Scottish Courts and Tribunals Service

IMPROVING THE MANAGEMENT OF SEXUAL OFFENCE CASES

Final Report from the Lord Justice Clerk's Review Group

March 2021

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FOREWORD *by the RT Hon Lady Dorrian, the Lord Justice Clerk*

The Lord President and Lord Justice General, Lord Carloway, commissioned this review to develop proposals for an improved system to deal with serious sexual offence cases, following discussions with the Lord Advocate and the Cabinet Secretary for Justice.

The prosecution of sexual cases in the High Court has significantly increased in recent years, such cases now constituting the vast majority of High Court trials. The number of cases under Sheriff Court solemn procedure is equally significant, with a commensurate increase in the referral of these types of cases in the Children's Hearings system. As the number of cases has risen, they have often become more serious or complex. This pattern of growth, both as to volume and complexity, is likely to continue. Allied to this is an anticipated rise in High Court prosecutions relating to serious and organised crime.

I willingly agreed to Chair the review, believing it is essential to meet the increased workload with a modern sustainable system promoting the efficient disposal of business with fair, and just outcomes delivered at the earliest opportunities and as locally as possible. It was clear that to achieve effective improvements, we had to take an entirely fresh look at the way in which sexual offences are dealt with.

To support me in undertaking this review I established a cross justice Review Group with representation from members of the judiciary and representatives of the Scottish Courts and Tribunals Service, Police Scotland, the Crown Office and Procurator Fiscal Service, the Faculty of Advocates, the Law Society of Scotland, the Scottish Children's Reporter's Administration, the Scottish Government and the Scottish Legal Aid Board, as well as third sector organisations including Rape Crisis Scotland, Scottish Women's Aid and Victim Support Scotland. I am very grateful to all participants for the wealth of their contributions. I asked from the outset that we should adopt a "clean sheet" approach and I am indebted to members of the group for their willingness to approach the issues involved with open minds and in a collaborative spirit. I am also grateful to my law clerk, Danielle McLaughlin, for additional research and her valuable assistance in the writing of this report.

Lady Dorrian

EXECUTIVE SUMMARY:

The Aim

i. The aim of this independent judicially led review was:

"To improve the experience of complainers within the Scottish Court system without compromising the rights of the accused; to evaluate the impact that the rise in sexual offence cases is having on courts; and to consider whether the criminal trial process as it relates to sexual offence cases should be modified or fundamentally changed. The review will then generate proposals for modernising the courts' approach. The review will examine potential changes to the court and judicial structures, procedure and practice as well as determining recommendations for changes to the law".

ii. The Terms of Reference were agreed at the first meeting of the Review Group in April 2019 and can be seen at annex 1.

The Background

iii. This wide ranging review was prompted in particular by the growth in volume and complexity of sexual offending cases affecting all sections of the criminal justice system to a degree which would become unsustainable as presently managed. To do nothing would be likely to lead to increasing dissatisfaction with the *status quo*. At the same time it was recognised that there were many ways in which the current system could and should be changed fundamentally so that it can provide an improved experience for all those involved in it.

The Approach

iv. From the outset the Review Group approached its task by taking a "clean sheet approach" in considering how best to create a modern system which is affordable, future focussed, efficient and capable of delivering justice as locally as possible and at the earliest opportunity, whilst improving both the experience of complainers and confidence in the justice system overall.

v. The Review Group met on eight occasions. Following agreement of the group's remit at its first meeting, key areas for consideration, and to inform discussion at subsequent meetings were identified. Consideration was given to the complainer's journey through the whole process, from reporting an alleged incident to trial, focussing on the methods in which the aforementioned could be improved and developed. Key areas for consideration were: the pre-recording of evidence; the

potential for the creation of a specialist court; and the role of the jury. These issues were discussed by the Review Group as a whole, before being remitted for further in-depth consideration by sub-group working parties, the results of which were used to facilitate further discussion by the Review Group as a whole.

vi. The Review Group considered 'the experience of complainers and witnesses' as central to the question of how to create a modern system which does not inflict further trauma on them, but remains mindful of the rights of an accused under Article 6 of the European Convention on Human Rights (ECHR), and maintains and improves public confidence in the criminal justice system at large. Members were also mindful of the other reforms and strategies already in train, for example, the significant steps made in relation to taking evidence by commissioner in relation to children and vulnerable witnesses following upon the judicially led Evidence and Procedure Review, commencing in 2015, with its associated reports[1] and the subsequent enactment of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019, the creation of the Victims Taskforce and further development of attitudes to the adoption of a Scottish approach to Barnehus[2]. The Review Group was mindful that this review should not duplicate the work of other initiatives looking at matters which arise prior to the decision to prosecute or after prosecution has concluded but should focus on those issues most relevant to the process of managing these cases within the Scottish Court system.

vii. Despite recent improvements, changes in legislation, and numerous strategies, initiatives and pilots, the review concluded that there remained many aspects of the way in which sexual offences are progressed which could be improved. This was apparent from reported cases, the experience of practitioner members of the Review Group, academic research, the results of a witness feedback protocol between Rape Crisis Scotland and the Crown Office and Procurator Fiscal Service (COPFS) for the period January to June 2019, and the actual reported experience of complainers, all of which were taken into account by the Review Group in its task. The Review Group examined other commonwealth jurisdictions which have experienced similar challenges regarding the prosecution of sexual offences and the approaches they have taken in response.

viii. In our discussions a number of key themes emerged, all giving rise to concerns over the operation of the current system. These related in particular to provision of information to, and communication with, complainers; delays in the processing of cases, particularly at the pre-indictment stage; the effect of the

[1] For a summary and copies of the review and associated reports see https://www.scotcourts.gov.uk/evidence-and-procedure-review

[2] Barnehus (which literally means Children's House) is a model in place in Scandinavian countries in which custom designed facilities are used for the interview, assessment and other services required to support child witnesses. For further details see e.g. paragraphs 2.51-2.61, Evidence and Procedure Review Report, March 2015, accessible at: http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report---publication-version-pdf.pdf?sfvrsn=2

passage of time before a complainer's evidence is given at trial; practical issues relating to attendance at court; concerns over privacy, and the retention of belongings; and the risk of re-traumatisation. These are explored in more detail in the body of this report.

Pre-recording of the Evidence and Case Management

ix It was clear that further changes to current methods of taking and presenting the evidence of complainers and witnesses would be required if the Review Group's aims were to be achieved. Police interviews, written statements, attending court and giving live evidence in chief and in cross-examination were labour and time intensive, contributing to delay and the negative experience of complainers. Significantly, it is well-recognised that the presentation of evidence by a complainer attending court many months, even years, after an alleged incident, is not conducive to the presentation of best evidence. The Review Group was acutely aware of the vison of and recommendations made by the Evidence and Procedure Review and the working groups that followed thereunder, and the positive experience and achievements which have resulted from the increased use of commissions for taking evidence, with Ground Rules Hearings and improved judicial management. It is unquestionable that if a complainer's evidence, including cross-examination, were captured at as early a stage as possible, much of the trauma arising from the whole trial process would be diminished, the time scale for the complainer's direct involvement would be greatly compressed and the traumatic effect considerably alleviated. The benefits are such that it cannot be disputed that this is a change which must be made as soon as possible. In addition to improving the experience of complainers it would assist in the main preparation for trial for both the prosecution and the accused, including disclosure, and reduce time at trial.

x. The Review Group noted the positive improvements which have followed the greater use of commissions, the Practice Notes relating to that, and the beneficial effect of more detailed case management by Preliminary Hearing (PH) judges, including the adoption of Grounds Rules Hearings. At the same time, problems continued to be noted with the management of some trials, and the way in which the evidence of complainers was dealt with at trial. The greater control exercised by the small, focused group of PH judges is not replicated across the system. It became clear that the intimate nature of sexual offences makes them different from other offences. Research has identified that sexual offence complainers may face a higher risk of re-traumatisation through the criminal justice process than in other crimes justifying a different approach in how the criminal justice system engages with them. The adoption of trauma-informed practices is a central way in which the experience of complainers can be improved. There is a sound basis for recommending the development of such practices within a specialist court dealing with solemn sexual offences.

Creation of a Specialist Court

xi. The Review Group has concluded that the majority of the themes and issues identified in the course of this review could be resolved by the establishment of a specialist court, adopting the routine pre-recording of the evidence of complainers and using trauma-informed practices and procedure, with requisite training for all participants. In the meantime, there are certain interim changes to current practice and procedure which would immediately improve the complainer's experience.

Independent Legal Representation

xii. Consideration was given to whether sexual offence complainers should be afforded independent legal representation (ILR), particularly within the context of applications made under section 275 of the Criminal Procedure (Scotland) Act 1995 (1995 Act). It was clear to the Review Group that in very many cases the nature of the questioning proposed in such applications would "represent a particularly intimate, sensitive and important aspect of a complainer's private life" and had the potential to engage a complainer's Article 8 rights. The experience of many complainers was of a lack of information and engagement with COPFS and an inability to convey their response with regard to such applications, with the extremities of the situation highlighted in recent case law. Having regard to the importance of these issues to complainers, the potential tension between their interests and those of the Crown in such applications, and the need for the court to have sufficient information before it to address the statutory test, the Review Group considered that notwithstanding changes in COPFS policy to reflect case law and obligations under section 1 of the Victims and Witnesses (Scotland) Act 2014, publicly funded ILR should be made available to complainers in respect of section 275 applications, and appeals. Complainers should have a right of appeal against such decisions in line with current provisions under section 74(2A)(b) of the 1995 Act.

Delays

xiii. Delay, at different stages of the process, was another theme repeatedly raised in the course of this Review. Delay has significance for the gathering of and production of best evidence; the experience of, and stress upon, the complainer; the effect on the accused; and engagement and confidence in the criminal justice system generally. It was acknowledged that whilst the setting of additional or new targets by the key bodies involved in the process to reduce delays at various stages was essential, there was also a need to consider the stages of the process which were the most time intensive and how improvements could be made thereto.

Communication and Information

xiv. On communication and information generally, it became clear that for complainers there was a lack of, and on occasion incorrect, inconsistent or inadequate provision applying at all stages of the process. This was alleviated in some cases where there was access to advocacy support services. Generally, complainers had little awareness of legal issues and court procedures and this in turn resulted in misunderstandings and misconceptions as to the role of the key parties in the prosecution of allegations and the process generally. This was seen to exacerbate an already difficult process. The Review Group concluded that complainers in sexual offences would clearly benefit from clearer information, provided at an earlier stage particularly in relation to issues of sexual history evidence, the procedures around removal of personal devices, legal rules which limit the leading of certain evidence, privacy and recovery and use of medical and other sensitive records. There is a need for greater and more user friendly information from one consistent trauma-informed source of contact, from the outset and at relevant key stages of the process, provided by someone with adequate knowledge of the process, the circumstances of the case and of the complainer.

Identification of Complainers in the Media and the Issue of Anonymity

xv. In a similar vein consideration was also given to whether the current methods by which complainer anonymity in Scotland is protected was adequate, given the technological advances and proliferation in use in the last decade of social media by those other than the traditional press in the reporting of criminal trials and allegations and investigation thereof. While there may generally be little risk of publication of inappropriate matter in the main stream press, the aforementioned general rise in publication and the rise of “new” or “citizen” journalists suggest that the tools relied upon in Scotland are no longer adequate. The introduction of express legislative protection has accordingly been recommended.

The Debate on Continued Use of the Jury Trial

xvi. The continued use of juries in the determination of sexual offences is a subject of much debate. The Review Group considered at some length the use of juries for trying sexual offence cases and alternative methods to the current model, as used in other jurisdictions. An account of these discussions including the pros and cons of their maintenance is included in the body of the report. 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.

The Children's Hearing System

xvii. Although the review's primary focus was on sexual offence crimes in the High Court and Sheriff Court and the role of the Jury therein, separate consideration, with the setting up of a specific sub-working group, was given to the approach taken in the Children's Hearing system. The Children's Hearing system provides a unique mechanism with the aim of helping to keep children out of the criminal justice system by treating their welfare and interests as being a paramount consideration. A separate chapter dealing with the Children's Hearing system has been included, although some elements of that different context have been highlighted within the body of the report. The sub-working group in the course of its discussions identified a number of specific organisational and procedural improvements that could be introduced. Accordingly these have been addressed within that separate chapter of the report.

xviii. The Review Group recognises that the successful implementation of its recommendations is dependent upon a number of factors, most notably adequate resources and a continued willingness from judges, practitioners and all parties and agencies involved to work together to innovate, to expand their knowledge base and to commit to additional training. The response of all sectors so far in projects such as the Evidence and Procedure Review, the relevant Practice Notes developed therefrom, and the protocol regarding long and complex cases in the High Court, as well as their helpful involvement in this review, suggests that the legal profession in Scotland is sufficiently forward-looking and innovative to embrace beneficial change and help ensure that our system is one which is appropriate for a modern representative democracy. This attitude has most recently been displayed in the willingness of the profession to engage with new methods of conducting serious criminal trials during the current Covid-19 pandemic.

xix. I would like to extend my thanks to all who participated in the Review Group and who shared their knowledge and experience, and those who attended our discussions and shared the research findings, some of which was unpublished at that time. In particular I would like to thank those victims of sexual crimes who have shared their experience of the criminal justice system with the third sector parties who participated in the review. While a broad consensus on the recommendations was reached this does not mean that all the members of the Review Group accepted every detail. This review report is intended to set out broad recommendations, the precise detail of which may require further consideration and wider consultation and scrutiny.

xx. This report has unavoidably been delayed in publication due to a number of factors. The discussions over the role of juries were understandably protracted, and required a number of sub-working group meetings. A more significant factor has been the ongoing Covid-19 pandemic, which required the focus and energy of many of the Review Group to turn towards mitigating the impact of the pandemic and ensuring the continued functioning of the Scottish criminal justice system. This refocusing of attention has included the adoption of new procedures and media to create remote jury centres and live links to other court venues, to ensure the recommencement of jury trials while maintaining compliance with public health requirements. Experience gained and the lessons learnt from this undertaking will no doubt further inform and assist the implementation of some of the recommendations in this report.

The Recommendations

Recommendation 1

(a) In accordance with the recommendations of the Evidence and Procedure Review (EPR) the police interviews with complainers in serious sexual offences[3] should be video recorded to capture the evidence of the witness at the earliest possible opportunity. The interviews should be conducted with officers trained in taking such statements, all as recommended by the EPR. The resultant recording(s) should be used, subject to editing under the control of the court, as the evidence in chief of the witness. Any further evidence should be pre-recorded on commission at the earliest opportunity in the proceedings and where appropriate this should be done prior to service of the indictment per section 271I(4A) of the Criminal Procedure (Scotland) Act 1995. This recommendation can and should be acted upon as soon as possible, and irrespective of acceptance of other recommendations made in this report.

(b) In the interim, in any case where the police statements have not been recorded in a manner which would allow their use as evidence in chief, the whole evidence of the witness should be pre-recorded on commission, at the earliest opportunity in the proceedings, the recording to constitute the evidence of the witness at trial.

(c) Ground Rules Hearings (GRHs) should be introduced for any occasion when a complainer is to give evidence on commission or at trial. As currently occurs in the High Court, any section 275 application should be conjoined with the GRH.

Recommendation 2

A National, specialist sexual offences court should be created, in which the core features should be:

1. Pre-recording of the evidence of all complainers;

2. Judicial case management, including GRHs for any evidence to be taken from a complainer, either on commission or in court; and

[3] For the purposes of this review and the recommendations serious sexual offences shall mean all offences identified in paragraphs 36 to 59ZL of Schedule 3 to the Sexual Offences Act 2003 with the exception of paragraphs 41A, 44, 44A, 45, and 46 on the basis that such offences are unlikely to involve an individual complainer providing evidence or determination of whether there is a 'sexual' element' to the offence is a matter following trial. Paragraph 59A will similarly be dis-applied in circumstances where there is no complainer.

3. Specialist trauma-informed training for all personnel.

The court should have the following features:

(a) A national jurisdiction in respect of serious sexual offences prosecuted on indictment;

(b) Procedures based on current High Court practice, revised to meet appropriate standards of trauma-informed practice;

(c) Those procedures to include judicial case management including GRHs and practises similar to those developed in High Court of Justiciary Practice Note No 1 of 2017 and No 1 of 2019;

(d) Presided over by a combination of High Court judges and Sheriffs, who have received trauma-informed training in best practice in the presentation of evidence of vulnerable witnesses and appointed to the court by the Lord Justice General;

(e) Sentencing powers of up to 10 years imprisonment;

(f) Rights of audience available to members of the Faculty of Advocates, solicitor advocates, and prosecutors all of whom have received specialist trauma-informed training in dealing with vulnerable witnesses, including examination techniques, in accredited courses approved by the Lord Justice General;

(g) SCTS administrative and support staff trained in trauma-informed practices expanding on services already provided in the Evidence suites in Glasgow and Inverness;

(h) Pre-recording of the whole of a complainer's evidence as the default method of presenting the complainer's evidence;

(i) The right to independent legal representation (ILR) to allow complainers to oppose section 275 applications with appropriate public funding (discussed further in chapter 4);

(j) In the event of complainers requiring to attend court measures adopted will be those which address the comfort and safety of the witness;

(k) Measures in respect of pre-instruction and charging of juries as recommended in chapter 5 of this report; and

(l) Legal aid provision for the court including a dedicated table of legal aid fees.

In support of the case management powers available to the specialist court, and the High Court currently, and for the reasons given in paragraphs 1.19 and 1.20, there should be a review of the utility of section 70A of the Criminal Procedure (Scotland) Act 1995 with a view to strengthening the requirement therein to lodge a meaningful defence statement. This review should proceed irrespective of the implementation of any of the other recommendations made in this report.

Recommendation 3

Improved communication with complainers should be developed by relevant agencies expanding upon obligations imposed under the Victims and Witnesses (Scotland) Act 2014. General information could be provided in a written guide accessible on line and in hard copy and/or in video/webcast form. Specific information about the case should be provided by a single trauma-informed source of contact. Practical arrangements for the making of statements or the giving of evidence should be approved in the interest of the comfort and safety of complainers.

(a) General Information to be provided

A non-exhaustive list of information which should be conveyed includes:

i. Information on basic concepts, such as: the role of the Advocate Depute, the existence of rules regarding admissibility of evidence, sexual history evidence, and access to medical records; the typical stages of the court process such as indictment, bail applications, preliminary hearings; and explaining the kind of information which might be provided.

ii. An explanation of the process of giving a statement to the police including an explanation that it may be necessary for that process to be relatively challenging.

iii. Clear information about the retention and use of personal electronic devices, with information about how and when the devices will be returned.

