FACULTY OF ADVOCATES

Response from the Faculty of Advocates

to the

Victims, Witnesses, and Justice Reform (Scotland) Bill

Foreword:

Faculty raises again, as it did in its response to the Scottish Government's consultation on improving victims' experiences of the justice system, the tension between labelling people as the 'victims of crime' and the presumption of innocence.

Faculty notes that the Policy Memorandum accompanying the Bill outlines, at paragraph 4, that there are different words to describe those who have experienced crime, particularly sexual offences. The Policy Memorandum states that terms such as 'complainer' are used when describing a person in a legal setting, 'victim' or 'survivor' are more commonly used when referring to a person in a broader context not restricted to the legal system. The glossary to the Policy Memorandum defines a victim as a person who has been directly affected by a crime. Section 23 of the Bill provides that a victim is a person against or in respect of whom an offence or harmful behaviour by a child has been, or is suspected to have been, committed or carried out.

It is the experience of Faculty that there are a great many cases in which there is no dispute as to whether there is a victim of an offence; the matter for trial is whether the identity of the perpetrator, or perpetrators, of the offence has been proven beyond a reasonable doubt. There are however cases where the assertion that a crime has been committed is itself in doubt until a court has issued a verdict. Faculty considers that the courts refer to people who allege criminal treatment as 'complainers' because nominating them as 'victims' cannot stand alongside a true presumption of innocence.

As the Policy Memorandum notes, the term 'complainer' is used in a legal setting. Faculty considers that in legal contexts, such as legislation, 'complainer' is the appropriate term to be used. Faculty considers that Parliament ought to give great consideration as to whether it wishes to designate an individual as a 'victim' prior to a conviction, and potentially despite a verdict of acquittal. It would be unfortunate if Parliament chose to disregard the presumption of innocence and equiparated the making of an allegation with an automatic presumption of guilt. Faculty will, nonetheless, reflect the wording of the Bill in its response.

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

Faculty welcomes the establishment of the Victims and Witnesses Commissioner for Scotland. It notes the terms of Schedule 1 to the Bill setting out further details of the office. Faculty supports the provision in this Schedule confirming the independence of the Commissioner. It is noted that paragraph 4 of the Schedule provides for the disqualification of individuals from holding the office of Commissioner if they have, in the year preceding

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF

the date on which the appointment is to take effect, been: a member of the Scottish Parliament; a member of the House of Commons; a member of the House of Lords; or a person who is a member, employee, or appointee of a criminal justice agency. If these provisions are meant to enhance the public perception of the Commissioner's independence, Parliament may wish to consider whether the length of time between holding such a role and appointment as the Commissioner ought to be extended. It may be that a gap of 366 days is not sufficient to satisfy the public of the Commissioner's independence from a previous political or criminal justice role. This is particularly so given the length of time taken for criminal proceedings to reach a resolution. If the Commissioner was previously employed in the criminal justice sector, there is every chance that cases on which they worked in their previous employment will still be before the courts when they are holding the office of Commissioner.

Faculty notes the terms of Section 4 of the Bill. In terms of Section 4(1)(b) of the Bill, the Commissioner must pay particular attention to groups of victims and witnesses who do not have other adequate means by which they can make their views known. It is not clear to Faculty what is intended by this provision. It is unclear whether the reference to adequate means refers to financial means, or other means to make their views known. It may be that, in practice, it is difficult for the Commissioner to identify which groups of victims or witnesses do not have other adequate means by which they can make their views known.

Section 7(1) of the Bill gives the Commissioner the power to do anything which appears to the Commissioner to be necessary or expedient for the purposes of, or in connection with the performance of the Commissioner's functions, or to be otherwise conducive to the performance of those functions. Whilst this general power is subject to a restriction on the ability to pay fees and allowances, and the restriction in terms of Section 8 of the Bill not to exercise any function in relation to an individual case, the power to do "anything" appears to Faculty to be a wide one, and the Parliament may wish to consider whether it wishes to give the Commissioner such a wide-ranging power.

