Somewhat disagree

b. Reason: Faculty considers that relinquishing anonymity is a serious and irrevocable step which regret cannot fix. It should be kept until they are of an age at which it is assumed they can take such decisions properly.

40. 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?

a. Answer: Strongly agree

b. Reason: Faculty refers to the reasons given above.

Faculty notes, however, that any child with a smartphone or other internet enabled device can publish their identity as the victim of a sexual offence to a wider audience than would be available to any Scottish newspaper. In practical terms, it is difficult to see how a child could be precluded from broadcasting to their immediate social circle, or a far wider audience, that they were the victims of a sexual offence. Faculty notes that it is unlikely that the legislature or the Crown would consider it appropriate to bring criminal proceedings against a child who unilaterally set aside their anonymity without there having been an application to the court. In these circumstances, Faculty notes that there may be little practical effect in requiring a child to make an application to the court.

41. 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?

a. Answer: Strongly agree

b. Reason: Faculty refers to the reasons given in answer to question 39 above.

42. 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?

a. **Answer:** Strongly agree

b. **Reason:** Faculty considers that the example given of a complainer who is subsequently convicted of an offence against justice itself is one in which we consider a court could rescind the anonymity. The basis would be that the public interest lies in making known their identity to allow people affected by it to consider remedies available to them in light thereof.

43. **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?

a. **Answer:** Somewhat agree

b. **Reason:** Faculty refers to the reasons given above, with the caveat that an intimation of intention to appeal should stay the expiry until the appeal process is concluded.

44. **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. **Answer:** Faculty considers that the maximum sanction to be applied for any breach of a right of anonymity is a policy matter which is properly for the legislature to consider.

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

a. **Answer:** Strongly agree

b. **Reason:** Faculty considers that strict liability in criminal offences should only be created in the most exceptional of circumstances.

46. **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. **Answer:** (a) Adopt the model of the 1992 Act in England, Wales, and Northern Ireland; and (b) a 'reasonable belief' defence.

b. **Reason:** Faculty has been unable to identify any particular issues in respect of these potential defences and considers that they strike the correct balance where strict liability offences are to be imposed. The model of the 1992 Act in England, Wales, and Northern Ireland also has the advantage of being a 'tried and tested' model.

47. **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?

    a. **Answer:** No.

48. **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?

    a. **Answer:** Somewhat agree

    b. **Reason:** Faculty considers that independent legal representation is likely to improve a complainer's understanding of how things are done and why. Improving that understanding is likely to lead to a realistic and informed appreciation of the probable outcome, and should facilitate greater levels of satisfaction and confidence in the court process.

49. **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?

    a. **Answer:** Strongly disagree

    b. **Reason:** Faculty notes that neither the accused nor the Crown have *a right* to appeal. They can apply for leave to appeal but that is commonly refused. Faculty considers that the complainer should not be put in a preferred position,

in a system where the accused is presumed to be innocent and has more at stake in the outcome than anyone else. If something appears to have gone awry at the Preliminary Hearing stage then the Crown can be trusted to seek permission to appeal.

50. 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)?

a. **Answer:** Slightly agree

b. **Reason:** For the reasons set out in answer to question 48 above, Faculty considers that improving the complainer's understanding of what was happening and why will result in greater confidence in the criminal justice system and improvements in satisfaction in outcome.

51. 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?

a. **Answer:** Slightly disagree

b. **Reason:** The main reason for Faculty's disagreement is pragmatism. When something like this arises (which is very rare), the argument and decision will form an interruption to the trial. Bringing a lawyer for the complainer in, whether the same ones as before or not, will likely lead to substantial delay at that stage. Those lawyers will require to be brought up to speed with what is happening at trial, to put the crisis in context. This would seem likely to take a day or more, not least because in the High Court there are very unlikely to be any lawyers available for immediate involvement. Further, this sort of situation can arise during the complainer's own evidence. It would be hard to involve them in the discussion about it during their own evidence. There would be a risk of tempting a dishonest complainer towards self serving advantage at that stage. In

summary, they will have to trust that the judge will deliver justice on the point, as an accused so often must.