(b) Single point of contact, and specific information

i. Complainers should have available to them a single appropriately trained and trauma-informed point of contact from the reporting of an alleged sexual offence until the conclusion of proceedings.

ii. The contact should be familiar with the criminal justice process and should be able to interact with the various justice agencies and, where necessary, access information required to support the complainer. Justice agencies, applying data protocols and guidelines, will need to co-operate and work together to facilitate such access.

iii. Adequate notice should be given of any VIPER procedure (use of the video identification parade electronic recording system), with a full explanation of the process. Complainers should be made aware of any special defence of consent where possible so as not to be ambushed when giving evidence by whatever means. They should have the opportunity to meet the Advocate Depute, and this should not be left to the day of the trial.

iv. Independent legal representation (ILR) should be made available to complainers, with appropriate public funding, in connection with section 275 applications and any appeals therefrom. Complainers should have a right to appeal the decision in terms of section 74(2A)(b) of the Criminal Procedure (Scotland) Act 1995. Representation at any review further to limit the permissible evidence under section 275(9), should be at the judge's discretion.

v. Current advocacy support services should be expanded in so far as possible to ensure greater support throughout the process, made available at the earliest opportunity, i.e. from the reporting of an allegation.

vi. A Charter for complainers in sexual offence cases should be developed, setting out standards and values adopted by key agencies in the criminal justice system, the way in which complainers in such cases may expect to be treated, the information to which they will be entitled, how they will be communicated with, what will happen to their property, and how and when they will get it back, and all the general information which is contained in the various Standards of Service, Protocols and the like referred to in paragraph 4.23, as well as the additional information recommended in this report. Such a document should include a sexual offence complainer's journey map as shown at annex 4. A cross sector group consisting of members of the key agencies in the criminal justice system discussed in chapter 4 plus representatives of third party sectors should be created to prepare and draft it. Guidance can be taken from the documents referred to above.

(c) Practical considerations regarding statements or evidence

i. Where a hand written statement is recorded by the police, and requires to be read back to the witness, the witness should be given a short break before this occurs.

ii. In the event that a witness requires to attend court to give evidence, measures for the comfort and safety of the witness should be adopted, including the provision of a separate entrance to the building from where the accused may enter, a separate waiting room and arrangements designed to prevent a chance encounter with the accused.

(d) Improving Efficiency

i. In the absence of any other effective structure within COPFS designed to achieve the same objective, early identification of the trial Advocate Depute, so far as possible, should be made, to enhance preparation of the case, identify the information to be provided to the complainer, accelerate disclosure, and facilitate engagement with the defence at an early stage of proceedings.

ii. Appropriate targets should be set by Police Scotland, COPFS, and SCTS to achieve a reduction in the delay between reporting of an alleged sexual offence crime and conclusion of trial.

(e) Publication of information relating to the identity of complainers

Legislation should be introduced granting anonymity to those complaining of rape or other sexual offences along the lines of the Sexual Offences (Amendment) Act 1992.

Recommendation 4 – Steps to enhance the quality of jury involvement

This recommendation proceeds on the assumption that juries will continue to be utilised for the resolution of serious sexual offences (as to which however, see recommendation 5).

(a) Myths and preconceptions

A pilot programme should be developed to communicate information to juries regarding certain common rape myths and stereotypes, possibly in the form of a video, drawing upon the research findings referred to in the report, and the equivalent pilot programme commenced in England and Wales. In the meantime

the current statutory directions to address rape stereotypes and myths should continue to be utilised whenever appropriate.

(b) Jury note taking

To encourage greater jury note taking, or engagement with the evidence, the trial judge should direct jurors to take a short period of time to review their notes or reflect on the evidence they have heard, at the start of their deliberations; and the pre-trial instruction should advise them that they will be expected to do this. This is a matter which should be taken forward by the Jury Manual committee.

(c) Pre-instruction of the jury

The recently adopted method of pre-instruction of juries on key concepts, and in writing, should continue, with regular assessment of its content and format by the Jury Manual committee.

(d) Plain language directions

The Review Group accepts that yet more could be done in this area and urges both the Jury Manual committee and individual judges to concentrate their efforts in this regard.

(e) Route to verdict

The Review Group considered the use of what are known as "routes to verdict", structured aids to assist juries in reaching a verdict. The Review Group concluded that the Jury Manual committee should consider ways to assist judges to formulate their directions in a way which more clearly provides the jury with the "road map" helping them find a "route to verdict", but without necessarily introducing structured "routes to verdict".

Recommendation 5- As noted in chapter 5 this is an issue on which the Review Group was strongly divided. Accordingly the wording of the recommendation reflects that division.

Consideration should be given to developing a time-limited pilot of single judge rape trials to ascertain their effectiveness and how they are perceived by complainers, accused and lawyers, and to enable the issues to be assessed in a practical rather than a theoretical way. How such a pilot would be implemented, the cases and circumstances to which it would apply and such other important matters should form part of that further consideration.

Recommendation 6 – The Children's Hearings System

Recording of Evidence

i. Having endorsed the recommendations already made within the Evidence and Procedure Review Pre-recorded Further Evidence Work-stream report of September 2017 for improvement of the quality of Joint Investigative Interviews (JIIs) (see paragraphs 2.8 and 6.8), the Review Group emphasises the need for further action and progression of these recommendations. While issues of training may take time to be reflected in improvements to the quality of the interviews, practical and technical issues, such as poor positioning of cameras, or poor sound quality should be relatively straightforward to resolve and steps taken now to address this.

ii. A training programme of the kind currently piloted by Police Scotland and Social Work authorities with support from COPFS and SCRA, which focuses on enhanced training for those involved in taking JIIs, discussed further at paragraph 6.8, should be rolled out nationally.

iii. Recommendation 1(a) of this Report, regarding the visual recording of police interviews with complainers in sexual offences, should extend to and include complainers where the allegation is made against a child, and may be addressed within the Children's Hearing system, and related court proceedings. Similarly where evidence in chief has been captured by JII or otherwise visually recorded, cross-examination or any further examination of the witness should take place on commission, at as early a stage as possible within the relevant proceedings. In each case of a commission to take the evidence of a complainer, there should be a GRH or equivalent at which issues of the kind identified in High Court of Justiciary Practice Note No 1 of 2017 and Practice Note No 1 of 2019 are addressed.

Trauma-informed Practice

iv. The recommendations made in relation to the adoption of trauma-informed practices and procedure in this report should be adopted within the Children's Hearing system. Trauma-informed training, as discussed in chapter 3, should be required of Sheriffs who conduct referral proceedings, SCRA and SCTS staff, and practitioners appearing in these proceedings specifically solicitors, solicitor advocates and counsel. To facilitate the uptake of such training by practitioners a requirement to attend accredited courses could feature as an additional requirement for registration to provide children's legal assistance.[4] Other practitioners appearing who are

[4] For current requirements, see in particular part 5B of the Legal Aid (Scotland) Act 1986.

funded by other means would require to provide evidence of attendance at accredited courses.

v. In circumstances where, for whatever reason, the complainer requires to give evidence in person at related court proceedings, measures for the comfort and safety of the witness should be adopted, including the provision of an entrance to the building separate from that from which the referred child may enter, a separate waiting room and arrangements designed to prevent a chance encounter with the referred child. To facilitate this SCRA is encouraged to review the position and to give consideration in conjunction with relevant justice agencies to improve current arrangements in so far as possible.

Provision of Information

vi. Broader information for complainers is required, addressing how the Children's Hearing system, and associated referral proceedings, work, explaining in particular the restrictions applicable to the provision of information and the reasons for these, all with a view to helping mitigate complainers' concerns, and enabling them to appreciate the requirement of confidentiality in these proceedings. To facilitate this the Review Group recommends that the following should occur:

(a) In appropriate circumstances (i.e. where the allegation is made against a child) and at the earliest opportunity Police Scotland, and COPFS as required, should raise with complainers the possibility that allegations may proceed via the Children's Hearing system and that different rules limiting the provision of information may apply. The possibility of the single point of contact, the introduction of which is recommended elsewhere, facilitating the provision of this information should be explored. Complainers should be advised as soon as practicably possible that a referral has been made.

(b) The SCRA should undertake a review of its currently available information and the means by which it is provided, with a view to further advancing understanding of the process and ensuring provision of the abovementioned information.

(c) Other justice agencies, particularly Police Scotland and COPFS, are similarly encouraged to review and update any references in respect of the Children's Hearing system procedure within their own publicly available information.

The draft complainer's journey through the Children's Hearing system produced in the course of the Review process (see annex 4) may assist all agencies in this process of review. As in the context of the criminal justice system, a range of accessible formats may be of assistance in conveying the necessary information. The creation by SCRA of more detailed and updated documentation addressing in so far as possible the expectations of complainers, explaining how they should be treated, and providing necessary information about the Children's Hearing system and its ethos, could take the place of the proposed charter referred to in the context of the criminal justice system in chapter 4.

Independent Legal Representation

vii. The Review Group recommends that a means of introducing the right to independent legal representation (ILR) to oppose applications under section 175 of the Children's Hearing (Scotland) Act 2011 should be explored with SCRA in consultation with relevant justice agencies to determine the best way of achieving this without compromising critical features of the system.

viii. The implementation of single points of contact and separately the continuation and expansion of advocacy support discussed in chapter 4 of this report should also be available to complainers throughout the Children's Hearing process, again recognising the limitations required by the particular nature of proceedings of this nature.

Improving Efficiency and Case Management

ix. The setting of targets within which referral proceedings before the Sheriff, as discussed in chapter 6, should be concluded is recommended. Given the necessity and importance of avoiding the potential for delay at all stages including, for example, initial referral by Police Scotland, decisions by COPFS, and conduct of court hearings, the Review Group encourages all the justice agencies to review the processes for inter-agency communication.

x. The Review Group recommends the continued expansion of current Practice Notes and protocols in place in certain Sheriffdoms,[5] but on a consistent and nationwide basis. Complex cases should throughout be dealt with wherever possible by the same Sheriff using case management

[5] Sheriffdom of Glasgow and Strathkelvin, Practice Note No.1 of 2018: Children's Referrals under the Children's Hearings (Scotland) Act 2011, and Sheriffdom of Lothian and Borders, Practice Note No.2 of 2018: Children's Referrals, both accessible at: http://www.scotcourts.gov.uk/rules-and-practice/practice-notes/sheriff-court-practice-notes-(civil)

powers, including the powers available under the Rules of Court[6] and particularly Rule 3.46A.

[6] Rule 3.46A, Act of Sederunt (Childcare and Maintenance) Rules 1997.

Chapter 1 - THE BACKGROUND TO THE REVIEW

1.1 As noted at paragraph iii above, the review was necessitated by a combination of the growth in number and complexity of cases of rape and sexual assault and the recognition that despite recent improvements, for example in relation to the taking of evidence on commission, various obligations placed on various parties under the Victims and Witnesses (Scotland) Act 2014 (2014 Act) with regard to the provision of information to, and effective participation in proceedings by, complainers, there was still much which could be done to improve the experience of those who participate in these proceedings, particularly complainers.

1.2 Over the last four years to end March 2020 there has been a consistent and significant year upon year increase in the volume and complexity of cases before the High Court of which sexual offence allegations constitute a significant proportion. The indication given to the Review Group was that 75% of the work of the Crown Office and Prosecutor Fiscal Service (COPFS) consists of sexual offences of one kind or another. The vast majority of High Court trials which now proceed relate to sexual offending. Indeed over the last four years, on average, more than 50% of all evidence led trials in the High Court related to sexual offences, with the figure reaching a high of 69% in the year April 2019 to March 2020. A reason for this may be that the average plea rate for accused persons charged with sexual offence cases is much lower compared to other types of offence. Over the same four year period mentioned 19% of accused on average pled, resulting in 81% of such cases proceeding to trial in the High Court. The comparative rate for all other offences in the High Court for the same period is 52% pleading, with only 48% proceeding to trial.

1.3 At the commencement of the review, the volume of business within the High Court was at capacity and it was anticipated that the volume of this type of offence specifically would continue. Whilst intermittent and short term increases in the volume of business may be addressed by revising the programming of business, or temporarily diverting resources, these are not long term options. Despite efforts to prevent it, adjournments due to lack of resource can occur. Six per cent of all High Court trials were adjourned due to lack of court time in 2019-20. In 2018-19, 11 trials were adjourned due to lack of court time, rising to 49 in 2019-20. It was clear that a sustainable solution required to be identified.

1.4 This situation has been exacerbated with the Covid-19 pandemic, as solemn trials, both in the High Court and Sheriff Courts were unable to proceed between March and October 2020. While innovative and public health compliant methods have been adopted to assist the recommencement of jury trials, it will take some time to address the unavoidable backlog caused by this interruption. The immediate situation has been relieved a little by emergency changes to time limits introduced under the Coronavirus (Scotland) Act 2020, but this serves only to delay the

inevitable. Data from November 2020 indicates that there are 938 outstanding trials within the High Court which is 240% above normal operating levels. There are 2995 solemn trials outstanding in the Sheriff Courts, which is 590% above normal levels. It is currently estimated that it will take 4 years to return to normal operating levels, even if it proves possible to deploy an additional 4 courts within the High Court and 2 within the Sheriff Courts.

1.5 Sexual offending associated with the increased use of social media has contributed to the complexity of solemn sexual offences, as has the increase in the number of offences committed some time ago (historic offences) which are only now being disclosed to the police. The latter may be attributed to a number of factors including greater public awareness, ongoing public inquiries, enhanced investigation methods adopted by police, and increased confidence in the criminal justice system. The complexity of the case has an inevitable effect on the timely progression of cases. In practice the length of time that may have elapsed from the original incident to its reporting can add considerably to the complexity of the case, and to the time required for the police to investigate and ingather information to merit the lodging of a Standard Prosecution Report (SPR) with the COPFS for consideration. Potential evidence may have been destroyed or witnesses died or moved away.

1.6 In response to the more recent growth in sexual offence cases, prior to the pandemic, SCTS temporarily provided additional resources, including judicial, clerking and administrative resources, and has furnished additional court dates for preliminary hearings and trials. This had helped the High Court to keep the delay between Preliminary Hearings and Trial Diet within manageable limits so far. However, the continuing increase in volume and complexity of sexual offence cases, together with an increase in other complex cases, means that it will not be possible to maintain this, even in the medium term.

1.7 The Children's Hearings system had also seen an increase in the volume and seriousness of sexual offences cases referred to the Principal Reporter in the last four years. At present the current journey time from receipt of a referral to the reporter making an assessment decision in cases of rape or serious assault is on average 12 to 14 weeks.

1.8 The second factor driving the review was that despite recent initiatives there were many aspects of the way in which sexual offences are progressed which could be improved. This was apparent from reported cases[7], the experience of Review Group members, academic research, the results of a witness feedback protocol between Rape Crisis Scotland and COPFS for the period January to June 2019, and the actual reported experience of complainers, all of which were taken into account

[7] *Dreghorn* v *HM Advocate* 2015 SCCR 349; *Donegan* v *HM Advocate* 2019 JC 81; *McDonald* v *HM Advocate* [2020] HCJAC 21; and *CH v HM Advocate* [2020] HCJAC 43.

in identifying the matters highlighted in this chapter. The Review Group also explored the procedures available in other commonwealth jurisdictions which have experienced similar challenges in the prosecution of sexual offences.

1.9 Before stating the key themes which emerged it is worth noting that over many years steps have been taken to recognise and improve the experience of those participating in the criminal justice system, with a particular focus on complainers. We refer in due course to sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 (1995 Act); the Evidence and Procedure Review (EPR), and consequent developments; and decisions of the High Court. Amongst more recent provisions are those contained in the 2014 Act, the origins of which are to be found in Directive 2012/29/EU of 25 October 2012. This Act, amongst other things, addresses measures designed to enhance the rights of those who appear to be victims of crime and assist in enabling them to be effective participants in the proceedings in which they are involved.

1.10 Section 1 of the 2014 Act places an obligation on a number of persons and institutions to have regard to certain principles when carrying out their functions in relation to complainers in respect of criminal investigations and proceedings. These persons include, for our purposes, the Lord Advocate, the chief constable of the Police Service of Scotland, the Scottish Ministers and the Scottish Courts and Tribunals Service; the latter being a reference to the statutory agency which provides administrative and other support for the courts and tribunals. Section 1 does not impose an obligation on the courts themselves.[8] The principles are that:

i a complainer or witness should be able to obtain information about what is happening in the investigation or proceedings;

ii the safety of a complainer or witness should be ensured during and after the investigation and proceedings;

iii that a complainer or witness should have access to appropriate support during and after the investigation and proceedings; and

iv that, in so far as it would be appropriate to do so, a complainer or witness should be able to participate effectively in the investigation and proceedings.

1.11 In carrying out functions conferred on them in relation to a criminal investigation or criminal proceedings the same parties must also have regard to a

[8] *RR petitioner*, 7 October 2020, HCA/2020/4/XM (unreported).

number of general principles[9] and must set and publish standards of service for victims and witnesses.[10] The general principles are that complainers and witnesses:

i should be treated in a respectful, sensitive, tailored, professional and non-discriminatory manner;

ii should, as far as is reasonably practicable, be able to understand information they are given and be understood in any information they provide;

iii should have their needs taken into consideration; and

iv should be protected from— (a) secondary and repeat victimisation, (b) intimidation, and (c) retaliation.

Other provisions within the 2014 Act include rights to obtain information[11], seek referral to providers of support services[12], the right to specify the gender of the police interviewer[13] and a policy on the return of belongings.

1.12 Notwithstanding the clear statements of principle within the 2014 Act, identified in chapter 1, and the fact that in accordance with its provisions the relevant individuals/organisations have set and published standards of service for victims and witnesses, the responses from complainers during this Review suggest that, as with the operation of sections 274 and 275 of the 1995 Act, the legislation has been less successful in its aims than might have been hoped. This may yet again be a general failure of communication in making complainers aware of the information. It may to a certain extent be because the written standards are designed to apply to all complainers in cases to which the 2014 Act applies, which although primarily aimed at sexual offences, has a somewhat wider scope. The resultant documents may not therefore have been prepared with the needs of complainers in sex offences specifically in mind. Many of the recommendations made by the Review Group in relation to the improvements which might be made to current practice in the interim, pending creation of a specialist court as recommended in chapter 3, align with the intentions and provisions of the 2014 Act, and are designed to make the provisions of the 2014 Act more effective.

[9] Section 1A of the Victims and Witnesses (Scotland) Act 2014 (2014 Act)
[10] Section 2 of the 2014 Act
[11] Section 3C of the 2014 Act
[12] Section 3D of the 2014 Act entitles complainers (victims) to seek referral to providers of victim support services. There is, however, no single support agency or single gateway to accessing such services. Rather there are numerous organisations and agencies, each with their own individual obligations and responsibilities, some of which overlap with each other. Police Scotland has a Scotland wide agreement with Rape Crisis Scotland (RCS) to offer to provide (in compliance with data protection laws), at their request, details of any complainer of rape or sexual assault, aged over 13, to RCS to facilitate a counsellor contacting them to offer support. As part of the referral arrangement, RCS provides feedback on the complainer's experience of their interaction with the police, to assist them with their own evaluation and service provision.
[13] Section 8 of the 2014 Act. The investigating officer need not comply with the request if (a) complying with it would be likely to prejudice a criminal investigation, or (b) it would not be reasonably practicable to do so.