Faculty notes that Section 20 of the Bill provides for protection from actions of defamation. Faculty can see the force in providing for absolute privilege in relation to statements made to the Commissioner. It is, however, more difficult to understand the justification for providing absolute privilege for any statement made in the Commissioner's report on an investigation. Faculty notes that in terms of the Defamation and Malicious Publications (Scotland) Act 2021, absolute privilege is provided only in relation to contemporaneous reports of court proceedings while a number of categories of statements are given qualified privilege. Faculty can see no justification, for example, for a defamatory statement in a report prepared by the Commissioner which is shown to be made with malice to be subject to absolute privilege.

Faculty notes the definitions provided for in Section 23 of the Bill. Faculty has made its views clear in relation to the term "victim" in the foreword to this response and does not intend to repeat those views here. The definition of "witness" provided in the section is a person who is or appears to be a witness in respect of an offence, or harmful behaviour by a child. Faculty notes that there are often witnesses who are called on behalf of the defence who will give evidence saying that no offence occurred. Faculty understands that there may be certain organisations who will assist and represent the views of witnesses called on

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF

behalf of the Crown but will not provide the same services to those who are called as defence witnesses. Parliament may wish to consider whether it wishes to make clear that the Commissioner's duties extend to those who are called as witnesses on behalf of the defence.

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

Whilst Faculty supports the promotion of trauma-informed practice through specifically highlighting the issue within key legislation, Faculty remains of the view that legal professionals within the justice system already possess the necessary skills and experience required to recognise and adapt practices for the benefit of persons who may have experienced trauma.

The proposed amendment to legislation to include specific reference to and definition of "trauma informed practice" is not anticipated by Faculty to cause any significant change to already established practices. There exists a common law power for every judge to regulate the conduct of matters in their court. The judiciary can, and has, been trusted thus far to modify and improve the courts' and practitioners' approaches to recognise the lived experience of parties, witnesses and accused people. It is not explicit nor clear how the proposed changes will affect the practices already in place.

It is essential that the principle is not utilised in conflict with a legal system founded on the presumption of innocence. Sections 27 – 29 make specific reference to the duties to be imposed on judicial office-holders to have regard to trauma-informed practice in the scheduling of court business. In order for the justice system to properly serve participants who have experienced trauma the necessary resources will require to be made available to alleviate the current significant levels of pressure on Scottish court services. Failure to properly resource the justice system, both in terms of the Scottish Courts Service but also the professionals and contracting bodies who ensure court business is able to run, will mean these provisions reflect only a change in rhetoric rather than ethos.

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

Faculty supports the provisions which will enable special measures to be made generally available in civil proceedings, no matter whether evidence is to be led or not. Faculty supports the special measures being available in civil cases where no evidence is led but an appearance is required by the parties. The new provisions recognise Faculty's experience of conducting complex and challenging litigation involving vulnerable parties and will enable parties to be present at all hearings should they so wish.

Faculty further supports the introduction of a register of solicitors to ensure those prevented from conducting their own litigation are able to access legal advice. However, the same questions of resource remain. The provisions leave regulation of the register (including training and qualification requirements) and matters of remuneration to the Scottish Ministers. Faculty would welcome further information as to the Government's intentions in this regard. Faculty holds a concern that, just as is the case in the criminal

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF

sector, the number of solicitors registered to provide civil and children's legal aid continues to diminish. It may be that due to pressures of business and level of remuneration, there will not be a sufficient number of solicitors willing to be included on the register relative to the demands of litigants.

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

Faculty opposes the abolition of the not proven verdict. Faculty can do no better than repeat the answer it gave to the Scottish Government's Consultation Paper on the Not Proven Verdict and Related Reforms:

> *"Experience tells us that in rape cases in particular, the factual questions are often hard to determine. It is the experience of Faculty that cases of rape, and attempted rape, are the most frequent types of case to present a jury with heavily nuanced competing evidence from lay witnesses, often affected by alcohol or other substances, in situations where it is rare to have other eyewitnesses, or forensic evidence that speaks to existence or absence of consent. Faculty notes that this may make it difficult for juries to establish the essential elements of the offence beyond a reasonable doubt. That may leave a jury unable to convict, but by no means assured about innocence (beyond that it is presumed).*
>
> *This may be a reason why rape and attempted rape cases yield the verdict more frequently than other charge categories. It is the experience of Faculty that there are often more factually difficult questions in such cases than in any others. It may be that juries appreciate that and communicate it through this measured means of acquittal.*
>
> *Faculty is concerned that, should the not proven verdict be removed, there is a potential danger of jurors wrongly convicting an accused person. Removing this verdict may force jurors who have not been convinced by what they have seen and heard into one of the two polar verdicts, where they feel uncomfortable with either but are left with no choice. To do so undermines the presumption of innocence and may turn the trial into an examination of the morals of the accused rather than whether the prosecution have proved their case beyond reasonable doubt.*
>
> *Whilst many lawyers would translate every 'not proven' verdict into one of 'not guilty' in the event that such a verdict were removed, Faculty notes that there are those who consider that any such change would result in cases which may presently result in not proven verdicts ultimately returning guilty verdicts. While Faculty is not aware of the evidential basis for this belief, it is concerned that emotive cases may produce such a result, where jurors are unwilling to pronounce innocence (as they may understand a not guilty verdict to be) and accordingly return a guilty verdict.*
>
> *In our system, where eight votes out of fifteen for "guilty" will deliver simple majority verdict, just one juror yielding to this influence could deliver an unjustified guilty verdict and change the course of a citizen's life wrongly and forever. Every single wrongful conviction erodes public confidence in our system of justice.*

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF

Faculty considers that the not proven verdict may be a safety valve for jurors who have not reached the threshold for conviction but reject the impossibility of guilt. It is in practice now tied closely to our unusual system of majority verdicts. There may be cases which should not end in conviction, but where the removal of the safety valve could turn them into false and wrongful convictions, as jurors may find the polarity of 'not guilty' is repellent in the hard evidential landscape of rape and attempted rape cases."

Faculty notes that the Bill proposes a reduced size of jury and a qualified majority for conviction. It does not seek to introduce the additional safeguard of the requirement for a unanimous decision, failing which a 10-2 majority if directed by a judge. Accordingly, the same criticism advanced in relation to the abolition of the not proven verdict remains. Faculty considers that the not proven verdict cannot be removed without other fundamental changes being made in the jury system, particularly in relation to the size of any majority required for conviction.

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

Faculty refers to its response to Question 8 of the Scottish Government Consultation Paper on the Not Proven Verdict and Related Reforms:

"Faculty considers that the abolition of the not proven verdict would not be, in itself, a basis for reducing the size of a jury in a criminal trial. As is noted on page 21 of the consultation document, Lord Bonomy's Post Corroboration Safeguards Review recommended that research should be undertaken to ensure any reforms made to the Scottish jury system, including the size of the jury, were made on an informed basis. Faculty considers that there remains a need for such research.

Faculty notes that there is continuing debate regarding the reliability of both the jury research carried out in England, with real jurors in real trials, and that carried out in Scotland, with mock jurors in mock trials. It is extremely important to note that the many of the findings of the respective research conflict with each other. As has been recognised throughout the consultation document, the research in Scotland was carried out using mock jurors and mock trials and cannot therefore be said to reflect real life juries. The limitations of the Scottish Government research as outlined in the consultation document can be summarised as follows:

- *Sample size.*
- *Findings based on mock jurors' responses to only two specific types of trial.*
- *The unknown impact of mock jurors knowing that they were not participating in real trials.*

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF

Faculty is of a view that proposing reform based on research that has such significant limitations would be rash. There is a real risk that such reform would have a detrimental impact on the overall administration of justice.

Faculty observes that a further limitation exists in the use of only finely balanced mock trials within the mock jury research. By definition, finely balanced trials are those that are on the cusp of meeting the necessary standard of proof. These are exactly the type of trials that, in the experience of Faculty, might well result in a not proven verdict. That may be the most appropriate verdict in that case. Faculty has concerns that the jury research does not tell us anything other than how mock juries behave in a very specific set of circumstances.

Faculty has further concerns regarding some of the findings from the Scottish Government jury research. On page 21 of the consultation document, it is asserted that mock jurors in 15 person mock juries were less likely to change their minds on a verdict than mock jurors in 12 person mock juries. It is not clear to Faculty what is to be taken from this observation. It might be thought that mock jurors being cajoled or even bullied by others was more keenly felt by participants in a smaller group. The desire not to be a lone voice or part of a small minority may have led to mock jurors changing their minds. It might be that groups of 15 providing a greater degree of diversity also provide a greater degree of comfort for those with views that differ to many others in their group. Faculty considers that the research available at present does not sufficiently explore the relationship between the number of persons on a jury and the decision making process that juries undertake.