52. 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?

a. Answer: Strongly agree

b. Reason: Faculty considers that the spirit of this development would be undermined if the complainers required to find the means to pay for it. Experience suggests that complainers in such cases are rarely in better financial circumstances than accused people, who most often have the benefit of Legal Aid.

53. **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. Answer: Faculty expresses no view on this matter.

54. 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?

a. Answer: Strongly disagree

b. Reason: At this time, the stresses on the reduced defence Bar renders compliance with the existing time limits hard enough. Forcing the applications in earlier will exacerbate that. If more time is needed as the PH approaches, postponements as appropriate could be sought by the complainer's lawyers.

55. 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?

a. **Answer:** No.

56. **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?

    a. **Answer:** Somewhat agree

    b. **Reason:** Specialism within the Court of Session is perceived as effective in the fields of commercial and family cases. There is reason to think that bringing specialism to serious sexual offence trials within the High Court would also bear fruit. The improvements promised seem to us, respectfully, to be somewhat naïve in contemplation. Delays at this time are caused largely by resource issues (courtrooms, judges etc) and speed of disclosure is rarely a stated problem in cases of this sort. Specialism of judge will not cure either issue.

57. **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?

    a. **Answer:** Strongly disagree

    b. **Reasons:**

        i. Faculty questions whether, at a time when resources for the criminal justice sector are said to be already stretched, there is really funding available for a whole new set of judges and courtrooms? And lawyers to people them? If it is intended to use existing resources, Faculty considers that this does not seem likely to yield any improvements in case scheduling, since the capacity is the same. Faculty considers that for any specialist sexual offences court to be effective, it would require new judges and new court buildings, more prosecution resources and more legal aid spending.

ii. We have previously made the argument, referred to in the introduction to this chapter of the consultation document, that downgrading rape and serious sexual offences into some lower court seems somewhat at odds with the general public messaging on the subject. Faculty understands that where a sentencing ceiling had once been in contemplation, (and despite what the consultation document suggests) this had been superseded by a proposal of unlimited sentencing powers, perhaps to answer the argument against downgrading such prosecutions. It makes sense that if this new court structure is to deal with the full range of serious sexual offending then it would indeed need to have unrestricted sentencing powers. If that is the case, it would be a specialist offshoot of the High Court, which takes us back to our answer to the preceding question.

iii. It is not clear to Faculty whether it is intended for any specialist court to be presided over by a sheriff rather than a High Court judge. It is further unclear to Faculty which rights of audience will be required to allow a legal representative to appear in the specialist court (although please see the answer to Question 64 below), and whether it is intended there will be lower rates of legal aid remuneration for those appearing in the court. If so, Faculty has concerns that this may mean, or at least produce a public perception that, despite the sentencing equivalence, this remains a *de facto* downgrading of rape and other serious sexual crimes from the High Court. If we are wrong about that, and it is going to cost the same to run as such trials in the High Court, then Faculty suggests that those considering the matter may wish to avoid the negative messaging and keep these cases in the High Court, as a specialist form of High Court akin to the Commercial and Family courts.

iv. Faculty notes that judges could rotate into and out of the serious sexual offences specialism, as is done in Commercial and Family courts. The importance of that point is that serious sexual offence trials are the most

gruelling for judges and practitioners alike. Creating a court in which the caseload is entirely composed of such cases will have adverse consequences. Few talented applicants would choose such an unrelenting caseload. We barely have enough defence practitioners with rights of audience in the High Court to deal with things as they stand. Where will you recruit people for this lesser role? Criminal defence solicitors have been quitting the profession in substantial numbers for several years. What is it about a new court entirely occupied with the most dispiriting and unrewarding type of trial that would draw new blood into the profession?

58. **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. **Answer:** b) Within both the High Court and the Sheriff and Jury court.

    b. **Reason:** The existing High Court already has the infrastructure needed to deal with these cases, subject to the improvements in education of judges and personnel referred to in previous chapters. Specialist Sheriff and Jury level cases could be accommodated within existing Sheriff Court estate resources, but with further training of sheriffs to promote specialism in the field. Again they could rotate into the court and out of it, to avoid repelling talented applicants.