Key themes relating to the conduct of sexual offences prosecutions

1.13 Most complainers reported that their first encounters with Police Scotland were positive. However, the taking and confirmation of their statement was more challenging. This was described, in the responses received in the 2019 academic research Justice Journeys[14], as daunting, brutal, and taken in an uncomfortable environment with no thought given to personal needs, for instance the need for refreshments or breaks. Many found having the statement read back to them immediately after being noted very challenging and traumatic. Those who had third party support at this stage found it invaluable.

1.14 A key theme which emerged throughout complainers' experiences of the process was the lack of or inadequate provision of information at all stages of the process, and the effect this had. A lack of communication between COPFS and the defence more generally was also noted and is discussed separately in this report. In respect of complainers, it was noted that from the taking of the initial statement onwards there was a lack of communication, gaps in communication and on occasion incorrect communication. This was alleviated in some cases where a complainer had access to advocacy support services, particularly where these were available from the earliest opportunity, and provided by the same person throughout. Communications generally were not well-managed with the result that expectations and reality frequently failed to coalesce.

1.15 During the investigation of allegations of rape and sexual assault personal possessions are often seized, in particular personal phones are taken to gather the data thereon. Complainers expressed concerned that they were unaware where their belongings were or when they would get them back. This persisted despite the statutory obligations on COPFS and Police Scotland with regard to the return of property seized and the publication of a joint policy.[15] The aforementioned concerns, combined with the entire experience and lack of information was said to have a negative impact upon their work and social lives. Preparation for trial was, in the main, characterised by complainers as consisting of delays, inadequate preparation and errors. The impact of this on normal life was strongly emphasised. Delay, and the stress caused thereby, may have an adverse impact on the willingness of complainers to continue to engage with the criminal justice process. Delays reported in the press can affect public confidence in the justice system. Delay in collecting and providing evidence can prevent 'best evidence' being provided. Accused

[14] Brooks-Hay. O, Burman. M, and Bradley. L, Justice Journeys: Informing policy and practice through lived experience of victim-survivors of rape and serious sexual assault, Scottish Centre for Crime & Justice Research, August 2019

[15] In terms of section 3I of the 2014 Act the Lord Advocate and the Chief Constable of Police Scotland are required to make arrangements for the return of such property, and to publish and keep under review joint guidance about the process by which property seized in the course of a criminal investigation or proceedings is returned.

persons on remand, or on strict bail conditions and who may be suspended from work as a consequence of the ongoing criminal investigation, are also adversely affected by delay and presumably would also wish that this be minimised wherever possible.

1.16 Where a court visit in advance of the trial was possible this was welcomed by complainers and seen as useful, but only beneficial where the visit was to the actual court where the evidence would be given. Complainers found the opportunity to read their police statement in advance, helpful, although not all were aware this was an option. The discovery of obvious errors when the statement was subsequently reviewed by a complainer was distressing and confirmed complainers' perception of poor preparation. Where cases did not proceed to court complainers had a real sense of disbelief, something which could be mitigated by improved explanation and support.

1.17 Generally, complainers had little awareness of legal issues and court procedures and would benefit from more information in this regard particularly in relation to the law regarding sexual history evidence, the procedures around removal of personal devices, legal rules which limit the leading of certain evidence (including hearsay) and recovery and use of medical and other sensitive records. Witnesses were generally not aware that a special defence of consent had been lodged meaning they felt ambushed when in the witness box. The same applied to section 275 applications and the resultant questioning on prior sexual behaviour allowed. Issues such as these, together with the recovery and use of medical and other sensitive records, and electronic devices, gave rise to serious privacy concerns for complainers.

1.18 Given the terms of statutory provisions which have been in force for some significant time the Review Group was concerned that this was the case. The intention of the changes brought about by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 was to ensure that both the complainer and the defence were clear at as early a stage as possible what the nature of any defence was. For a discussion of the historical background and legislative intent behind these provisions, see *MM* v *HM Advocate* [2005] 1 JC 102. The Policy memorandum accompanying the bill noted, at para 20, that "The Bill also attempts to ensure that both the complainer and the defence are clear at as early a stage as possible what the nature of the defence is, and what this may involve for the complainer."

1.19 The introduction, in 2011, of a statutory requirement to lodge a defence statement under section 70A of the 1995 Act,[16] should similarly have assisted with the Crown's understanding of the defence (the primary intention of the provision being to assist in the Crown's disclosure duties), which in turn should filter through to

[16] As introduced by the Criminal Justice and Licensing (Scotland) Act 2010, section 124(3).

the complainer. The reality is, however, very much different, and the advantages the provisions bring in that regard, particularly in contrast to its progenitor in England and Wales are questionable at best. In *Barclay* v *HM Advocate*[17] the court concluded that the statutory duty to produce a defence statement could be fulfilled by a plain denial and/or a call upon the Crown to prove its case, there being no onus upon an accused to advance a positive defence. The result is that defence statements tend to be vague, anodyne, and often lodged late. In addition, the timescale for the provision of defence statements is such that even were any detail to be provided, any beneficial effect on advancing disclosure is likely to be minimal. Subsection 4 provides that no later than 7 days before the trial diet, the accused must lodge a further statement setting out whether there has or has not been a material change in circumstances since the defence statement was lodged originally. If a material change has occurred, the statement must set out the details of that change and what the new position is. Further material changes must similarly be detailed in subsequent statements (subsection 5).

1.20 All of this suggests that the original legislative intention was not simply to facilitate the Crown's duty of disclosure, but was also that at least some detail of the nature of the defence, including (where a positive defence such as might found a special defence was not being advanced), should be provided to give an advance indication of the issues in dispute. This is confirmed in the Policy memorandum which accompanied the Bill, which states that the requirement to lodge a defence statement was viewed as "a procedural measure designed to assist the court to identify the real issues in dispute. The fact that the requirement to lodge a defence statement is not being operated in this way simply puts a heavier burden on Preliminary Hearing judges who have to manage cases as they progress, and one of whose tasks is to ascertain the extent to which there is a dispute between the Crown and the defence on matters of fact. In contrast to the position in Scotland, where the legislation does not expressly authorise any wider use of the defence statement other than to facilitate the Crown's disclosure duty, adverse comment and the drawing of adverse inferences are permitted in England where an accused does not lodge a defence statement timeously, or changes his position at trial from that given in the statement.[18] This, of course, is consistent with the differing nature of the caution administered in England, and the provisions of section 34 of the Criminal Justice and Public Order Act 1994, which enable juries to draw inferences adverse to the accused's case if at trial he relies on facts which he could reasonably have been expected to mention when questioned or charged, but did not mention. It may not be necessary to go so far in Scotland, but there would be considerable benefit in strengthening the requirement to lodge a meaningful defence statement. Given the current state of matters in Scotland, further review of these provisions and their utility

[17] 2012 JC 40

[18] See section 11 of Criminal Procedure and Investigations Act 1996, albeit it should be noted that the obligation to lodge a defence statement only arises after the prosecution had complied with its disclosure obligations- see section 5(1)(b).

is required. A more exacting requirement on the accused to provide a meaningful defence specifying for example the respects in which the defence takes issue with the Crown case would enhance the court's current case management powers, and those of any specialist court, matters which we return to in chapter 2 with an appropriate recommendation made therein.

1.21 Complainers often failed to understand why other evidence that they thought important had not been gathered. This point was associated with a subsequent feeling that they were not able to tell their full story when examined in court, without understanding why. Early explanation and provision of information on the process and the legal rules applicable may help to alleviate or minimise such negative feelings.

Concerns raised about the process of giving evidence in court included:

a. That questioning was disjointed and frequently interrupted.

b. A feeling that questioning seemed irrelevant, with a lack of challenges by prosecution to defence questioning compared to the number of objections made by the defence.

c. That the tone of questioning was hostile, designed to make them look bad, of bad character or unreliable and the prosecution did little to intervene.

d. That defence questioning could seem intimidating, bullying, trying to trip them up and lacking a clear order, to the confusion of the witness.

1.22 Provision of Special Measures (live link from another room to the court, a screen between the witness and the accused, and a supporter, in terms of sections 271J-L of the 1995 Act) was welcomed but a lack of information regarding how they would work sometimes led to their use being rejected. For some, who responded, the use did not alleviate the fear of seeing the accused within the court building or while entering or exiting it. The attendance of a support person during the giving of evidence was viewed as valuable, particularly if it was someone the witness had encountered before. Continuity of personnel interacting with complainers was repeatedly emphasised as advantageous.

1.23 The opportunity for the complainer to meet the Advocate Depute prior to examination was welcomed by complainers, and helped them feel better prepared for giving their evidence, particularly when it occurred more than once. The early identification in so far as possible of the Advocate Depute who would prosecute at the trial was seen as a desirable step not only for the complainer but for the efficient conduct of sexual offence cases as a whole. This in turn should assist with the full

and prompt disclosure to the defence to avoid or minimise delays at subsequent stages in the preparation process. A key misunderstanding which complainers have been found to have is in relation to the role of the Advocate Depute. Many complainers reported to be disappointed upon finding out that their function is to represent the public interest as opposed to appearing for the complainer *per se*.

1.24 At trial the experience for complainers was not necessarily found to improve. The trauma and distress resulting from giving evidence in court caused further anxiety. Apart from the factors already identified, some practical issues were often referred to by complainers, including:

a. Having to stand when accused was sitting.

b. Changes in the date of hearing were unsettling and gave rise to heightened anxiety.

c. Worry about seeing the accused in the court building.

d. Small kindnesses, from court personnel, made a huge difference.

e. Pre-court meetings with COPFS made a positive difference.

f. In some cases the distance complainers had to travel to give their evidence was substantial, resulting in increased inconvenience and stress.

1.25 The cumulative effect of these points was that complainers were left feeling that their views and needs were marginal to the whole process, and that they "don't matter", leading to stress and anxiety and serving to compound the effect of the original trauma.

1.26 The re-traumatising effect of giving evidence, a concept to which this report will return to (see chapter 3), and of the mental anxiety experienced during the whole, and to complainers, lengthy, process, was a factor which was repeatedly drawn to the attention of the Review Group. This may best be explained by reference to the words used by complainers in describing their experiences:

- "In our court system, you are totally humiliated, it was the most degrading experience I have been through".
- "Court was absolutely horrendous, it was worse than being raped".
- "Although there was a guilty verdict, I would never go through it again".

Delay

1.27 Another theme repeatedly raised related to delay in the process. Three key stages in the process were identified, namely the time from report to the police until a decision to initiate proceedings, leading usually to the issuing of a petition warrant; the period from first appearance on that warrant to first appearance on indictment at a preliminary hearing; and the period from that hearing to trial. There was a feeling amongst members of the Review Group that sexual offence cases should be given a degree of priority to reduce the time between reporting and trial, and to ensure the trial proceeded on the assigned date. Delays in the processing of cases, particularly at the pre-indictment stage, were acknowledged by members of the Review Group. For the benefit of the Review, Police Scotland, COPFS and SCTS briefly outlined how their part of the system was currently performing.

Delay between reporting and initiation of proceedings

Police Scotland

1.28 The indications from Police Scotland were that every attempt and effort was made to ensure the expedition of SPR reports, including active engagement with COPFS, according to agreed timescales and protocols, but backlogs persisted and it was suggested that greater resources were needed. The procedures followed and the timescales to the issuing of the SPR varied according to a number of factors including the complexity or nature of the complaint received. A complaint alleging a historic offence resulted generally in a longer investigation because of the additional efforts required to trace witnesses and gather evidence before the SPR could be issued. Digital or cyber forensic examinations posed challenges due to the significant volume of data usually involved. The need for a forensic examination and the subsequent reporting thereof was identified as another pinch point for delay in the SPR. This is something which must be addressed by the organisations involved. It is something which should be included in the setting of targets recommended in chapter 4.

Delay between initiation of proceedings and indictment
COPFS

1.29 It was evident (even pre-pandemic) that there was a backlog at COPFS of cases awaiting a marking decision at petition stage[19]. The Review Group was advised that, in order to address this, COPFS had introduced strict timescales for marking and created a separate team with sole responsibility for marking all High Court sexual offence cases. In addition, the Scottish Government had provided

[19] The decision by COPFS on whether and where to prosecute following receipt and consideration of a SPR is the "marking decision." Further details on the process are available within the COPFS's Prosecution Code available at https://www.copfs.gov.uk/

COPFS with additional resources to help reduce the timeline from petition to indictment. Additional staff (25%) were now working on High Court preparation. They were (and continue to be) working to a number of new and evolving Key Performance Indicators (KPIs), in particular a KPI of indicting a case within nine months from receipt of the SPR. While initial achievement of this KPI was low given its recent adoption, a noticeable reduction over the next twelve months was anticipated, pre-Covid-19. The Crown view was that once in court the volume of sexual offence cases meant that prioritisation was extremely difficult.

Indictment to trial
SCTS

1.30 Pre-pandemic, the time period between the Preliminary Hearing and Trial Diet had remained stable notwithstanding the continued increase in business. However this achievement was the result of the temporary allocation of additional judicial, court, clerking and administrative resources, which was not sustainable. It was therefore difficult to appreciate the true impact of the increase in work emanating from COPFS, had such provision not been made. Prior to the pandemic, the average period from Preliminary Hearing to verdict was 21 weeks in the High Court and 14 weeks in Sheriff Court. There were of course cases that would take a longer, or shorter, period. A continued increase in indictments registered will place further pressure on court and judicial resource.

1.31 In respect of the period between indictment and trial, several factors contributing to delay have been identified: see for example the Evidence and Procedure Review, March 2015[20]. A primary factor inducing delays relates to disclosure of evidence and the consequent impact on the progression of Preliminary Hearings (PHs) and the fixing of trials. Section 274 applications, and legal aid applications are perceived to be delay-inducing factors particularly when sanction for expert reports are sought in relation to the latter. Since the reports of the Evidence and Procedural Review (EPR), significant advances have been made, seeking to avoid unnecessary continuation of PHs. This has been achieved via greater judicial management of High Court cases by selected PH judges. It is accepted that well-prepared and managed PHs will save court time and costs overall. The problems of disclosure were described in the EPR as “intractable” and clearly have the potential to disrupt the entire trial process. Early and effective disclosure is critical. It was accepted that disclosure is still problematic. Factors which are likely to facilitate more efficient and timely disclosure include early identification of the Advocate Depute wherever possible, early identification and appointment of the defence team, with a timely grant of legal aid, greater clarity within the defence statement, and early and meaningful communication and engagement between the Crown and defence.

[20] Scottish Court Service, Evidence and Procedure Review Report, March 2015 accessible along with subsequent reports at: https://www.scotcourts.gov.uk/evidence-and-procedure-review

1.32 The disruption caused by Covid-19 and the resulting cessation of solemn trials in the High Court and Sheriff Courts between end March and October 2020 will cause additional strain and increase the potential for the delay of trial dates being fixed and proceeding. Academics are already noting the impact that postponement of trials is having on both complainers and accused standing trial[21], particularly its potential to exacerbate trauma, a concept discussed later in this report.

The Accused

1.33 The aims of this independent judicially-led review include:

"To improve the experience of complainers without compromising the rights of the accused".

1.34 It is clear that these are not mutually exclusive aims, and indeed some of the recurring themes affecting complainers addressed in this report impact the accused as well. Obvious examples are delays in trial and problems arising from lack of timely disclosure. Some of the changes proposed in this report would thus have a beneficial effect on the experience of the accused. Where possible we have tried to identify in each chapter those circumstances and any additional benefits to the wider criminal justice system.

1.35 Steps taken to improve the means and ways of capturing a witness's evidence and steps to improve disclosure and communication between the defence and prosecution should assist defence preparation as well, and facilitate the early allocation of diets of trial. Obtaining 'best evidence' and making it available to the jury is in everyone's interests.

1.36 Recommendations are made in the remaining chapters in this report to address where appropriate the key themes and issues identified in this chapter.

[21] See e.g. Burman. M and Brooks-Hay. O, Delays in Trials: the implications for victim survivors of rape and serious sexual assault, Scottish Centre for Crime & Justice Research, June 2020.

Chapter 2 – THE CASE FOR GREATER PRE-RECORDING OF EVIDENCE

Background

2.1 Pre-recording of evidence and the expansion of its use is not a new concept in Scotland and has been part of a vision to improve the criminal justice system for some time, having been a significant feature of the recommendations of the Evidence and Procedure Review (EPR)[22] .

2.2 All members of the Review Group were familiar with the recommendations of the EPR and the reported research and recommendations of the Evidence and Procedure working group that followed on from the initial 2015 report[23]. Of particular relevance to the Review Group's consideration and discussion was the recommendations of the Pre-recorded Further Evidence Work-stream[24] report of September 2017 (the 2017 Report), the main terms of which are reproduced in tabular form in annex 3.

2.3 Broadly summarised, the recommendations of the 2017 Report were that, as a generality:

(a) The evidence of child complainers should be collected by Video Recorded Interview (VRI) using an expert forensic interviewer (termed as 'Level 1'). In the majority of cases that recording alone would provide the whole evidence of the child. In the rare event that further evidence was required, that should be taken on commission as early as possible.

(b) Pending the introduction of a Level 1 system for children, the evidence of child complainers[25] should be captured by a VRI/statement to be used as evidence in chief, with any cross-examination or further examination taken on commission (Level 2).

(c) Level 2 should also apply to vulnerable adult complainers, which given the definition of vulnerable[26] would include sexual offence complainers.

(d) Pending wider availability of VRIs for vulnerable adult complainers, written statements should, where possible constitute evidence in chief, followed by

[22] See https://www.scotcourts.gov.uk/evidence-and-procedure-review for a summary of the review and reports produced to date.
[23] Scottish Court Service, Evidence and Procedure Review Report, March 2015 (2015 Report) accessible at: https://www.scotcourts.gov.uk/evidence-and-procedure-review
[24] Scottish Courts and Tribunals Service, Pre-recorded Further Evidence Work-stream Report, September 2017 (2017 Report), accessible at: https://www.scotcourts.gov.uk/evidence-and-procedure-review
[25] For the purposes of this discussion the definition of 'child' used in the EPR is adopted herein.
[26] Discussed later in this chapter at 2.5.

commission for the remainder of their evidence, captured at as an early a stage in the process as possible.