Faculty is also concerned by the suggestion, also on page 21 of the consultation document, that reducing the number of jurors on Scottish juries from 15 to 12 might lead to more jurors participating more fully in the deliberations. It is submitted that such an uncertain conclusion is no basis on which to reform such a fundamental part of the Scottish justice system. On page 7 of the consultation document, it is noted that caution must be taken when generalising results from the mock jury research to real juries. Standing the limitations summarised above, Faculty suggests that should be great caution.

A jury is the most democratic body we have, and we are lucky that we have a larger jury than other jurisdictions, which better reflects our society. As was pointed out in the 2008 Scottish Government consultation "The Modern Scottish Jury in Criminal Trials", a jury of 15 is more likely to include a mix of gender, ethnicity, experience, and social awareness. That has never been truer than today, as our society becomes increasingly diverse.

It is noted, on page 8 of the consultation document, that nothing in the Scottish Government jury research should be taken to undermine confidence in individual verdicts. It follows that we remain confident in the verdicts that our juries deliver. Faculty considers that, unless there exists compelling evidence that juries get it wrong, great care must be taken in altering a system that ostensibly works."

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF

Faculty remains of the view that the size of criminal juries should remain at 15 jurors. The research on which the proposal to reduce jury size is based has significant limitations. It is based on volunteer mock jurors playing the part of real jurors. Real jurors are cited and must attend. The mock jurors knew they were not participating in real trials and knew that the complainer, the accused and the witnesses were not real. Mock juries cannot be said to reflect real life juries. Findings in jury research with real jurors in real trials in England conflict with the findings in the Scottish mock jury research. Faculty is of the view that changing the size of real juries on the basis of mock jury research would be rash. There is a real risk that such reform would have a detrimental impact on the overall administration of justice.

If the size of criminal juries remains at 15 jurors, then the qualified majority in favour of conviction should be 12 jurors.

If the jury size is reduced to 12, Faculty is of the view that the qualified majority should be 10 jurors. The vast majority of legal systems with a jury size of 12 jurors require unanimity or a qualified majority of 10 jurors. Faculty is of the view that Scotland should not stand apart with a lower threshold. Higher jury thresholds are adopted because they provide higher protection against wrongful conviction of serious crime.

If the jury size is reduced to 12, then in event of death or discharge of jurors Faculty is of the view that the trial should not proceed unless there remain at least 10 jurors. The safeguard of a qualified majority to convict should remain at 10 jurors. A person should not be convicted of a serious crime by a jury of fewer than 10 jurors.

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

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

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

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

Faculty considers that the public understand and appreciate that the most serious crimes in Scotland are prosecuted in the High Court of Justiciary. Faculty has concerns about the proposals to remove such cases from the High Court of Justiciary. The first of these concerns is practical. Given the current difficulties in the criminal justice system in relation to backlogs, funding, and the number of practitioners available to conduct trials, it is not

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF

clear to Faculty how establishing a new court, which will presumably require to be staffed and resourced, with suitable accommodation, can be achieved. Further, it is the experience of Faculty that serious sexual offences trials are the most gruelling for judges, practitioners, and court staff alike. Creating a court in which the caseload is entirely composed of such cases may have adverse consequences in attracting staffing.

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

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

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

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

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

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

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF

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

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

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

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

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

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

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

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF

require to provide advice to the complainer. They will require to take the complainer's instructions. These matters are time consuming.

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

Extending the time limit for the lodging of a Section 275 application does not appear to take into account the reasons for the existing difficulties in complying with the statutory time limits. In terms of section 66(6) of the Criminal Procedure (Scotland) Act 1995, the Crown are required to serve an indictment on an accused person not less than 29 clear days before the Preliminary Hearing. In such cases, the defence would then only have slightly over a week to prepare a 275 application. This must be seen in the context where the Crown regularly indict an accused within weeks of the Preliminary Hearing; where disclosure by the Crown may only be made in the weeks before the Preliminary Hearing; there is then the need to consult with the accused, and the difficulties experienced by counsel and agents in visiting accused people in custody, where often the only available times to consult are during the court day; and the pressure of business mentioned above. Faculty has concerns in relation to the well-being of its members should they be obliged to comply with ever more stringent time limits.