59. **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)?

    a. **Answer:** Strongly disagree, if the specialist court is to be distinct from the High Court and Sheriff Courts.

    b. **Reasons:**

i. As above - limiting the level at which rape is prosecuted risks portraying our justice system as cheapening the allegation of rape, and undervaluing the importance of this terrible crime to those who have experienced it. To act in a manner which tells victims of rape that they are not entitled to the resources of the High Court but instead of some lower court, sits awkwardly with the ambitions set out in the rest of the consultation document.

ii. Faculty considers that there is no single feature of the proposed court which could not be delivered rapidly by introducing specialism to the existing High Court and Sheriff and Jury court structures, without forcing a devaluation of their experiences and expectations onto rape victims and complainers.

60. **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?

a. **Answer:** Somewhat agree

b. **Reason:** Much of what is set out in the preceding answers applies here. Faculty considers that a court which falls short of the High Court should not share the unlimited sentencing powers of the High Court. It will not be presided over by Senators (High Court judges). If you devalue the charge of rape by announcing it worthy only of a court subordinate to the High Court, the messaging that flows from it is regrettable in the extreme. It undermines by action all of the proud words spoken in support of this most vulnerable and abused contingent of our society. Faculty has concerns that, inevitably, the lower grade of the court would be used to justify lower rates of pay for judges and other professionals than in the High Court, with a consequent reduction in talent and ability deployed in these demanding cases. If the decision is to be taken primarily for

cost reasons, Faculty considers that that should be stated openly and the public can have a discussion about where our societal values lie.

61. **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. **Answer:** Not applicable

62. **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?

    a. **Answer:** Neutral

    b. **Reason:** Faculty considers that this is hard to answer. Built into the question is the preceding paragraph about appointment by the Lord President. The issue which arises is mainly with those sheriffs appointed to sit in what must be a court higher than the sheriff court. As stated at the start of the consultation document, the majority of cases in the High Court are now serious sexual offences. What is being contemplated is the creation of a mid-way court which will take on most of the business of the High Court. This will be a substantial structure indeed. Public confidence in it must be preserved, at no lower level than in the High Court. Public confidence is substantially influenced by perception. Having every serious sexual case presided over by judges/sheriffs selected and deselected by one person, no matter how eminent, poses a serious risk of public perception that there is an unseemly concentration of influence in that one person, spanning by then the majority of what would have been High Court business prior to its downgrading. We must guard against perceptions which may undermine public confidence in important institutions. Concentrating the power of appointment in a single person would render the appointment process open to public skepticism in a similar way to reducing fact finders from fifteen down to one in trials (of which more later).

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

    a. **Answer:** b) High Court judges only

    b. **Reason:** All of our concerns about how the downgrading of rape and similar sexual offences erodes progress in this important aspect of criminal justice apply to this answer. Faculty considers that populating the Bench of any such new court with High Court judges would diminish the negative effects of any such new court structure, by proclaiming that those who need that court will encounter only the most able of our society's legal minds, in the person of full Senators of College of Justice.

64. **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?

    a. **Answer:** Strongly agree

    b. **Reason:** Faculty refers to the preceding answers. Anything less would both deprive witnesses and accused of the high standards of legal representation and treatment, and send a clear message that those relying on the new court were deserving of less than they were before its creation.

65. **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?

    a. **Answer:** Somewhat disagree

    b. **Reason:** Faculty notes that, if it was a statutory precondition, you would require to await sufficient numbers of qualified professionals applying. With the current extraordinary demands on High Court professionals, you may find that the

process by which people are required to devote time to retraining deters the most able (busiest) practitioners from doing so. It is the experience of members of Faculty that standing the reduced numbers of the defence bar, along with the stated desire to eliminate the back log of cases as a result of the pandemic, the professional demands on practitioners are only increasing. Faculty already has concerns about the impact of the current increased workload on its members and their mental health. Faculty considers that requiring those practitioners to undertake additional unpaid training, over and above that already carried out, and the reduction in the time available to them to dedicate to their other workload and personal lives would not be attractive to an already over-stretched criminal bar. The end result would be a slow start to the project.

66. **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?

    a. **Answer:** No.