2.4 A key message at all stages of the EPR was the desirability of having "best evidence". The original 2015 Report noted that there was a compelling case that the evidence of vulnerable witnesses should be captured as soon as possible after the initial complaint. A significant driver of the EPR was that the system should be one which "allows the vulnerable witness to give their best evidence as early as possible after the alleged offence is reported". That strategic imperative has driven developments in Scotland in the years that have followed, and we see no reason to depart from it. The 2017 Report concluded that there should be a presumption in favour of evidence by pre-recorded interview as close as possible to the report of the alleged incident itself. The Review Group endorsed that conclusion and considered that this should be the default setting for complainers in sexual offence cases. Any derogation from the default position should be very strictly limited, perhaps along similar lines to that allowed for under the provisions introduced by the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019[27].

Benefits of the pre-recording of evidence

2.5 The benefits of pre-recording evidence are obvious. They were summarised, in the context of child witnesses, in the 2017 Report thus:

> "involvement in the criminal justice system as a witness, and the stress associated with it, is concluded sooner; the duration of cross-examination is reduced; and more detailed and more reliable evidence is secured as earlier evidence capture reduces the likelihood of forgetting or contamination."

While this summary was in relation to child witnesses, it applies equally to adult complainers. In reality, as the current legislation recognises, regardless of age complainers in sexual offence case are likely to be vulnerable. If the allegations against the accused have any truth in them, the complainer will be recounting events that were particularly traumatic, threatening or harmful; with the accused often representing a figure of fear for the witness. Complainers in specified sexual offences[28] come within the definition of 'vulnerable witness'[29], as do those in respect of whom the court considers there to be a significant risk that the quality of their evidence will be diminished by reason of fear or distress in connection with giving evidence at the hearing. Scotland's approach to defining vulnerable witnesses in this manner has been commended by other jurisdictions.[30]

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[27] The Criminal Procedure (Scotland) Act 1995 (1995 Act) section 271BZA(7) and (8).
[28] The Sexual Offences Act 2003, schedule 3 paras 36 to 59ZL.
[29] Section 271(1)(b) of the 1995 Act.
[30] See for example Sir John Gillen's Review into the law and procedures in serious sexual offences in Northern Ireland, May 2019, at paragraphs 4.102-4.103.

2.6 A recurrent observation during the Review Group's discussions was that if the use of pre-recorded evidence of complainers in sexual offence cases could be accelerated many of the most significant and repeatedly encountered issues discussed in chapter 1 could rapidly be eliminated. There would also be benefits for the accused and the criminal justice system as a whole. The evidence of the witness would be captured at a much earlier stage in proceedings, with the stress and anxiety associated with the anticipation of giving evidence, and attending court, removed, or at least resolved at a much earlier stage in proceedings. Mis-transcription of, or the otherwise incorrect recording of the evidence in written statements that many complainers spoke to and indicated were a source of anxiety and frustration, would largely be eliminated.

2.7 The greater use of pre-recording would provide the accused and the defence legal team an opportunity from an early stage to see and consider the complainer's evidence in chief, would facilitate discussion with the prosecution about disclosure or otherwise, and would help focus the issues for trial. This works to the advantage of both sides, in the interests of justice. Where it has occurred, in some cases it has led to a plea of guilty and in others it has caused the Crown to withdraw a charge or charges.

2.8 The Review Group noted that concerns continue to be expressed over the audio and visual quality of some Joint Investigative Interviews (JIIs) of child complainers. Examples included footage focusing on the questioner rather than the witnesses, audio feedback and audio quality. Recommendations for the improvement of the quality of JIIs were identified by the EPR in the 2017 Report and the separate "Joint Investigative Interviews Work Stream Report" of September 2017. The Review Group endorse those recommendations and would merely emphasis the need for action and progression, particularly given the relative simplicity with which some of the problems could be resolved.

Methods of recording evidence

(i) Police interviews

2.9 At present it is not standard practice for police interviews of adult complainers alleging sexual offences to be visually recorded. As at the 2017 EPR report, data on the frequency of visual recording of police interviews with adult witnesses was not recorded. The visual recording of statements was a fundamental change recommended by the EPR and endorsed by the Review Group. As noted above, complainers who responded to the 2019 academic research Justice Journeys[31]

[31] Brooks-Hay. O, Burman. M, and Bradley. L, Justice Journeys: Informing policy and practice through lived experience of victim-survivors of rape and serious sexual assault, Scottish Centre for Crime & Justice Research, August 2019

spoke of the negative experiences they had with the written recording of their statements and in particular the distress and trauma involved in the immediate re-reading of these, and the subsequent discovery of mistakes and errors therein, in some instance shortly before or at trial. Requiring the visual recording of these initial statements to police has the significant potential to elevate the negative experiences aforementioned, helping to reduce the risk of re- traumatisation (a concept which will be discussed later in chapter 3) associated with revisiting evidence. Such recordings, would fulfil the EPR's vision of capturing 'best evidence', namely evidence as close as possible to the recording of the alleged incident. Combined with the recording of any required cross and further examination by commission, such recordings would remove the need for a complainer to attend court to give evidence, with the benefits consequent thereon. As noted below a pilot has commenced for the recording of the evidence of rape complainers.

2.10 We do not underestimate the complexity of the changes which pre-recording of evidence involves, or the resource implications, which would involve a further shift in resources to the front end of investigation. Police Scotland would require to have sufficient resource and equipment in place to undertake and store additional visual recordings and securely transfer them to other criminal justice organisations, particularly COPFS. However, it is unquestionable that if a complainer's evidence, including cross-examination, were captured at as early a stage as possible, much of the trauma arising from the whole trial process would be diminished, the time scale for the complainer's direct involvement would be greatly compressed and the traumatic effect considerably alleviated. The benefits are such that it cannot be disputed that this is a change which must be made as soon as possible. The potential impact on resources was a key factor in the 2017 Report's ultimate proposal that a phased introduction of Video Recorded Interviews (VRIs) for vulnerable witnesses should take place.

2.11 Matters have moved, on however, since 2017. In furtherance of efforts to address the EPR recommendations, Police Scotland has commenced work on infrastructure, training, equipment and technology. The EPR recommendation that a structured approach to the taking of evidence of children and vulnerable witnesses under judicial supervision on commission be developed has been advanced with the introduction of the High Court of Justiciary Practice Note No 1 of 2017, and refined further with the subsequent introduction of Practice Note No 1 of 2019. A phased implementation of a "legal presumption in favour of pre-recording" of evidence has more recently been put on a statutory footing and commenced from 20 January 2020 under the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 (2019 Act). From 20 January 2020 there is a presumption that evidence of child witnesses will be taken in this manner. The 2019 Act provides a power for the Scottish Ministers to make regulations extending the ability to give evidence in solemn proceedings to deemed vulnerable witnesses. At this juncture further steps to implement such regulations have yet to be taken.

2.12 On 1 November 2019 a VRI pilot was commenced, supported by Police Scotland, the Scottish Government and in conjunction with COPFS and Rape Crisis Scotland, in 3 local policing divisions (Edinburgh City, Dumfries and Galloway and Highland and Islands). In keeping with the recommendations of the EPR, this utilises specially trained sexual offences liaison officers (SOLOs) who visually record witness statements provided by adult complainers and 16-17 year old complainers of rape/attempted rape. Bespoke training was provided to the officers in question. With the aim of ensuring that the VRI was of a standard capable of use as evidence in chief, and of improving the complainer's experience, the course included:

- knowledge and application of cognitive interview methods;
- knowledge of trauma-informed interviewing;
- enhanced forensic awareness relative to sexual offences;
- expectations of COPFS relevant to evidence in chief; and
- how to obtain, present and test best evidence during the recording process

The intention is for the pilot to be evaluated independently with a view to proceeding to a phased national implementation. COPFS have already noted that early indications of the pilot suggest positive benefits from visual recording, including a reduction in the amount of time taken to record the complainer's statement.[32] This follows on the recommendations of the EPR and is a promising basis for implementation of the Review's recommendations regarding pre-recording of evidence.

2.13 We consider that capturing the complainer's evidence by VRI and commission as recommended by the EPR should be introduced as soon as possible. The EPR reports contain a great deal of useful material that will be of assistance when it comes to developing the detailed procedures. In the meantime, it should be utilised in all cases under current practice where the complainer's statement has been taken by VRI. Where a vulnerable complainer's investigative interview or witness statement had not been visually recorded but was encapsulated in a written statement that statement should (in redacted form, if necessary), and with the permission of the court, constitute the evidence in chief of the complainer. Cross-examination and any re-examination should be undertaken by way of procedures for the taking of evidence on commission, and at as early a stage after service of the petition as is feasible. Where there has not been a VRI, and where the use of written statements as evidence in chief is not permitted or is impractical, the default position, should be that all the evidence of the witness should be taken on commission, as soon as possible after the alleged incident. The vulnerable witness application should seek

[32] As discussed at pages 12 and 23 of Standards of Service for Victims and Witnesses Annual Report on Performance 2019 – 2020, accessible at https://www.copfs.gov.uk/images/Standards%20of%20Service%20for%20Victims%20and%20Witnesses%20Annual%20Report%202019-20.pdf

permission both for evidence in chief to be given by way of prior statement and for any further evidence to be taken on commission; and, as recommended below, should address all issues which would be relevant to address at a Ground Rules Hearing.

(ii) Evidence on commission

2.14 The use of pre-recorded evidence in the form of VRI and commissions has, as already discussed, the potential to address many of the other issues with which this review is concerned, particularly the duration of the complainer's involvement in the criminal justice process, the context and form of the questioning, and the length of the trial.

2.15 The practical experience of many members of the Review Group following the introduction of the Practice Note No 1 of 2017, and the results of the initial evaluations thereof, have shown that where evidence is taken on commission it tends to be concluded in a much shorter period of time than when the witness attends court. Indeed 37% of judicial respondents to a questionnaire issued as part of the initial evaluation of the 2017 Practice Note felt that the evidence and cross-examination at a commission hearing was faster than if the witness was to attend trial. One response stated:

> "*If the witnesses' evidence had been taken at trial under the pre-practice note system, then I would estimate that it would have taken twice as long*."

2.16 The evaluations showed that in the first calendar year that followed implementation of it, of the 25 witnesses who ultimately had their evidence played at trial, their involvement with the criminal justice system concluded an average of 57 days (8 weeks) earlier than would have been the case if they had given their evidence at trial. The success of commissions may be largely attributed to the positive impact Ground Rules Hearings have on the preparation and structure of questioning. As the EPR acknowledged a potential consequence of pre-recording evidence as close to its original reporting as possible is the possibility that new or additional evidence may come to light in the course of proceedings, and may require further evidence to be taken. With detailed early investigation, and early and full disclosure, the circumstances in which this should occur should be relatively limited, but where this does occur, any additional evidence should be taken on commission following a ground rules hearing, with the approval of the court that the evidence is necessary. An application on cause shown should specify what further questions require to be asked of the complainer, what issues the applicant wishes to have covered and why a further commission is the only way to address these issues and obtain the information sought. Expedited timescales for appeals to this decision will be required.

Ground Rules Hearings (GRHs): Improving cross-examination

2.17 GRHs mean that significant attention is given to preparation for the examination of the witness at the subsequent commission, with a focus on the content and form of proposed questioning. The result is that the tone and content of questioning at commissions has shown that it is entirely possible to challenge the reliability and credibility of a witness in a way which is calm, measured and respectful. Commissions carried out under both Practice Notes have shown that it is quite feasible for the rights of the accused to be vindicated by sensitive cross-examination, and for that cross-examination to take place outwith the presence of the jury.

2.18 Experience suggests that well-conducted visually recorded evidence taken by commissioner or in JIIs can have at least as much impact as evidence given in person at trial.[33] A number of studies in Australia and England[34] have shown that the use of pre-recorded evidence or live links of adult female rape complainer does not significantly influence jurors' evaluations and verdicts.

2.19 Indeed the positive experience in Scotland following the introduction of the Practice Notes No1 of 2017 and No 1 of 2019 to date, in respect of the content of questioning and the time taken, largely echoes that in England and Wales following the section 28 pilot[35] on pre-recorded evidence. As noted by the 2017 EPR Report[36], in the evaluation of the section 28 project:

> "Practitioners regarded defence lawyer questioning in section 28 cross-examinations to be more witness-friendly, focused, relevant and pared down than in conventional trials."

Section 28 cross-examinations were also perceived to run more smoothly than cross-examination in conventional trials, with less need for judges to interject in proceedings. Both of these effects were felt to be due to the scrutiny that the cross-examination approach received at the GRH[37] the occurrence of which were made mandatory in all of the cases piloted. As was identified in *R* v *Lubemba*[38]:

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[33] 2017 Report, at paragraph 64.
[34] Ellison. L, & Munro. V, A Special Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials, 2014 23 (1) Social and Legal Studies 3 and Taylor. N, & Joudo. J, The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision making: an experimental study, 2005, Australian Institute of Criminology Research and Public Policy Series *(No. 68)* Canberra: Australian Institute of Criminology.
[35] The pilot involved the visual recording of the cross-examination of certain child witnesses in advance of trial in England and Wales in 2015 under section 28 of the Youth Justice and Criminal Evidence Act 1999. Ground Rules hearings (GHS) were made mandatory in the pilot. For further details see Ministry of Justice, Process evaluation of pre-recorded cross-examination pilot (Section 28), 2016, accessible via: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553335/process-evaluation-doc.pdf
[36] At paragraph 39.
[37] 2017 report at paragraph 39.
[38] [2014] EWCA Crim 2064, at paragraph 45.

> "It is perfectly possible to ensure the jury are made aware of the defence case and of significant inconsistencies without intimidating or distressing a witness".

GRHs expansion

2.20 It was a recommendation of the EPR that the use of GRHs should be extended to cover any situation where a complainer in a sexual offence case is expected to give evidence. Paragraph 43 of the 2017 Report stated that:

> "Until such a time as the Group's vision is implemented, the Group considered that, as an interim measure, GRHs should be introduced for all cases in the High Court in which a child or vulnerable adult witness is required to give evidence, even where this is to be done using conventional approaches. A GRH is an uncomplicated and highly effective tool to begin the process of changing culture and practice in relation to taking the evidence of vulnerable witnesses by introducing greater scrutiny of approaches to questioning, and builds on what ought to be current good practice by highly skilled legal practitioners."

2.21 In the years that have succeeded the 2017 Report, GRHs have been a feature in all cases where evidence on commission is sought for a vulnerable complainer. Experience has shown that they have been successful in improving the experience of complainers and are working effectively. In light of that the Review Group is of the view that it is imperative that GRHs are now rolled out as a priority for all sexual offences cases in which the complainer is to give evidence irrespective of the method in which the evidence is to be provided to the court. At paras 2.15 – 2.17 we referred to the extent to which examination and cross-examination of complainers in commissions has tended to differ from the approach taken when the same witness appears in court. A major reason for this is the approach taken in GRHs which require all concerned to focus clearly and well in advance on the nature, content and purpose of the examination, under the management of the PH judge and in accordance with detailed Practice Notes setting out what is expected.

2.22 The approaches adopted in GHRs and commissions held under the conditions specified in the GRH, alongside the fullest use of pre-recorded evidence would be inherent in a court of specialist jurisdiction, addressed in the next chapter. In the meantime, however, the following measures should be introduced without delay.

***The Review Group recommends*:**

Recommendation 1

(a) In accordance with the recommendations of the Evidence and Procedure Review (EPR) the police interviews with complainers in serious sexual offences[39] should be video recorded to capture the evidence of the witness at the earliest possible opportunity. The interviews should be conducted with officers trained in taking such statements, all as recommended by the EPR. The resultant recording(s) should be used, subject to editing under the control of the court, as the evidence in chief of the witness. Any further evidence should be pre-recorded on commission at the earliest opportunity in the proceedings and where appropriate this should be done prior to service of the indictment per section 271I(4A) of the Criminal Procedure (Scotland) Act 1995. This recommendation can and should be acted upon as soon as possible, and irrespective of acceptance of other recommendations made in this report.

(b) In the interim, in any case where the police statements have not been recorded in a manner which would allow their use as evidence in chief, the whole evidence of the witness should be pre-recorded on commission, at the earliest opportunity in the proceedings, the recording to constitute the evidence of the witness at trial.

(c) Ground Rules Hearings (GRHs) should be introduced for any occasion when a complainer is to give evidence on commission or at trial. As currently occurs in the High Court, any section 275 application should be conjoined with the GRH.

[39] For the purposes of this review and the recommendations serious sexual offences shall mean all offences identified in paragraphs 36 to 59ZL of Schedule 3 to the Sexual Offences Act 2003 with the exception of paragraphs 41A, 44, 44A, 45, and 46 on the basis that such offences are unlikely to involve an individual complainer providing evidence or determination of whether there is a 'sexual' element' to the offence is a matter following trial. Paragraph 59A will similarly be dis-applied in circumstances where there is no complainer.

Chapter 3 - THE CASE FOR SPECIALISM

3.1 Over at least the last decade the criminal justice system in Scotland has developed an approach in which there is increased recognition of the role, needs and welfare of witnesses, and complainers in particular. This can be seen, for example, in:

- The passing of the Victims and Witnesses (Scotland) Act 2014;
- The Standards of Service for Victims and Witnesses produced by Police Scotland, the COPFS, SCTS, Scottish Prison Service and Parole Board for Scotland;
- The launch of the Victims Code for Scotland in 2015;
- All stages of the EPR;
- The Practice Notes No 1 of 2017 and No 1 of 2019;
- The issuing of the Joint Protocol on Working together for Victims and Witnesses in 2017;[40]
- The 2017 and 2020 reviews by HM Inspectorate of Prosecution relating to the investigation and prosecution of sexual crimes;
- The establishment of the Victims' Task Force in 2018;
- The annual report on the Standards of Service for Victims and Witnesses;
- The passing of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019;
- The introduction of Forensic Medical Services (Victims of Sexual Offences) Scotland Act 2021.

3.2 This change in approach has been designed to reset the relationship the criminal justice system has with complainers and witnesses. This heightened awareness of the interests of witnesses generally, and particularly vulnerable complainers, is valuable, and seeks to build on work already done over many years to address issues relating to the way in which complainers are treated, the way in which their evidence is gathered and given, and the scope of questioning to which they may be subjected within the trial process Despite some notable successes (the expansion of the use of evidence on commission following the introduction of High Court Practice Note No 1 of 2017 and the positive response thereto, for example), far too often the issues reported by complainers echo what was being said by complainers in sexual offence cases 20, 30 or even 40 years ago. There is a consensus that, notwithstanding the introduction of general principles in the 2014 Act, more requires to be done, and specifically with regard to practice and procedure relating to the way in which sexual offence cases are processed and managed. One

[40] Accessible at: https://www.scotcourts.gov.uk/docs/default-source/coming-to-court/working-together-for-victims-and-witnesses.pdf?sfvrsn=6

option for which there has been growing support in recent years relates to the concept of specialism, the issue addressed in this chapter.