Faculty suggests that Parliament may wish to consider, if it wishes to amend Section 275B of the 1995 Act, doing so to leave the time limits in place but provide for an administrative adjournment of the next diet should a complainer wish to obtain independent legal representation.

It is the experience of Faculty that there are occasions when an application under Section 275 of the 1995 Act requires to be made during the course of the trial diet, or consideration to be given during the course of the trial to a pre-existing application. It is not clear to Faculty from the terms of the Bill what, if any, consideration has been given to the effect on trial diets if there requires to be a delay for a complainer to obtain independent legal representation. Further, if such an application is made or considered during the course of the complainer's evidence, he or she will be unable to discuss his or her evidence with his or her legal representatives. It is not clear to Faculty how proper legal representation can be given in such circumstances.

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

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

In March 2021, the final report from the Lord Justice Clerk's Review Group on Improving the Management of Sexual Offence Cases was published. A stated aim of the report was

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF

"To improve the experience of complainers within the Scottish Court system without compromising the rights of the accused…". It is Faculty's position that the abolition of trial by jury and any pilot scheme not involving a jury are at odds with that stated aim and would undoubtedly compromise the rights of the accused.

Faculty notes that report further states *"Not surprisingly the Review Group was not able to reach a concluded view on the continued use of juries. The content of the discussions clearly suggests that there would be merit in a wider debate on this issue given its far reaching implications on the Scottish criminal justice system together with further research into jury decision-making in Scotland. However, on the assumption that juries would continue to play a critical role in these cases the review group examined steps which might be taken to better equip jurors for their task, which resulted in numerous recommendations for improvements to the general functioning of the current system"*. It is Faculty's position that if a pilot scheme is to be introduced, it is premature to do so without conducting further research and giving time for the recommendations for improvements to be implemented.

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

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

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

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF

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

Faculty considers that the irresistible conclusion is that the sole purpose of the pilot scheme must be to determine whether a single judge will increase conviction rates in sexual offences. Such a scheme whose raison d'être is to increase conviction rates is fundamentally at odds with our system of justice. If the purpose of the scheme is other than that, applying as it does to sexual offences only, those advocating for it should specify in clear and unequivocal terms what that purpose is. In trying to promote the interests of one side (complainer) above the other (accused), it seems intended to create an imbalance, rather than balancing competing interests with the overall interests of justice.

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

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

- multiple complainers
- historical allegations
- children
- single complainer

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

The report and the experience of High Court practitioners would suggest that the first three of these categories are unlikely to have significantly lower conviction rates than any other

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF

cases. If there is a perception that the conviction rate for single complainer cases is lower, then there are perfectly valid reasons why that should be so.

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

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

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

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

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

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

Examples include the exclusion of evidence of consensual sexual intercourse immediately after the alleged rape has taken place when by contrast, the prosecution rely on evidence of distress during that same time period, and text messages in which the complainer has spoken in positive terms about their sexual encounters with the accused. There are so

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF

many more examples. There is a real sense that the "pendulum has swung" too far in favour of the complainer and that this approach from the judiciary is most likely to be replicated in their approach to juryless trials.

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

- Further research on real juries in Scotland could be facilitated by legislation or by authority of the Lord Justice General.
- Time should be given to consider the effect of the new jury directions on so called rape myths.
- Data should be collected on the conviction rates in judge-only cases to determine whether there is a bias in favour of guilty verdicts.
- Data should be collected on cases involving an examination of facts in sex cases to determine whether and in what percentage of cases in these judge-only cases the facts are established.
- Data should be collected on the conviction rates of individual judges to determine whether there is significant disparity in decision-making depending on the individual judge.
- Time should be given to determine the effect of any legislation abolishing the not proven verdict.
- Consideration should be given to whether vetting in jury selection might address these so-called "myths".

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

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

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

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF

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

No.

11. Do you have any additional comments on the Bill?

No.

T 0131 226 5071
A Parliament Square, Edinburgh, EH1 1RF