67. **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?

    a. **Answer:** Strongly agree

    b. **Reasons:**

        i. Many of the arguments against stripping the public out of the decision-making process in these cases are set out in the consultation document. We will not simply repeat them.

        ii. We consider it important to emphasise the following points:

            1. Faculty considers that this question, and much of the debate surrounding this issue, comes from an assumption that there are an insufficient number of convictions for rape and other sexual

offences in Scotland. Faculty considers that it may assist the debate in this area if those who consider there to be too few convictions are able to explain what they consider an acceptable rate of convictions to be, and which criminal justice system they consider to have achieved such a rate. This would allow for a proper examination of what lessons could and should be learned, and what if any changes to our system require to be made.

2. Faculty considers that the research within the 'Scottish mock trial jury research' is of very limited relevance to this enormously important question in any democracy. There is academic criticism of it. The view of people pretending to be jurors should not be used as 'evidence' of what real jurors thought and did in real cases. One would not try and diagnose a medical problem by asking someone to pretend to be a doctor and then give what they think a real doctor's opinion would be.

3. We do not criticise the authors of the research though, since their work was curtailed by the prohibition on asking real jurors about real cases.

4. Our membership includes a greater accumulation of experienced High Court lawyers than any other organisation in Scotland. The comments in the consultation document about conviction rates give rise to the following resonances:

a. We have no doubt that some rape cases are brought to court with little or no prospect of success. Why that is the case is interesting, but not within our line of sight to explore. It is the experience of members of Faculty that no other type of case in the High Court suffers from this.

b. Rape and similar serious sexual offending cases are peculiarly sensitive to nuanced interpretation by involved civilians, in a way that other types of High Court level violence are not. For example, in most High Court violence (non-sexual) trials, the fact of illegal violence is not in any real doubt. The same applies for drugs or firearms offences. Juries are often left with 'who' questions, which can be more easily answered. Rape charges are unusual because there is often dispute about every aspect of the case *except* the 'who' component. It is frequently possible, in our experience, for all of the important witnesses to be telling the truth and yet still a conviction should not and does not result. It follows that it is not a jury failing, but a reflection of the subtlety and complexity of private human interactions, particularly where perceptions are blunted or distorted by intoxication. Rape and similar cases have the least certainty available, on the evidence, and that factor we think dominates the conviction rate. If investigation is done into the verdicts in single complainer rape charges where the parties know each other, against violent 'stranger' rapes, or multiple complainer rape cases, we are confident that it will be shown that juries are quite able and content to convict when the evidence is there for a conviction. The 'problem' doesn't lie with the jury but with the difficulty of being sure in single complainer cases.

5. It was with interest that we read the Judiciary's response to the recent consultation about the 'not proven' verdict. When discussing whether a jury should be composed of twelve or fifteen, the majority opinion was that fifteen was better. The

reason given was that (at pages nine and ten) "*as pointed out in the response by judges to the Scottish Government's 2008 consultation document the modern Scottish jury in criminal trials, juries comprising 15 members had for a very long time enjoyed, and continued to enjoy, the confidence of the public and all those who work in our criminal courts, including judges and sheriffs. Nothing which was drawn attention to in the current consultation paper causes us to depart from that view. No persuasive reason to alter the current size of a Scottish jury has been identified. A larger number permits a wider representation of the community and ought to reduce the risk of biased, irrational, capricious or eccentric reasoning having undue influence."*

6. The strong reasoning in that quote supports the choice of fifteen over twelve, but must, *a fortiori*, support the retention of a jury over any single judge.

7. We take pride in democracy, and should cherish the use of citizens to tell us what to make of their fellow citizens' thoughts and actions.

8. The persistent theme in the arguments against juries in rape and related cases is that this or that special interest group, experienced in one side of the events only, claims to know better than the general public about the personal affairs of the general public. Faculty notes that the evidence of rape and other sexual offences complainers is taken in closed court. Unless they are acting as a supporter to a witness, members of special interest groups are not permitted to be in court for large parts of the evidence. It is not clear to Faculty what experience of how matters currently proceed in the High Court these groups have.