The development of legislative protection for sexual offence complainers and continuing problems

3.3 In its 1983 report on Evidence in Cases of Rape and Other Sexual Offences[41] the Scottish Law Commission stated:

> "*4.1 For a good many years now there has been widespread concern about, and criticism of, the way in which complainers are treated in rape trials.*
>
> *4.2 The nature of this concern is both general and specific. On the general level it has been claimed that the police, prosecutors, the courts and perhaps society as a whole treat the victims of sexual crimes, and particularly rape, with a lack of proper sympathy and understanding. It is said that this lack of sympathy and understanding makes the whole experience up to and including an appearance in court much more traumatic and distressing for rape victims than is necessary. It is also suggested that a fear of having to undergo this experience may in fact deter some women from proceeding with a complaint of rape.*
>
> *5.1 We are satisfied that there is considerable force in the criticism that our laws of evidence in rape and certain other sexual cases are out of touch with contemporary sexual habits and attitudes and that they often cause unacceptable trauma and distress to those who claim to have been the victims of such offences. We think that that is particularly so when these laws permit, or are seen as permitting, a wide-ranging enquiry into a woman's sexual history for the sole purpose of establishing that, because she has in the past had sexual relations with A and B, she must, therefore, have consented to intercourse with C. We are also persuaded that the present state of the law of evidence on such matters is unsatisfactory for other reasons as well. The declared law is in some respects unclear; it is apparently not always being followed in practice*;…. "

3.4 The rape shield legislation which followed this report, which limited the circumstances in which prior sexual behaviour of a complainer could be raised at trial, while initially well received and seen as a step forward was quickly found to be wanting. As with the law before its introduction, the new provisions were in some respects lacking in clarity, and were seen as being so loosely drafted that the intention behind them was not being achieved.[42] This led to the Scottish Executive's

[41] Scottish Law Commission report number 78, Evidence in Cases of Rape and Other Sexual Offences, 1983. Accessible at: https://www.scotlawcom.gov.uk/files/9912/7989/7431/rep78.pdf

[42] See for example the comments made by the court on this prior legislation in *M* v *HM Advocate* 2013 SLT 380.

consultation paper "Redressing the Balance: Cross-examination in rape and sexual offence trials" and response,[43] and further revised legislation introduced in the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. The policy memorandum to the Bill leading to this legislation, stated, under reference to sexual history evidence:

> "*The Executive believes that there are a number of deficiencies in [the existing] provisions. They are sufficiently elastic not to strongly discourage the use of this type of evidence. Such evidence is rarely relevant. Even where it is relevant, its probative value is frequently weak when compared with its prejudicial effect. This may include invasion of the complainer's privacy and dignity and distortion of the course of the trial by diversion of attention from the issues which require to be determined in arriving at a verdict onto the past behaviour of the complainer. The current provisions rely heavily on individual judges to achieve a proper focus on these matters, without providing clear guidance*."

The provisions that followed are what we now know as sections 274 and section 275 of the Criminal Procedure (Scotland) Act 1995 (1995 Act).

3.5 Unfortunately however, despite the revised provisions having now celebrated their eighteenth year of application, problems in respect of their interpretation, application and the general questioning of complainers at trial by both bar and bench continue to arise. One recent example can be found in *Dreghorn* v *HM Advocate*[44]. Despite guidance from the High Court on appeal that there was no place for insulting or intimidating cross-examination, the case was followed by *Donegan* v *HM Advocate*[45]. There the complainer was subjected to what the court described as a lengthy, unjustified and sometimes insulting cross-examination[46], without objection by the Crown or intervention by the trial judge. The court noted:

> "*In recent years, in line with the approach in other jurisdictions, notable steps have been taken in Scotland seeking to address and demystify for court users various supposed "myths" associated with the reporting of and the reliability of rape allegations; and to improve the experiences of those involved and those giving evidence. Procedures have been adopted to address the perceptions of the jury and the requirement of their role, most notably section 288DA. The conduct of the sort that occurred during the trial has the potential to erode*

[43] Scottish Executive, Redressing the balance: cross-examination in rape and sexual offence trials, Consultation, November 2000 and Scottish Executive, Redressing the Balance: Cross-Examination in Rape and Sexual Offence Trials, Report on Responses to Consultation, 2001 the latter accessible at: https://web.archive.org/web/20001216055100/http://www.scotland.gov.uk/consultations/justice/rtb-00.asp

[44] 2015 SCCR 349

[45] 2019 JC 81

[46] See paragraph 54.

such progress. We therefore wish to remind all involved of their respective roles in keeping examination of a witness within proper and reasonable bounds."[47]

3.6 The most recent, egregious, example of bad practice came to the attention of the High Court on appeal in the case of *McDonald* v *HM Advocate*[48]. There the court made these observations:

> "33. Over recent years, the court has made repeated efforts to ensure that the "rape shield" provisions of sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 are properly adhered to by trial courts. It has explained the import of these sections in clear terms (see eg *CJM* v *HM Advocate* 2013 SCCR 215; HM *Advocate* v *CJW* 2017 SCCR 84). It has also given definitive guidance on the duties of a judge to control the tone and content of cross-examination, especially in sexual offences cases (eg *Dreghorn* v *HM Advocate* 2015 SCCR 349, *Donegan* v *HM Advocate* 2019 JC 81). The importance of this to the proper administration of justice cannot be underestimated. The problem is well understood and was outlined two decades ago in the Scottish Executive's paper "Redressing the Balance: Cross-examination in rape and sexual offence trials" which prompted the changes to sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995 in section 7 of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. Despite this, and the clear import of these sections, the courts have continued to be criticised for failing to provide complainers in sexual offence prosecutions with adequate protection from irrelevant, and often distressing, questioning. This case is a further illustration of a trial court's failure in this regard.
>
> …
>
> This trial was conducted in a manner which flew in the face of basic rules of evidence and procedure, not only the rape shield provisions but also the common law. It ignored a number of principles which have been laid down and emphasised in several recent decisions of this court. If justice is to prevail in the prosecution of sexual offences, it is imperative that those representing parties abide by these basic rules. If they do not do so, the judge or Sheriff must intervene to remedy the matter. During her cross-examination, this complainer was subjected to repetitive and at times irrelevant questioning. She became extremely distressed and rightly so. The court did nothing to intervene. Were this to be repeated, the situation in sexual offences trials would be unsustainable.

[47] See paragraph 56.
[48] [2020] HCJAC 21

…

37. Allowing evidence of this irrelevant and insulting nature into a trial of a sexual offence is a serious failure in the administration of justice.

…

40. … All of this evidence ought to have been objected to and excluded. It is most unfortunate that a complainer in a sexual offences trial should have been subject to such questioning. It is not at all surprising that she was distressed as a result."

3.7 *McDonald* was an extreme case, where there was a series of permitted but irrelevant and inappropriate questioning of the complainer, referrals to inadmissible hearsay, a failure to follow appropriate procedures in respect of sections 274 and 275 of the 1995 Act, a failure by the trial judge to give the mandatory directions required by section 2888D, and a failure to exclude a special defence of consent for which there was no evidence. However, *McDonald* is not a rarity. In addition to cases showing obvious bad practice, there have been numerous appeal cases in which the High Court has been at pains to explain clearly what is to be expected of practitioners in respect of the presentation of applications under section 275, suggesting that, 20 years after the introduction of the rape shield legislation, some practitioners (and Advocate Deputes) have still not grasped the full import of the legislation, and regularly fail to follow the procedural requirements thereof.

3.8 Examples of good practice could of course be given: particularly the work of Preliminary Hearing judges in the High Court of Justiciary; the operation, by those same judges of the Practice Note No 1 of 2017; and the subsequent Practice Note No 1 of 2019; all of which is to be commended. Under the chairmanship of a dedicated "evidence on commission" judge, judges have shown themselves to be supportive of, and motivated to make a success of, the improved arrangements for taking evidence on commission. Nevertheless, the litany of recent cases suggests that examples of poor and inappropriate practice in respect of the examination of complainers at trial and section 275 applications in particular are still too common[49] permeating the criminal justice system, and requiring further changes to remove them.

3.9. The success of a dedicated team of Preliminary Hearing judges overseeing and taking greater roles in case management provides a useful example of a concept which might help identify the way forward. The operation of Preliminary

[49] Apart from cases already mentioned, some examples are: *CJM* v *HM Advocate* 2013 SCCR 215; *LL* v *HM Advocate* 2018 JC 182; *JG* v *HM Advocate* 2019 HCJ 71; *Lee Thomson* v *HM Advocate*, unreported 13 December 2019; *RN* v *HM Advocate* [2020] JC 132; *SJ* v *HM Advocate* [2020] HCJAC 18; *HM Advocate* v *JW* 2020 SCCR 174; and *CH* v *HM Advocate* [2020] HCJAC 43.

Hearings, introduced as part of the Bonomy reforms over 15 years ago,[50] was for many years patchy, and inconsistent. It was only when steps were taken to create effectively a team of dedicated PH judges that the aim of the reforms really took effect. The point is made in the EPR 2015 report[51]:

> "The system only came into its own when new judges were introduced with a view to taking a much more pro-active role in the Preliminary Hearing systems, and to maintain a uniform and effective approach to them. The object of these judges was to produce an efficient system which complied with the intention of the legislature and to ensure that trials were held within a reasonable time. The effect of this has been that, over the last few years, the average number of Preliminary Hearings per case is less than 2. Since it cannot be less than 1, and some cases involve complex matters requiring multiple hearings, the system is now seen as working as it should."

3.10 This experience is a clear illustration of the benefits of placing a particular type of work into the hands of selected judges, and clerks, all duly trained for the task. It might therefore reasonably be anticipated that if the conduct of sexual offence cases was placed in the hands of judges and staff who had been trained thoroughly and in depth, assisted by prosecutors, and defence lawyers who had similarly been trained, in programmes which inter-linked in terms of identifying and developing good practice in a way which recognises and seeks to avoid re-traumatisation (a concept we will return to later in this chapter), then we would see real benefits for witnesses, complainers and the accused in the way in which such cases are conducted, resulting in improvements to the criminal justice system as a whole. The means of doing so would be via the potential introduction of a specialised sexual offences court.

3.11 The Review Group accordingly gave consideration to the arguments in favour and against the implementation of a specialist court for sexual offences in Scotland, drawing upon its own knowledge of specialist approaches adopted domestically and elsewhere, including examples of specialism implemented or piloted in the rest of the UK and commonwealth. Some systems merely involved fast-tracking and clustering of cases within the current work stream of a court. However, given the nature of the problems outlined in this report, and the significant volume of cases these options are clearly not sufficient. The Review Group favoured an approach which involved the creation of a dedicated specialist court for solemn sex offences.

3.12 The prospect of and use of specialist managed courts is not a new concept in Scotland. Following a pilot in Glasgow a number of Domestic Abuse courts were implemented and have been in operation for a number of years. The evaluation of

[50] Following on from Lord Bonomy, Review of the practices and procedure of the High Court of Justiciary, 2002.
[51] At paragraph 4.6.

the initial Pilot Domestic Abuse Court[52] in Glasgow recorded that there was overwhelming support for a specialist court approach to domestic abuse, with an overwhelming majority of complainers, accused and witnesses supporting the specialist court approach.[53] Specialist courts also exist in respect of extraditions, and in the civil sphere in commercial cases, family cases and personal injury cases.

3.13 It was noted by the Review Group that the principal arguments in support of specialism include the potential to assist the judiciary, staff and practitioners to be better equipped in dealing with complainers, enhance the experience of complainers, encourage greater sharing of information and to reduce delay. In South Africa, research reported[54], that specialist sexual violence courts were linked to significant reductions in delay, particularly for cases involving child complainants. Furthermore in Scotland, defence agents involved in the Glasgow Domestic Abuse Pilot suggested that the availability of the dedicated prosecutor made it easier to obtain information which enabled them to advise clients quickly which, in turn, could result in an increase in guilty pleas.[55] Similarly a 2004 study[56] following the introduction of domestic violence courts in England and Wales found enhanced effectiveness of court and support services for complainers, improved advocacy and information sharing, and increased levels of complainer participation and satisfaction, resulting in an increased public confidence in the criminal justice system.

3.14 Arguments against the introduction of a specialist court included the potential risk of trauma on judges, staff, and practitioners involved in the day to day practice of the court; perceived loss of impartiality from the focus on a particular type of case, and that alleviation of delay in the initial years of establishing the court may be modest.

3.15 The Review Group did note that research and evaluation of pilot specialist sexual violence courts in New South Wales (NSW) in 2005[57] suggested that the pilot had little impact upon delay or case management. However, evaluators noted that there was little to differentiate the specialist pilot court from other courts, which would not be the case under the proposals made within this report. There were several issues which caused problems for the scheme which seem to have their root in the

[52] Reid Howie Associates, Evaluation of the Pilot Domestic Abuse Court, Edinburgh: Scottish Executive Justice Department, 2007.
[53] See also Connelly. C, Handling Domestic Abuse cases: a Toolkit to Aid the Development of Specialist Approaches to Cases of Domestic Abuse, Scottish Government, May 2008. Accessible at: https://www2.gov.scot/resource/doc/228707/0061940.pdf
[54] See Sadan. M, Dikweni. L, and Cassiem. S, (2001) Pilot Assessment: The Sexual Offences Court in Wynberg & Cape Town and related services Cape Town: IDASA
[55] *Supra note* 53, particularly chapter 4.
[56] Cook. D, Burton. M, Robinson. A, and Vallely. C, Evaluation of Specialist Domestic Violence Courts/Fast Track Systems, London: CPS and Department for Constitutional Affairs, 2004. See also Cashmore, J. and Trimboli, L, An evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot Sydney: NSW Bureau of Crime Statistics, 2005 and Parkinson. P, Specialist prosecution units and courts: a review of the literature Sydney: Royal Commission into Institutional Responses to Child Sexual Abuse, 2016.
[57] Cashmore. J, and Trimboli. L, An evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot Sydney: NSW Bureau of Crime Statistics and Research, 2005.

way in which the pilot was set up. For example, a failure to develop practice directions; late appointment of prosecutors to some cases; inflexibility among some participants in the process; and technological defects. However, any scheme developed in Scotland would have appropriate practice directions and case management at its heart, as well as a need for early identification of the trial depute, and suitably appropriate procedures. Problems similar to those encountered in the NSW pilot are unlikely to be reflected here. It is significant to note that a pilot in New Zealand, referred to in detail below, did not encounter these difficulties. As to technology, we would have the benefit of drawing upon the lessons learned from the experience of running virtual courts in appeals, trials and civil business during the Covid-19 pandemic. This suggests that unsurmountable technological issues are unlikely to be encountered.

New Zealand's pilot specialist courts

3.16 By way of background, in 2015, as part of a review on a remit to consider "how the position of complainants might be improved, but without compromising the trial rights of defendants" New Zealand's Law Commission recommended that a specialist District Court for sexual offences be trialled and evaluated[58]. In response, pilot sexual violence courts were set up in two court districts (Auckland and Whāngārei) and came in to operation in December 2016. The aims of the pilot were to reduce delays and improve the courtroom experience for complainants, reducing secondary trauma, while preserving the rights to a fair trial for the accused. The pilot courts covered serious sexual violence allegations where the defendant denied the charges and elected to be tried before a jury. A list of designated offences for the purposes of the pilot includes rape and attempted rape.[59]

3.17 The pilot courts operated within the legislative framework in operation at the time of their implementation and consisted of the listing of similar cases prioritised under the pilot. Guidelines for best practice were developed[60] covering case management, case review hearings and the trial itself. The pilot included the use of designated trained judges; greater front loaded case management procedures, including enhanced judicial case management; the introduction of dedicated sexual violence case managers to examine files proactively, with a view to early identification of issues which could potentially cause delays to trial; earlier allocation of cases; earlier trial scheduling; more frequent use of special measures for the

[58] See recommendations 17-19 in Law Commission of New Zealand, The Justice Response to Victims of Sexual Violence. Criminal Trials and Alternative Processes, December 2015. Accessible at: https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC-R136-The-Justice-Response-to-Victims-of-Sexual-Violence.pdf

[59] Accessible at: https://www.districtcourts.govt.nz/assets/Uploads/Publications/97adc4f1e7/List-of-offences-for-SVC-pilot-as-of-March-29-2017.pdf

[60] List accessible at: https://www.districtcourts.govt.nz/assets/Uploads/Publications/26a11ed789/Best-Practice-Guidelines.pdf

giving of evidence by complainants; and imposition by judges of tighter constraints for cross-examination of complainers.

3.18 Associated measures to help complainer experiences more generally included separate court entrances for complainers; ensuring that child witnesses gave evidence early in the day; providing an opportunity for complainers to meet the judge, defence counsel and prosecutors before the trial started; the opportunity to review any pre-recorded evidence (evidence interview video) before it was played to the jury; and an improved understanding that there may be a need for communication assistance or that alternative ways of giving evidence might require to be considered. All judges designated to preside over pilot cases underwent specialised training on dealing with sexual cases, including content drawing on research on how complainers experienced the process. This training has now been rolled out to all District Court jury judges.

3.19 A preliminary evaluation conducted in 2017 showed positive early results from the pilot in terms of the time taken to process cases through the system[61]. In 2019 a comprehensive independent evaluation[62] of the first two years of the pilot was carried out and included quantitative analysis of timeframes by the Ministry of Justice and qualitative analysis of the experiences of participants including complainers, defence counsel, prosecutors, court staff, advocacy support advisors and judges. The findings from the evaluation confirm a number of successful outcomes[63] which included shorter wait times for cases to go to trial and reduced trauma to complainers. Pilot cases were found to have proceeded to trial about a third faster on average than before and most complainers felt the pilot's trials were managed in a way that did not cause them to feel re-traumatised by the process. Some key findings of the evaluation included:

- that pilot cases progressed more efficiently, faster and with fewer delays overall;
- participants perceived that trial quality had improved, with fewer adjournments and better quality evidence;
- complainers were generally better prepared for attending trial, reducing anxiety, and "trials were managed in a way that did not cause them to be retraumatised by the process"[64];

[61] The District Courts of New Zealand, Preliminary Evaluation: Sexual Violence Pilot Courts, 2017
[62] Allison. S and Boyer. T, *Evaluation of the Sexual Violence Court Pilot* (Gravitas Research and Strategy Limited/Ministry of Justice, Wellington, 2019, accessible at: https://www.districtcourts.govt.nz/assets/Uploads/2019_Publications/Sexual-Violence-Court-Pilot-Evaluation-Report-FINAL-24.7.19.pdf
[63] Some of the key findings were: that Pilot cases progress more efficiently, faster and with fewer delays overall; stakeholders perceived that trial quality had improved, with fewer adjournments and better quality evidence; complainers were generally better prepared for attending trial, reducing anxiety; the judiciary were more alert to unacceptable questioning and intervened more frequently; firm trial dates were issued earlier resulting in more and earlier guilty pleas; and there was unanimous support among stakeholders to roll the pilot model out nationally.
[64] *Supra note* 62, at page 72.

- the judiciary were more alert to unacceptable questioning and intervened more frequently;
- firm trial dates were issued earlier, resulting in more and earlier guilty pleas; and
- there was unanimous support among participants for the model to be developed nationally.

3.20 As might be expected of any pilot, the evaluation identified certain areas for improvement. Concerns remained about the length of time between complaint and the trial, cross-examination, and in Auckland, inadequate physical facilities to prevent encountering the accused.

3.21 In August 2019 it was announced that the pilot would become permanent in Whāngārei and Auckland, with rollout to other centres being dependent on the availability of resources. There was general support for the overall approach developed under the pilot. Shortly before the results of the evaluation were reported, the Ministry of Justice indicated it would await the outcome of the evaluation before commencing consideration of a national sexual offence court[65]. The potential for further improvement has been identified, particularly the position in respect of child witnesses. This was largely due to experience of issues in respect of children which in this jurisdiction informed the initial work of the EPR. Recommended improvements in New Zealand included that consideration be given to pre-recording the entire evidence[66] of a young witness[67].

3.22 The Review Group considered that the experience and the results in New Zealand in particular were encouraging and supportive of a similar approach being adopted in Scotland. The Review Group felt that there was overwhelming evidence that a specialist court in Scotland had the potential to address almost all of the concerns expressed by complainers and identified in the course of this Review, and that there would be commensurate benefits for the accused and the criminal justice system at large and the public's confidence in it. The Review Group accordingly proceeded on the basis that introduction of a specialist court should be recommended.

3.23 The Review Group, does not shy away from the fact that there are likely to be resource implications in the establishment of a specialist sexual offences court in Scotland, particularly those associated with training personnel, and the drafting and implementation of policy and practice. In reality, however, the establishment of a

[65] See paragraph 9, page 59 of New Zealand Parliamentary Under- Secretary to the Ministry of Justice, Proactive Release – Improving the justice response to victims of sexual violence, issued July 2019, accessible at https://www.justice.govt.nz/assets/Documents/Publications/7236-Proactive-release-SV-response-final.pdf
[66] See page 62, Randell. I, Seymour. F, McCann. C, Anderson. T, Blackwell. S, Young Witnesses in New Zealand's Sexual Violence Pilot Courts, 2020.
[67] Although evidence in chief is captured by VRI, cross-examination still takes place at court during the trial, often via live link within the building.

specialist court would involve, in some respects, the reorganisation or transfer of existing caseloads and the use of existing buildings so that resources are in fact used and managed more efficiently.

Trauma-informed Practice

3.24 Trauma-informed practice is a concept originating in the field of mental health. In this country it has recently been the focus of much discussion in relation to adverse childhood experiences, restorative justice and problem-solving courts. It was referred to in the context of family law disputes concerning children in the Journal of the Law Society of Scotland in October 2019[68]. That article suggested that:

> "Aspects of the legal system, such as being asked to recall traumatic events, being exposed to an alleged abuser, or the court experience reminding them of the disempowered feelings associated with past trauma, can trigger an individual's trauma-related stress or cause re-traumatisation (feeling as bad as when the trauma was actually happening)."

3.25 In 2016 NHS Education for Scotland was asked by the Scottish Government to develop a set of resources to promote and implement trauma-informed practice within Scotland. The result is a national trauma training framework[69] designed to be relevant to the broad Scottish workforce. This states that trauma-informed practice involves taking steps to resist re-traumatisation in line with the principles of: choice; collaboration; trust; empowerment; and safety. These principles are recognised as the key foundations of trauma-informed practice. How these may be relevant in the context of this report is discussed below.

3.26 The essence of trauma-informed practice is the adoption of strategies to avoid as far as possible exacerbating trauma-related problems, or causing re-traumatisation. A paper published by the Blue Knot Foundation[70], a national organisation in Australia dedicated to understanding and treating childhood trauma, focuses on trauma-informed practice in that context. This paper and others it refers to, however, support the contention that the application of trauma-informed practices more widely in a legal context can result in more effective, fair, intelligent, and just legal responses. Relevant for the Review Group's purposes is the authors' reference to research which shows that many people who experience complex trauma-related problems have been re-traumatised by the very services they have accessed for

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[68] Martin. N, Woodhouse. A, and Burke. C, Being trauma-Informed- in practice, 2019 64(10) JLSS 24, accessible at: https://www.lawscot.org.uk/members/journal/issues/vol-64-issue-10/being-trauma-informed-in-practice/

[69] NHS Education for Scotland, Transforming Psychological Trauma: A Knowledge and Skills Framework for the Scottish Workforce, 2016. An executive summary is accessible here: https://www.nes.scot.nhs.uk/media/rgxngvpv/nationaltraumatrainingframework-execsummary-web.pdf

[70] Kezelman. C.A. and Stavropoulos. P, Trauma and the Law: Applying Trauma-informed Practice to Legal and Judicial Contexts, Blue Knot Foundation, 2016. Accessible at: https://communitylegalqld.org.au/sites/default/files/downloads/webinars/blue_knot_paper_trauma_informed_practice.pdf

assistance[71]. From the material provided to the Review Group, some of which is discussed in chapter 1, this has clearly been the experience of many sexual offence complainers over the years in respect of their involvement with the Scottish criminal justice process. In the Blue Knot paper the observation[72] is made that trauma-informed practice involves recognition that:

> "the effects of overwhelming stress also impede the imparting of coherent narratives, such that the testimony and accounts of traumatised people can appear discursive, episodic, unreliable and even mendacious."

3.27 As Dr Caroline Bruce[73] explained in a discourse to the Judicial Institute, the effect of this can be that narrative recall of traumatic events can be vague and unclear in places, particularly for contextual details, and often has blanks or vague sections. It can also change over time, as memories are gradually integrated. The effect of trauma on witnesses can be to reduce the coherence and content of memory and access to the details of the events to which they are witness. The memories are much more sensory and physical, less coherent and linear, so the person may feel emotionally and physically the way they did during the traumatic events, rather than recalling the events in a linear fashion. It may seem as though it is happening again, and can feel quite overwhelming. Individual responses can be unpredictable. Some of the traditional yardsticks used to assess reliability and credibility, such as demeanour, internal consistency and inherent likelihood, may be tools which are too blunt for their purpose, when not interpreted against an understanding of the impact of trauma. That this is so is already, perhaps, implicitly recognised in Scotland in sections 288DA and 288DB of the 1995 Act.

3.28 This was also recognised in the article in the Journal of the Law Society of Scotland:

> "It is important to hold in mind that a person's behaviour or reactions at all stages of their journey through the legal system might be trauma-related. Practitioners should try to work in a way that reduces the risk of trauma-related distress by maximising choice, collaboration, trust, empowerment, safety and self-care."

3.29 Trauma-informed practices enable testimony to be imparted in a context in which additional stress is minimised[74], reducing the risk of re-traumatisation. Factors

[71] Trauma has often occurred in the service context itself, see e.g. Jennings. A, Models for Developing Trauma-Informed Behavioral Health Systems and Trauma-Specific Services. Report produced by the National Association of State Mental Health Program Directors (NASMHPD) and the National Technical Assistance Center for State Mental Health Planning (NTAC) United States, 2004, page 6.
[72] At page 13.
[73] Honorary Senior Lecturer in Clinical Psychology at the Institute of Health and Wellbeing, University of Glasgow.
[74] Page 13, Kezelman. C.A. & Stavropoulos. P, Trauma and the Law: Applying Trauma-informed Practice to Legal and Judicial Contexts, Blue Knot Foundation, 2016.

which contribute to re-traumatisation include witnesses repeatedly having to retell their story, feeling that they are not being seen or heard[75], delay and other stressful situations. 'Do no harm' is a guiding principle of trauma-informed practice[76]. The principles adopted by the Advocates Gateway[77] operate on a similar basis. This is consistent with the whole ethos of the EPR, namely that vulnerable witnesses should be enabled within the criminal justice system to give their best evidence, and both Practice Note No 1 of 2017 and No 1 of 2019 are directed towards that end. A key aspect of trauma-informed practice is to minimise triggers, minimise the interactions with the person that bring back that sense of loss of control, of entrapment, of loss of dignity, of uncertainty, or of being bullied. Minimising triggers will maximise a person's opportunity to give their best evidence[78].

3.30 The extent to which these initiatives, and legislation such as sections 274, 275, 288DA and 288DB of the 1995 Act have achieved, or failed to achieve, their purpose in relation to the examination in court of vulnerable witnesses is discussed above. However, the relevance of trauma-informed principles goes beyond the process of taking the evidence of the witness. The language in which the key principles of trauma-informed practice are expressed[79] in the context of mental health or the care of children who have been abused may not translate directly to the legal and judicial context which is at the core of this Review. However, the principles, rather than the labels attached to them, with the underlying aim of avoiding re-traumatisation, do resonate. The Mental Health Foundation[80], for example, refers[81] to a culture of thoughtfulness and communication, which on consideration, is highly relevant to the issues of communication with complainers noted above.

3.31 A paper from the University of Buffalo centre for social research, "What is Trauma-Informed Care?" [82], separates the label attached from the underlying principle, which can be a helpful approach in seeking to identify the particular issues which may be relevant for the context of the Review Group's considerations and this report. So for example, utilising the list from the National Trauma Training Framework and applying them to the issues which are of particular relevance to a

[75] University of Buffalo Centre for Social Research, What is Trauma- Informed Care?, accessible at: http://socialwork.buffalo.edu/social-research/institutes-centers/institute-on-trauma-and-trauma-informed-care/what-is-trauma-informed-care.html
[76] Page 14, Kezelman. C.A. & Stavropoulos. P, Trauma and the Law: Applying Trauma-informed Practice to Legal and Judicial Contexts, Blue Knot Foundation, 2016.
[77] See generally http://www.theadvocatesgateway.org/
[78] Dr Bruce in a discourse presented to the Judicial Institute for Scotland.
[79] Using terms such as safety, choice, empowerment/enabling, trustworthiness, collaboration see eg http://www.napac.org.uk ; http://www.nes.scot.nhs.uk/media/3983113/ NationalTraumaTrainingFramework-execsummary-web.pdf
[80] http://www.mentalhealth.org
[81] "Engaging with complexity: Providing effective trauma-informed care for women"
[82] University of Buffalo Centre for Social Research, What is Trauma- Informed Care?, accessible at: http://socialwork.buffalo.edu/social-research/institutes-centers/institute-on-trauma-and-trauma-informed-care/what-is-trauma-informed-care.html

sexual offence complainer, trauma-informed practice in the criminal justice system might include:

- Choice: this involves individuals being provided with a clear and appropriate message about their rights and responsibilities. In the present context one might add that the message should be consistent; and that this principle includes being made fully aware of and understanding what is involved in certain aspects of the process. Key examples would include being made aware of the options available for giving evidence by special measures and being given information outlining certain key legal concepts.

- Collaboration: this might include measures allowing witnesses to be represented when medical records and other information of a sensitive nature are sought; that witnesses are kept informed of key stages in the process; that they are informed about, and their views sought in respect of, section 275 applications, or given ILR therefor (see chapter 4). Offering breaks during the giving of evidence may also reflect this principle. Should there be an objection during the evidence of a complainer, the judge should carefully explain why the witness must leave, explaining that this happens with every witness when an objection is taken, and that the jurors will be asked to retire also.

- Trust: involves clarity and consistency of approach. This involves being clear about what will happen, when and why; getting in touch when you say you will. In other words explaining who does what, when and with what purpose. In the context of this report having a single point of contact, and meeting the Advocate Depute in advance of giving evidence would be relevant. How expectations are set or created, and managed is also a factor.

- Empowerment: this involves providing an atmosphere that allows individuals to feel validated. As reported to the Review Group many witnesses report feelings of marginalisation, and of being made to feel they don't matter.

- Safety: As reported to the Review Group repeatedly witnesses referred to their fear of meeting the accused at court. Ensuring that this does not happen, and that they know this, is an aspect of this principle. The nature of any waiting room, whether it is comfortable, whether other individuals may be there and so on is a factor here. Providing familiarisation visits to the court, and ensuring that the privacy of witnesses is given proper respect are relevant also.

These are only a few examples: there are many more ways in which the use of trauma-informed approaches could improve the manner in which sexual offences are dealt with.

3.32 The National Trauma Training Network programme "Scottish Trauma Informed Leaders Training" outlines some of the requirements for trauma training for organisations, which might be adapted for a specialist sexual offences court in Scotland. In that context it would require the systems, practices and policies of the court to be developed through a "trauma-informed" lens utilising ideas developed in other professional backgrounds where adaptable to the criminal justice context. It would ensure that no part of the system is designed such that it systematically misinterpreted the impact of trauma on the witness and the evidence they give, which current legal principles concerning the assessment of evidence, and associated jury directions, might permit (as explained at paragraph 3.27). It would also involve all those working in or appearing before the court understanding: the definitions, prevalence and impacts of trauma; the theory, principles and evidence underpinning trauma-informed practice, including the concept of "re-traumatisation"; and applying them in their communications, conduct and practice.

3.33 The benefits of trauma-informed practices are not limited to the effect on witnesses, although the benefit there is obvious. The principles also recognise the potential for, and raises awareness of, the risk of what is termed secondary, indirect or 'vicarious trauma' occurring in those dealing repeatedly with traumatic cases. Within the context of a specialist court this is of relevance to the wellbeing of the judiciary and court staff hearing sexual offence cases, and specialist practitioners appearing. A deeper understanding of this risk would assist in safeguarding the welfare of those involved and how best to do that, identifying what measures may guard against or reduce the risk, and developing policies and practices equally designed to do so.

3.34 The Review Group considered that the adoption of trauma-informed practice within the criminal justice system, and specifically within the context of a specialist court, was essential to address the ongoing, and repeated, issues experienced by complainers. It recognised that some steps have already been taken. SCTS staff based at the designated evidence and hearing suites in Glasgow and Inverness have received trauma-informed training and are equipped to assist in identifying support services for children and vulnerable witnesses. Children and vulnerable witnesses who attend the suite are to be welcomed by these specially trained and trauma-informed staff who explain the process for giving evidence. Such training should be developed and rolled out for all staff working within a Scottish specialist court.

What might a Specialist Court look like?

3.35 Expanding upon the concept of specialism the Review Group gave consideration to what might be the key features associated with a specialist sexual offences court. In doing so the Review Group proceeded on the basis that the recommendations of the EPR and of this review with regard to the use of pre-recorded evidence in lieu of live evidence given in court for complainers would be an essential feature of a Scottish Court, and the default approach to the giving of evidence.

Jurisdiction

3.36 The Specialist Court would have a national jurisdiction to deal with all solemn cases on indictment where the primary charges were serious sexual offences, as defined above. It would also have jurisdiction to deal with ancillary offences triable on indictment. In contrast indictments which feature serious sexual offences alongside or in combination with other serious offences such as murder, attempted murder, abduction, or where, for example, it is anticipated that should there be a conviction, the court may be asked, or may wish to consider, the imposition of an Order for Lifelong Restriction, will warrant being heard in the High Court, presided over by a judge who is also trained to sit in the specialist court assisted with similarly trained SCTS personnel in so far as possible. Provision would require to be made for cases to be transferred out of the High Court at the instance of that court to the specialist court, and setting the criteria therefor, where, although indicted to the High Court, it is apparent that the specialist court is the more appropriate forum. It would be prudent to provide for transfer from the specialist court to the High Court, on special cause shown, for those rare cases where that may be merited. The High Court should however have the final say on whether such a transfer should be effected, rather as the Court of Session has in respect of transfer of cases within the privative jurisdiction of the Sheriff Court[83]. Appeals under sections 74 and 106 (conviction and/ or sentence) of the 1995 Act would proceed to the High Court in the normal way. Sentencing is discussed further below.

Judicial staffing and appointments

3.37 The creation of a specialist court would allow all available resources to be used flexibly and to full capacity. Although the most serious sexual offences are currently prosecuted in the High Court, the volume of business is such that these cases are already often presided over by Sheriffs sitting as temporary Judges in the High Court. The Review Group envisaged that to enable best use of resources

[83] Section 92 of the Courts Reform (Scotland) Act 2014.

across the country judges in the specialist court would consist of both Sheriffs and High Court judges, the appointment to the court being made by the Lord Justice General upon satisfaction that the level of experience and specialist training of candidates had been attained.

3.38 We do not at present suggest any specific rotation period for those appointed to the court, as the need for this, together with the length of any rotation, will be dependent on the steps which can be taken to minimise the risk of secondary traumatisation or burn-out. It must be recognised that a great deal of a judge's work in the criminal sphere concerns traumatic events, and whilst sexual offences, particularly those involving children, may bring particular features, judges are to some extent protected by their training and experience which has disciplined them to take an objective and dispassionate approach to cases before them. Nevertheless, we accept that the potential for traumatisation, as the resources already referenced suggest, cannot be ignored. The Lord President, and the Judicial Council for Scotland, with whom responsibility for the welfare of the judiciary lies, regard the wellbeing of the judiciary as vital to the delivery of justice in courts and tribunals. It is recognised that effective welfare, guidance and support are essential elements of the judicial culture in Scotland. There is in place a Judicial Welfare Committee, led by a senior judge, the remit of which includes the setting and updating of Judicial Health and Welfare Policy. A number of strategies, support services and resources are available presently to assist members of the judiciary in the challenges they may face. In addition to identifiable senior judges who can be contacted for support, training on resilience is available for all, and a mentoring scheme is provided for new judges. Should the need arise, judges have access to a leading provider of adult traumatic stress services in Scotland. Consideration may require to be given to the expansion or extension of such provision for those members who sit on the specialist court.

Sentencing powers

3.39 The issue of the appropriate sentencing powers for the proposed specialist court is a difficult one, with both legal and policy implications. The proposal is to introduce a specialist court of national jurisdiction in respect of serious sexual offences prosecuted on indictment presided over by a combination of High Court judges and Sheriffs, who have received trauma-informed training in best practice in the presentation of evidence of vulnerable witnesses and appointed to the court by the Lord Justice General. Currently, Sheriffs have solemn sentencing powers up to a maximum of five years imprisonment with an unlimited power in relation to fines. High Court judges have no such limit, other than where there is a statutory limit for a particular offence. A Sheriff who considers his sentencing powers to be insufficient may remit to the High Court for sentence[84] (although few do so). Sheriffs sitting as

[84] See section 195 of the 1995 Act.

temporary judges have the same sentencing powers as High Court judges, but only when sitting in that court.