9. It is the experience of members of Faculty that rape trials in the High Court often require an examination of the sexual lifestyles and practices of those in their teens and twenties. These are individuals who have grown up in a world of easily accessible internet pornography, 'sexting', the widespread sharing of intimate images, dating or 'hook up' apps, and even potentially 'chemsex'. The world in which they have grown up is a different one from the one in which our judges grew up. A judge born in the 1950s or 1960s is as remote from the lifestyles and sexual practices and attitudes of our young people as a judge born in the 1890s or 1900s was from the youth of the 1960s. What may be seen as normal and unexceptional to one generation may appear wholly alien to another. Faculty considers that rape and sexual offences cases should continue to receive the benefit of a decision-making process involving a wide cross-range of society rather than one which is exclusively white, exclusively middle class, and exclusively from an older generation.

10. With rape myths, the danger is that what is a 'myth' is very much in the eye of the beholder. But fifteen sets of eyes are much more likely to drill down through myths to bedrock than any single mind, however well educated and intentioned.

11. This calls to mind the expression by the senior judiciary of the safeguard juries represent against the "*risk of biased, irrational, capricious or eccentric reasoning having undue influence".* It is a statement we cannot improve upon in stating our opposition to juryless trials.

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

a. Answer: Not applicable

69. **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?

    a. **Answer:** Strongly disagree

    b. **Reasons:** As at 67 above

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

    a. **Answer:** Not applicable

71. **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. **Answer:** c) (if limited to shorter trial lengths)

    b. **Reasoning:** Faculty is aware of at least one Senator who has stated the principal justification for excluding the public from such cases as being a time saving device. In a sophisticated democracy such as we hope ours to be, convenience should not trump justice itself in serious cases. That is why summary trials (with no jury) are tolerated at the lower end of the spectrum of seriousness. Convenience is their only advantage. It is the experience of members of Faculty that there is hardly a sheriff court in the land where one or more sheriff is not identified as more inclined to convict than others. That reflects the variations in human nature. These variations are what the rounding functions of multiple fact finders even out, engendering confidence in outcome.

72. **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. **Answer:** a) to d) inclusive, and e) ‘other’

b. Reasons: As set out above in answer 67 for a) to d) and the 'other' would be this-

i. Jurors are effectively anonymous, and their individual reasons for voting Guilty/Not Guilty/Not Proven are unknowable. This liberates them to deliver the truth as they see it, without worrying about personal consequences. How different the situation would be for each sheriff or judge, appointed to the sexual offences court sitting without a jury, where they might see their continued appointment, or further advancement to be dependent on some improvement in 'conviction rates'. Similarly, individual judges are far more likely than a jury to come under intense scrutiny from the media and special interest groups in the event that they acquit an accused in a particularly contentious trial, or their conviction rate is considered to be 'too low'.

73. 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. Answer: d) None. Faculty does not think there are any safeguards that could be put in place.

b. Reasons: The involvement of fifteen members of the public delivers validity and balance to decisions of fact in serious trials. You cannot repair that loss by educating judges or assessing their judgements, unless you perhaps had a panel of fifteen members of the public to oversee their decisions, to confirm the absence of "*biased, irrational, eccentric or capricious reasoning*".

74. 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?

a. **Answer:** An allowance for research into real juries somehow, although Faculty accepts that that carries the risk of altering their decisions when they know they are to be studied in their reasoning.

75. **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?

    a. **Answer:** Faculty is aware that there is a Pilot delivery group working on this, which includes some of our number, and would thus refrain from further comment.

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

    a. **Answer:** No.

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

    a. **Answer:** Yes.

    b. **Comment:** Measures involving only rape and serious sexual offences will impact male accused persons disproportionately, in that rape (and attempted rape) in particular has the requirement for a penis in its statutory definition. The removal of jury trial will effectively apply only to males. The legislator will require to consider carefully whether any issue arises in relation to Article 14.

78. **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?

    a. **Answer:** Yes

    b. **Comment:** Given the likely disproportionate effect on males, as accused in rape and associated prosecutions, the legislator will require to consider carefully

whether any issue arises under Section 13(1) of the Equality Act 2010 in relation to the withdrawal of jury trials.

79. **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)?

a. **Answer:** No.

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

a. **Answer:** No.

81. **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?

a. **Answer:** No.

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

a. **Answer:** No.

83. **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?

a. **Answer:** No.

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

a. **Answer:** No.