3.40 Accepting that it would be necessary for the sentencing powers to be significant, there would nevertheless be significant constitutional and structural issues, were the new court to be given sentencing powers equivalent to those of the High Court, effectively creating a parallel court, which itself would be an anomaly. Rather than risk downgrading sexual offences (a concern raised in the Review Group discussion, as noted in more detail below), this would run the risk of having a similar effect on the cases held in the High Court, and the important issue of the status of that court as a genuine Supreme Court in respect of criminal matters.

3.41 A number of issues were raised in the course of the Review Group's discussions about the practical issues associated with creating sentencing powers for a combined specialist court. A key theme was that the result should not run the risk of seeming to downgrade the importance of sexual offences. Notwithstanding that the judges of the court would include High Court judges, the increased use of Sheriffs, even those currently sitting as temporary judges, might increase concerns about the downgrading of sexual offence cases. It was desirable that all judges sitting in the new court should have the same sentencing powers, otherwise there would be the potential for two tiers within the same court, leading to further concerns about downgrading of cases.

3.42 These issues and concerns have to be examined in the context of the report and its proposals as a whole, which is entirely designed to achieve the opposite effect: to make sure that such cases are given the proper attention their particular nature demands. The creation of a trauma-informed court, with trauma-informed and trained judges and personnel should itself eliminate concerns of "downgrading". In addition, it is an error to view this issue as one determined by the sentencing power of the court, rather than the ethos and practice of the court, its members, staff and practitioners. The unlimited powers possessed by the High Court of Justiciary has not prevented this review from being necessary.

3.43 The statistical evidence suggests that sentences of over 10 years are rare in the context of sexual offences, and that sentences of over 12 years are very rare indeed, save where there are other features of the case such as abduction, attempted murder or murder, which would in any event, under the proposed model, be reserved for the High Court, but presided over by trauma-informed and trained judges and personnel. There can, of course, be rare and exceptional cases, but these would be catered for by the transfer powers referred to in paragraph 3.39; they should not be the benchmark according to which the court is established. Further provision for rare and exceptional cases could be provided by permitting a remit for sentence to the High Court, although to preserve the constitutional position it would be preferable for this to be to a court of 2 or more judges. Appeals against sentence

therefrom would likely be before a bench of 3 or more judges. The concept of remit is of course something with which High Court judges and Sheriffs are very familiar. Figures for the four year period 2016 to 2019 suggest that a sentencing power of 10 years would capture more than 95% of sexual offences on indictment. A sentencing power of 12 years, based on the same figures, would capture about 98% of cases. A sentencing power of up to 10 years is a very substantial one, and reflects the serious nature of the cases which would be before the court. This would seem to be a more desirable outcome than the bestowal of an unlimited power, which on the statistical evidence the court would be unlikely to need, given the constitutional sensitivities which might follow from doing so.The fact that the sentencing power of a High Court judge sitting in the specialist court would be somewhat restricted should not cause a difficulty. It is commonplace for sentencing powers to be limited under statute, usually for certain offences; in this case the restriction would apply to the specialist court. When sitting in the High Court, the judge would retain unlimited powers. In the civil sphere, Court of Session judges sit in other courts, for example in various chambers of the Upper Tribunal, where the powers they have are limited to the powers of judges of that Tribunal.

3.44 We recommend that the specialist court should have a sentencing power of 10 years imprisonment. We accept, however, that this is a sensitive issue which may require further consideration and consultation.

Rights of Audience

3.45 Consistent with the serious nature of the cases involved, many of which are currently prosecuted in the High Court, the rights of audience should reflect those applicable in that court. Currently members of the Faculty of Advocates undergo significant and rigorous training on the law of evidence and procedure, the nature and conduct of questioning, drafting of writs and general court practice. Solicitor advocates also receive enhanced training on these matters. The training received by all those with higher rights of audience is not readily assessable to the legal profession at large. Given the importance of good practice towards complainers it is essential that those who practice in the specialist court should receive the enhanced training required of advocates or solicitor advocates, reinforced by the additional requirement that their training should be trauma-informed. On the issues of wellbeing, it will be a matter for the relevant professional bodies to consider whether any expansion of services currently available may be merited. Legal professionals as a whole currently have access to LawCare[85] which provides a free, independent and confidential helpline for legal professionals and their families giving practical help and support for those experiencing stress and ill health or facing redundancy. In addition to Lawcare, the Law Society of Scotland works in collaboration with NHS Scotland, SeeMe, SAMH and other mental health charities to equip its members with

[85]See https://www.lawcare.org.uk/

information and signposting to help manage emotional wellbeing and assist those who may be experiencing difficulties to access support services and advice.

Administrative and Support Staff

3.46 It will be essential to the success of the court that administrative and support staff are experienced and well trained, with an understanding of trauma commensurate with the roles they are fulfilling. It is envisaged that third sector parties and agencies supporting complainers at court will have undertaken comparable trauma-informed training. Administrative staff are usually the first contact which a complainer has when attending court, and the nature of the interaction which follows is important. We address training under a separate heading, below. In addition, appropriate steps will require to be taken to ensure the wellbeing of staff directly involved in the day to day hearing of cases, and practitioners. SCTS already provides a Trauma Support Service for any employee who feels that the nature of their work is having a detrimental effect on their health or wellbeing, including access to employment service providers, and an on line wellbeing platform. For those working in the specialist court steps may need to be taken to increase awareness of such a service.

Locations

3.47 The specialist court would have access to a much wider pool of venues than currently available to the High Court. The three dedicated High Court venues would be supplemented with between 12 and 16 Sheriff and Jury Centres. The court could also sit at other locations across the country where this was appropriate. This would allow the court to draw upon and use specific facilities such as vulnerable witness suites already developed. It is to be borne in mind that it is assumed that the default setting of the court would be that the complainer's evidence would have been captured by pre-recording and that the complainer would not require to attend to give evidence. However, in such rare cases where that may remain necessary, the wider number of locations available to the court would facilitate the holding of trials in locations which reduced the inconvenience of travelling to court which many complainers expressed. The flexibility of the model would greatly facilitate the varying access needs of courts and communities across the country. On those rare occasions when a complainer did require to attend court, designated entrances and waiting areas for complainers only would be required.

3.48 There will be potential to use technology in a more innovative way than hitherto. In particular, lessons may be drawn from the use of remote jury centres implemented during the Covid-19 pandemic and remote methods of taking evidence.

Court Rules and practice and procedure

3.49 In respect of practice and procedure the proposed specialist court would develop its own stand-alone court rules and procedures designed to support a specialist, trauma-informed approach. These should be based on the current procedures in the High Court of Justiciary, suitably adapted. Experience would be drawn from the success of the approach adopted under Practice Notes No 1 of 2017 and No 1 of 2019, and the observations made by the court in cases such as *Donegan, RN, and McDonald.* The rules would be developed with the specific intention of reducing delay, achieving early disclosure of evidence, and encouraging communication between the Crown and the defence, by those in a position to make informed decisions. Cases would be subject to robust judicial case management with mandatory GRHs for any situation where the evidence of a complainer was to be taken, either in court or on commission. As discussed at paragraphs 1.19 and 1.20 above there are concerns that sight may have been lost of the benefits that a meaningful and timeously lodged defence statement can bring to the progression of a complaint. To assist and support the case management powers available both to the current High Court and to the specialist court, there should be a review of the utility of section 70A of the 1995 Act with a view to strengthening the requirement therein to lodge a meaningful defence statement.

Legal Aid

3.50 Legal aid will need to be made available for the court. In particular the court would need its own table of solicitors' fees.

Training

3.51 The creation and subsequent implementation of a specialist court to manage solemn sexual offence cases would require all those who interact with anyone attending court to give evidence, to be specially trained and trauma-informed. This training would extend to the judiciary, prosecution, defence, court staff and all who would provide a support service to this specialist court. Diffuse efforts to train judges and practitioners have not prevented situations such as those which arose in *McDonald, Donegan, Dreghorn* and other cases, both in the High Court and the Sheriff Court. The creation of a unified court in which all those involved are required to undertake specialist, enhanced training which follows a specific and trauma-informed curriculum, together with the other advantages which a specialist court should bring, should mean that these examples would not recur. Not only would judges and staff have specialist training, those appearing for the prosecution or defence should be required to undertake enhanced training within which they would have to demonstrate the desired skill sets for questioning in sexual offences. It is envisaged that third sector parties and agencies supporting complainers at court will have undertaken comparable trauma-informed training as well.

3.52 As discussed throughout this report the Review Group were in no doubt that timely, adequate and informed communication would have a very significant effect on improving the experience of complainers, making them feel less marginalised and more confident about the integrity of the whole process. It is clear that there is often an intention for there to be communication by various agencies but it is then missed or overlooked, or hurried. This is not intentional, any more than failing to accommodate a complainer's needs for comfort or refreshment would be. Such outcomes no doubt result from the fact that the case is one of many, that other work requires attention, that there may be competing priorities. However, if those involved were trained using a trauma-informed approach, to fully understand the importance to the complainer of timely and appropriate communication, the feelings of marginalisation which complainers experience, the significant demoralising effect of apparent slights, and many of the other issues identified and reported to the Review Group, there would be a consequent beneficial effect on the whole experience of complainers.

The Judiciary

3.53 Appropriate trauma-informed courses for the judiciary would require to be developed and provided by the Judicial Institute, in addition to and enhanced focus on training on sexual offences, the taking of evidence on commission and the examination of witnesses.

Court Staff

3.54 Suitable training would also require to be developed for court staff involved in the day to day dealings of a specialist court.

Legal Practitioners

3.55 Those appearing would require to be fully trained and trauma-informed before appearing before or supporting the specialist court. The Review Group recognised and commended the steps already taken by the Criminal Bar Association and Society of Solicitor Advocates in recent months to provide training on the examination and cross-examination of vulnerable witnesses and the making of section 275 applications following the decisions in *Donegan, RN, and McDonald* but agreed that more was required to improve the experience of witnesses and complainers under the current system and under a future specialist court. At present, advocates in England cannot participate in section 28 proceedings unless they can certify that they have read and absorbed the relevant materials on the Advocates Gateway. The Review Group considered that whilst something of this kind might be a bare minimum, it was not sufficient for the purpose of appearing before a truly

specialised court with specialist judges and practitioners. The appropriate courses should be developed by the relevant professional organisations and would require the approval of the Lord Justice General as to final content.

Evaluation

3.56 Within the specialist court strong monitoring and evaluation would require to be implemented to ensure that the anticipated benefits are delivered, and to ensure that practice is constantly improved.

The Review Group recommends:

Recommendation 2

A National, specialist sexual offences court should be created, in which the core features should be:

1. Pre-recording of the evidence of all complainers;
2. Judicial case management, including GRHs for any evidence to be taken from a complainer, either on commission or in court; and
3. Specialist trauma-informed training for all personnel.

The court should have the following features:

(a) A national jurisdiction in respect of serious sexual offences prosecuted on indictment;

(b) Procedures based on current High Court practice, revised to meet appropriate standards of trauma-informed practice;

(c) Those procedures to include judicial case management including GRHs and practises similar to those developed in High Court of Justiciary Practice Note No 1 of 2017 and No 1 of 2019;

(d) Presided over by a combination of High Court judges and Sheriffs, who have received trauma-informed training in best practice in the presentation of evidence of vulnerable witnesses and appointed to the court by the Lord Justice General;

(e) Sentencing powers of up to 10 years imprisonment;

(f) Rights of audience available to members of the Faculty of Advocates, solicitor advocates, and prosecutors all of whom have received specialist trauma-informed training in dealing with vulnerable witnesses,

including examination techniques, in accredited courses approved by the Lord Justice General;

(g) SCTS administrative and support staff trained in trauma-informed practices expanding on services already provided in the Evidence suites in Glasgow and Inverness;

(h) Pre-recording of the whole of a complainer's evidence as the default method of presenting the complainer's evidence;

(i) The right to independent legal representation (ILR) to allow complainers to oppose section 275 applications with appropriate public funding (discussed further in chapter 4);

(j) In the event of complainers requiring to attend court measures adopted will be those which address the comfort and safety of the witness;

(k) Measures in respect of pre-instruction and charging of juries as recommended in chapter 5 of this report; and

(l) Legal aid provision for the court including a dedicated table of legal aid fees.

In support of the case management powers available to the specialist court and the High Court currently, and for the reasons given in paragraphs 1.19 and 1.20, there should be a review of the utility of section 70A of the Criminal Procedure (Scotland) Act 1995 with a view to strengthening the requirement therein to lodge a meaningful defence statement. This review should proceed irrespective of the implementation of any of the other recommendations made in this report.

Chapter 4 – IMPROVING THE COMPLAINER'S EXPERIENCE *ad interim*

4.1 The creation of a specialist court, with the benefits which it would bring, in combination with a practice of video recording the evidence of all sexual offence complainers at the earliest stage possible, would address virtually all of the concerns associated with the current process, particularly those of complainers, which have been identified in the course of this review. It is recognised that these changes are resource reliant and may take some time to implement. In the meantime the Review Group has concluded that there are further steps which could be taken to improve the experience of complainers as they progress through the criminal justice system currently. We turn now to these issues and the associated recommendations.

4.2 The Review Group looked at the "complainer's journey" through the system, from the making of a complaint to any subsequent trial. The cross justice "Victims Map" (Map) available within the combined Standards of Service for Victims and Witnesses[86] (the Standards) was used as an aid to compare the predicted experience, with the actual experience of complainers as reported to the Review Group in the various forms detailed in chapter 1. It was apparent that, on a regular basis, the predicted experience as set out in the Map (page 5 of the Standards) did not reflect reality. In particular the provision of information at key stages was not achieved, or was perceived by complainers not to have been achieved. One particular concern was that the key stages of the process[87] at which the Review Group considered communication of information to complainers might be expected or desirable were not identified to complainers in the Map or otherwise. Where a decision to prosecute is made the Map simply provides that, "victims referred to VIA[88] will be given information about case progress", without further specification. When information was provided, the experience of complainers, as reported, was that it was highly variable and patchy.

4.3 The Review Group recognised that as the original Map is designed in such a way to apply to all complainers and witnesses rather than specifically those to whom the review was concerned, and thus will contain some generalisation. As discussed earlier however sexual offences are by their very nature different and warrant their own practices and procedures. Accordingly in the course of its review the Review Group compiled its own version of a map seeking to identify the key stages of a sexual offence complainer's journey through the criminal justice system, and

[86] Section 2 of the 2014 Act requires Police Scotland, the COPFS, SCTS, the Scottish Prison Service and the Parole Board for Scotland to set and publish standards of service for victims and witnesses. The standards are set out in this document.
[87] Eg reporting; petition; bail; indictment; Preliminary Hearing; plea; and section 275 applications. The latest version of the Standards is accessible at: https://www.copfs.gov.uk/images/Standards%20of%20Service%20for%20Victims%20and%20Witnesses%202020-21.pdf
[88] All sexual offence complainers are referred to COPFS Victim Information and Advice (VIA) service.

separately the Children's Hearing system, noting the points at which provision of information should be made. Copies are produced at annex 4. While it may well be that the joint justice agencies may wish to reflect on these comments during their annual review and evaluation of the Standards and adapt them accordingly, the Review Group is of the view that a specialist map akin to the one drafted for sexual offence complainers, should be introduced and form an integral part of the information provided to sexual offence complainers. It perhaps could also be incorporated within and form part of a recommended Values Statement or Charter which we will turn to in later in this chapter.

4.4 It was apparent to the Review Group that despite well-meaning efforts, in many instances information was either not provided, or was limited in nature, or was simply incorrect. This corresponds with the terms of HM Inspector of Prosecutions August 2020 report which speaks of "inconsistencies in the quality of communication with victims. While some receive a good and improving service from a dedicated VIA officer, others experience delays and gaps in communication".[89] All of this was a source of intense frustration for complainers, as well as an unnecessary stressor. By implication it also means that already limited, but valuable resources are being used in inefficient and unfocused ways. The impact of when, how and from whom a complainer receives information, is an important consideration and an area which the Review Group identified as requiring further attention. The need is for information from a consistent source of contact, at relevant key stages, to be provided by someone with adequate knowledge of the circumstances of the case and of the complainer. It was recognised that the difference between criminal proceedings and Children's Hearings system and the extent to which information was in the public domain in particular informed, and impacted upon what information could be made available to a complainer. We discuss the Children's Hearing system separately in chapter 6.

4.5 While the 2019 academic research Justice Journeys[90] presented to the Review Group identified some positive experiences, it was clear that complainers continued to face challenges at each stage of the criminal justice process, notwithstanding the terms of the 2014 Act. Some difficulties occurred at identifiable points within the process such as the initial taking of a police statement or the giving of evidence at trial, whereas others were far more generalised and occurred throughout the process. They included:

- disparities between expectations and experiences;
- inadequate communication from officials;

[89] Key findings, page 7, in HM Inspectorate of Prosecutions in Scotland, Investigation and prosecution of sexual crimes: follow-up review, August 2020, accessible at: https://www.gov.scot/publications/follow-up-review-investigation-prosecution-sexual-crime/

[90] Brooks-Hay. O, Burman. M, and Bradley. L, Justice Journeys: Informing policy and practice through lived experience of victim-survivors of rape and serious sexual assault, Scottish Centre for Crime & Justice Research, August 2019

- the lengthy duration of the process;
- the uncomfortable physical environments of police stations and courts;
- concerns about personal safety;
- feeling marginal to the process;
- perceptions of the system being weighted in favour of the accused; and
- a belief that the system does not adequately represent their interests.

4.6 The information provided to the Review Group included feedback from complainers during the period January to June 2019. It contained both negative and positive recurring themes. The negative themes were:

i The act of giving evidence in court does add trauma and distress, and that causes further damage.

ii Complainers' feelings are negatively impacted when they feel they do not get a chance to tell their story without understanding why; if they are not fully prepared for the experience of giving evidence; or when having to speak to a room full of strangers.

iii Small practical issues mount up and compound stress. Examples included not having a dedicated waiting room; having to stand whilst giving evidence whilst the accused is sitting; changes being made to the dates when evidence is to be given; and an inability to read what is being displayed on the screens within the courtroom. Complainers may feel unable, or reluctant, to advise the court of their predicament in the course of giving evidence. This should not arise: it should be quite clear that any document displayed on a screen can be seen clearly from the position of the witness.

iv Fear of encountering the accused whilst at court was a recurrent issue.

4.7 The Review Group noted that some of these matters could be resolved immediately and it is imperative that a review of relevant arrangements in relation to these matters is taken now. SCTS, as part of its Standards of Service published in response to the 2014 Act, already states that it "will provide separate waiting rooms for prosecution and defence witnesses, and access to refreshments"[91]. However, this requires to be extended to ensure, in so far as practicable, that complainers are kept separate from all other witnesses. Indeed some steps have been taken on this front already, but more is required. The Justice Centre in Inverness has been designed to take into consideration the importance of separate areas for witnesses and separate access routes for those considered vulnerable. The evidence suite has a separate entrance to help alleviate anxiety or concerns. Evidence suites planned

[91] SCTS's Standards state that "We will provide separate waiting rooms for prosecution and defence witnesses, and access to refreshments;" page 8 of the latest Standards.

for Edinburgh and Aberdeen are to adopt similar principles in their design. As noted in the previous chapter the Review Group envisages that a specialist court would ensure that should complainers require to attend court they would be provided with separate entrances and waiting areas, and that whenever possible they should be allowed to give evidence whilst seated. Such steps can be implemented now in so far as practicable, and in furtherance of the Standards adopted under the 2014 Act.

4.8 Turning to the positive themes emerging from the research, these were:

i Small kindnesses shown to complainers can make a huge difference, making them feel valued.

ii Having pre-court meetings with the Advocate Depute can make a big difference in preparing a complainer for what they will experience in court. The benefit of this and the positive experience arising therefrom were repeatedly emphasised as having helped the complainer and gave them confidence.

iii Interventions by the Judge or Advocate Depute during inappropriate cross-examination in court helped settle the complainer to continue with giving evidence.

4.9 The Review Group was advised that the COPFS recognise that communication with complainers has been poor but that efforts were being made to address this. Similar conclusions about poor communication have been reached by HM Inspectorate of Prosecutions, most recently in August of this year.[92] Under new COPFS internal guidelines contact with complainers should now take place at least every 8 weeks, unless the complainer elects otherwise, or asks for more frequent updates[93]. Such guidelines are being kept under review. The practice of allocating a dedicated VIA officer to each High Court sexual crime case, adopted in October 2018, has been commended by HM Inspectorate of Prosecutions as in some respects improving consistency of communication.[94] COPFS were are also looking at the potential provision of trauma-informed training courses for staff involved in these communications. Such approaches were welcomed by the Review Group, but were seen to be only the start of what was required to address the situation.

[92] HM Inspectorate of Prosecutions in Scotland, Investigation and prosecution of sexual crimes: review, November 2017, accessible at: https://www.gov.scot/publications/thematic-review-investigation-prosecution-sexual-crimes/ and HM Inspectorate of Prosecutions in Scotland, Investigation and prosecution of sexual crimes: follow-up review, August 2020, accessible at: https://www.gov.scot/publications/follow-up-review-investigation-prosecution-sexual-crime/

[93] Operation Statement 15 of 2020.

[94] HM Inspectorate of Prosecutions in Scotland, Investigation and prosecution of sexual crimes: follow-up review, August 2020, at paragraphs 101-103.

4.10 Based on the information presented to it the Review Group concluded that the expectations of complainers are currently not well managed from the outset and this was primarily linked to the provision, or non-provision, of information. Advice provided at the start needs to inform expectations so that complainers have a general understanding of the process which will follow, the steps which might be taken, what will be expected of them, what information they can be provided with, and who will provide it. Complainers should not be left "in limbo" unsure of what is going on and afraid to ask in case they are seen as a "nuisance". While the provision of information was important, ensuring that the right information is provided at the right time, by the right people was equally key to rectifying the current situation. For example HM Inspectorate of Prosecutions found[95] that asking complainers to engage proactively on special measures at the beginning of the case being investigated by COPFS was premature, and was best held by to face to face meetings. This has now been reflected in COPFS procedure.[96]

4.11 Adequate advice and information at an early stage, explaining basic concepts, such as the role of the Advocate Depute, the existence of rules regarding admissibility of evidence, sexual history evidence, and access to medical records; the typical stages of the court process such as indictment, bail applications, preliminary hearings; and explaining the kind of information which might be provided, would help manage expectations and assist complainers to understand more about the process to come and the likely timescale.

4.12 Such improvements in how information about the process, and the practical aspects associated with it, are communicated, would be reasonably straightforward to implement. This information could be included in a written guide accessible on line and in hard copy, and/or in video form. Reflecting on the issues identified by complainers in the first chapter, a non-exhaustive list of the areas for improvement might include the following:

i Providing an explanation of the process of taking police statements, and their purpose, including an explanation of why it may be necessary for the process to be relatively challenging.

ii While there may in some cases be operational police reasons why reading back a statement immediately is important, consideration should be given to the possibility of providing a short break before it occurs. Of course, as identified and recommended earlier (Recommendation 1), video recording of the statement should eliminate this concern, along with issues in relation to errors in transcription.

[95] Based on feedback from complainers and witnesses and the agencies that support them, as well as evidence from its own case review.
[96] See paragraph 113, HM Inspectorate of Prosecutions in Scotland, Investigation and prosecution of sexual crimes: follow-up review, August 2020.

iii Section 9A of the 2014 Act provides that a complainer is permitted to be accompanied by their chosen legal representative and a person of their choice. It is understood that current Police Scotland policy is to offer support by advocacy workers from Rape Crisis Scotland's National Advocacy Project or other support agencies and to accommodate this where possible. The Advocacy/support worker may then continue to support the victim during the continuing investigation and court proceedings. Such third party support, reported to be very helpful at this stage, should be encouraged.

iv Adequate notice should be given of any VIPER procedure (use of the video identification parade electronic recording system), with a full explanation of the process.

v There should be a clear protocol on retention and use of personal electronic devices which should be explained to complainers, with information about how and when the devices will be returned. Whilst, in accordance with their statutory obligations[97], the Lord Advocate and the Chief Constable of Police Scotland have published joint guidance[98] about the process by which property seized in the course of a criminal investigation or proceedings is returned, the feedback received from complainers suggested to the Review Group that this policy is not known about and/or is not of clear assistance. Upon our own review the Group noted that the guidance was in very generalised terms with no specific reference to electronic devices. Publication of a protocol on such matters should assist in COPFS's commitment to: "4.4. Work with the police to make sure that any items kept as evidence are returned to you sensitively and as soon as possible".[99]

vi A brief explanation that there are rules which must be followed governing the gathering and use of evidence, including the issues of admissibility and hearsay, might assist complainers' understanding of why certain questions are/not asked, or why certain lines of evidence are/not pursued and that they might not be able to give their 'full story'.

vii Complainers should be made aware of any special defence where it is available so as not to be ambushed when giving evidence in whatever form that occurs. As discussed above, the intention of legislative changes brought

[97] In terms of section 3I of the 2014 Act.
[98] Victim's Rights - How do I get my property back?, accessible at: https://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/Victims%20Rights%20-%20Return%20of%20Property.pdf
[99] As stated in COPFS's 'Our Commitments to Victims and Prosecution Witnesses Information Booklet' accessible at: https://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/Our%20Commitments%20to%20Victims%20and%20Prosecution%20Witnesses%20-%20Information%20Booklet%20-%20June%2015.pdf

in by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 was to ensure that both the complainer and the defence were clear at as early a stage as possible what the nature of any defence was. Complainers should also be made aware of any applications made under section 275, or to recover medical or similar records and associated information.

viii Small matters of good practice can make a big difference as to how prepared a complainer felt about giving evidence in court:

- having an opportunity to read over a statement in advance;
- being given a full understanding of the special measures available and how they operate;
- a visit to the actual court where the trial is to take place;
- meeting the Advocate Depute, particularly on more than one occasion;
- steps being taken to eliminate, or at least minimise the risk of meeting the accused;
- access to a waiting room which is not full of people;
- being allowed to sit when giving evidence in court; and
- recognition that breaks might be welcome when the leading of the evidence is expected to take some time.

4.13 The Review Group noted that in July 2020 COPFS published Operational Instruction 15 of 2020, which sets out a new court management strategy. It provides that, when a High Court indictment is served, a template letter will be sent to the complainer clearly setting out the support measures to which they are entitled. These include:

- that before the trial, they can visit the court building where they will give evidence and read the witness statement that they gave to the police;
- before they give evidence they can, where possible, meet the prosecutor who will conduct the trial;
- VIA can apply to the court for special measures to assist them when giving evidence;
- if possible, VIA can make arrangements so that they can go in and out of the court building using a different entrance from other members of the public; and
- after they have given evidence, VIA will contact them to tell them the result of the trial.

It is understood that the Operational Instruction states that each of these measures should be discussed in detail with the complainer at an appropriate stage of the case.

4.14 Clearly such a strategy is commendable, however, given its infancy it is not possible to comment on its success, and for the reasons discussed generally in relation to complainers' experiences, the Review Group considers that it does not go far enough. In addition, it is applicable only to High Court cases.

4.15 The provision of timely information is a central issue and if done properly, has the potential to completely transform the experience for those who use the criminal justice system. The question for the Review Group therefore turned to how best to achieve this, be it via the extension of current provisions, implementation of new practices or a combination of these approaches. It was agreed that a non- binary approach was likely to be best.

Digital opportunities

4.16 The Review Group noted that a digital opportunity that may help deliver improvement in the provision of some of the aforementioned information is the proposed *Witness Portal*, already under development by COPFS. The observations made in this chapter, and in chapter 1, as to some of the issues of concern to complainers may be useful in the further development of the Portal and the considerations for that project as a whole. If it were to be developed in a way which identifies the key stages of the process at which communication of information to complainers might be expected or desired, and enables that information to be communicated in a satisfactory way, much progress will have been achieved.

Single point of contact

4.17 Over the years there have been calls for the introduction of a single point of contact for complainers, to reduce their frustrations with poor communications. Such an approach should ensure consistency and provide reassurance to complainers. In practice and based on the information available to the Review Group, while the implementation of such a concept and resource for complainers is welcomed, it is perceived by many as being difficult to achieve. To date it appears that the involvement of multiple agencies can, more often than not, lead to none of them providing information on procedure or progress to those who need it. This may be the result of a misunderstanding or miscommunication of who is doing what, and when. Indeed this was a recurring comment made by parties following the initial review of the National Advocacy Project.[100] There is certainly a lack of consistency, and this seems to continue despite the practice of allocating a dedicated VIA officer to each High Court sexual crime case, since HM Inspectorate of Prosecutions noted that whilst some complainers have experienced an improved service, others

[100] Brooks-Hay. O, Burman. M, and Kyle. L, Evaluation of the Rape Crisis Scotland National Advocacy Project, 2018.

continue to experience delays and gaps in communication".[101] This seems to suggest that awareness of internal policy on timescales could be improved generally, and that either the training of some VIA officers requires further attention or that the correct information is not being provided by COPFS in a timely fashion.

4.18 While it may be the case that at different stages of the process different organisations may be in possession of the necessary information, there seems to be no reason why in principle the information could not be made accessible or at least available for initial collation by one single trauma-informed source of contact who in turn can communicate it to the complainer. Protocols and systems can be put in place to ensure information sharing between agencies. Notwithstanding the restrictions on time and available resources the various justice agencies regularly work together in the provision of joint strategies and documents, the Standards of Services being just one example. A collective approach is needed, and the use of IT may help provide a solution.

4.19 There is anecdotal evidence that other jurisdictions have managed to make advances in this regard. In Northern Ireland the police service (PSNI) and the public prosecution service (PPS) have jointly established a dedicated Victim and Witness Care Unit.[102] A key feature of the Unit is that a dedicated case officer is assigned to each case to act as a single point of contact for complainers and witnesses at all stages from receipt of the police investigation file by the PPS through to the conclusion of court proceedings. With a view to improving the adviser's understanding and ability to provide information staff have access to both the police and PPS's information system. The Unit does not provide legal advice, nor do any of the voluntary agencies. Furthermore it does not provide advice from the earliest point of contact in a complainer's journey- i.e. interaction with the police- something which this Review Group concludes would have to feature in any single point of contact system. While further consideration requires to be given to its practical implementation in Scotland one possible means is to extend with appropriate resource provision the skills and resource within VIA. The difficulties experienced when the case moves from one agency to the next, for example police to COPFS, could be alleviated by a trained supporter familiar with the entire process who would be able to interact with the various agencies and support the complainer through the entire system. Key to the success of this would be (a) proper training including on trauma-informed practices; (b) a good understanding of the process and procedures; and (c) provision at the right time by police/COPFS of the correct information.

[101] Key findings page 7, HM Inspectorate of Prosecutions in Scotland, Investigation and prosecution of sexual crimes: follow-up review, August 2020, accessible at: https://www.gov.scot/publications/follow-up-review-investigation-prosecution-sexual-crime/

[102] For further information see the discussion at paragraph 1.21 of Sir John Gillen's, Review into the law and procedures in serious sexual offences in Northern Ireland, May 2019, (the Gillen Report); and https://www.ppsni.gov.uk/victim-and-witness-care-unit

Advocacy support

4.20 Feedback from those who used the system confirmed that it had significant benefits. The 2018 evaluation of the National Advocacy Project[103] reported on the significant positive contribution that advocacy workers can have in improving complainers' experience of the Scottish criminal justice system. It is clear that advocacy support assists the effectiveness of the communication process. Indeed the National Advocacy Project has been looked upon favourably by other jurisdictions as a model for implementing their own pilot projects for non-legal advocacy support.[104] The Review Group considered that there are many advantages to having and continuing the expansion of the non legal advocacy support that is currently available and for its provision to be used in conjunction with the introduction of a trained single point of contact mentioned earlier.

4.21 To improve the experience further advocacy services should be made available at the earliest opportunity to enhance communication and understanding. In Northern Ireland following the introduction or development of a single point of contract, the relevant unit continues to refer complainers and witnesses to equivalent support organisations for assistance and advice. The support provided by these organisations in Scotland goes beyond the criminal justice matters and covers health, housing and welfare which remain essential albeit outwith the scope of this review.

Values Statement or Charter

4.22 It is clear that there is currently a chasm between what complainers anticipate will happen, and the communication they expect to receive, and the reality of their experience. This needs to change. In addition to the provision of greater information in a consistent and timely manner there is, in the opinion of the Review Group, a need for a single document in the form of a Charter or values statement, setting out standards, values, and a statement of how complainers will be treated in the criminal justice process. It would be of considerable advantage for this material to be compiled and set out in one single document, or charter, readily accessible by complainers. Such a document, in addition to clarifying what they can expect, might go some way in addressing complainers' perceptions of inequality in the court room and their belief that they "don't matter" in the criminal process. It would provide them with a readily assessable statement and might help eradicate misconceptions. To ensure success there would require to be engagement from key parties including Police, COPFS and SCTS. The involvement of defence representatives, should professional bodies be willing to endorse this, to confirm that witnesses may expect to be treated with respect, may help ameliorate public perceptions vis-a-vis the

[103] Brooks-Hay. O, Burman. M, and Kyle. L, Evaluation of the Rape Crisis Scotland National Advocacy Project, 2018.
[104] See the Gillen report, recommendation 44.

treatment of complainers at trial. Witnesses may be more receptive to the role the defence will play if they are seen to have contributed to such standards.

4.23 At present there are many documents setting out in various forms what complainers might expect of the process, the standards of service applicable, information about support, and so on. Under the 2014 Act, COPFS, Police Scotland, SCTS, the Parole Board for Scotland and the Scottish Prison Service are required to produce separate Standards of Service for Victims and Witnesses. Each body has done so, and the results are available on their respective websites. For ease and convenience they are all published within one document (14 pages) available online[105], which includes the Victims' Journey Map, discussed elsewhere in this report. An annual review and report on the Standards is produced- thankfully in a combined document for all bodies[106]. The Victims Code for Scotland (16 pages) is published by the Scottish Government in accordance with its obligations under the 2014 Act, and is accessible online[107]. It sets out the rights victims of crime have and provides information about where to obtain help and advice. It includes information on: minimum standards of service (the Standards of Service referred to above are cross-referenced). It covers issues such as obtaining information about progress of a case; participation by being understood, understanding what is happening and explaining the effect the crime has had; protection from intimidation; support; compensation and expenses; and how to complain.

4.24 Also available is the Joint Protocol on Working together for Victims and Witnesses between COPFS, Police Scotland, SCTS and Victims Support Scotland (VSS) (35 pages), accessible online[108]. The Protocol is said to govern how the respective agencies will:

- share information;
- arrange for victim and witnesses to look around a court before trial;
- identify and explore the vulnerability of victims and witnesses;
- consider the impact this may have on their ability to give their best evidence;
- assess what special measures and/or additional support will make a difference; and
- work together to ensure the safety of victims and witnesses throughout.

The Standards of Service are again cross-referenced. The Protocol states:

[105] http://www.scotcourts.gov.uk/docs/default-source/default-document-library/standards-of-service-2020-21.pdf?sfvrsn=0
[106] https://www.copfs.gov.uk/images/Standards%20of%20Service%20for%20Victims%20and%20Witnesses%20Annual%20Report%202019-20.pdf
[107] https://www.mygov.scot/victims-code-for-scotland/
[108] https://www.scotcourts.gov.uk/docs/default-source/coming-to-court/working-together-for-victims-and-witnesses.pdf?sfvrsn=6

> "Many victims and witnesses will need support to deal with the information they are receiving particularly where a case has had a serious impact on them or their family. It is important that VSS can access information (where appropriate with the victim's or witnesses consent). This will ensure that victims and witnesses can receive the information within the context of a support or advice service where appropriate. COPFS, SCTS and Police Scotland will work with VSS to ensure that it receives the information it requires in such cases."

4.25 COPFS publishes the Crown Office and Procurator Fiscal Service Our Commitments to Victims and Witnesses: Information Booklet (16 pages), accessible online[109]. It sets out 10 commitments made by COPFS, including to:

> " 2. Communicate with you clearly and effectively.
> 3. Give you the information you need when you need it.
> 4. Deal with your case as quickly as possible.
> 5. Require you to give evidence in court only when we have to."

COPFS also publishes an Access to Information Protocol- A Guide for victims and Witnesses (8 pages), accessible online[110]. It also publishes a COPFS and Police Scotland joint policy with regard to the return of property seized (2 pages), accessible online[111].

4.26 Thus, before seeking to access any assistance or information from support services or third sector organisations, a complainer who had accessed all the information available would have looked at 89 pages, and six different documents, assuming all the Standards of Service had been accessed in the one document. The introduction to the Victims' Code states "This Victims' Code for Scotland clearly and simply sets out the rights of victims in one place." This seems to be an aspiration rather than a reality, but it would be greatly desirable if this were the case, and that a complainer in a sexual offence case would only require to access one document to find out all the necessary information. Given that the recommendations made in this report suggest that the information available to complainers should be increased rather than decreased, the need for all the relevant information (obviously this does not refer to specific information about individual cases) to be contained within the one easily accessible document is obvious. In Northern Ireland the response to the EU Victims' Rights Directive 2012/29/EU of 25 October 2012 was to create a Victim Charter, which sets out 22 entitlements, including: to be treated fairly, professionally, and with dignity and respect; to be updated at key stages and given relevant

[109] https://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Guidelines_and_Policy/Our%20Commitments%20to%20Victims%20and%20Prosecution%20Witnesses%20-%20Information%20Booklet.PDF
[110] https://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/Access%20to%20Information%20Protocol%20-%20COPFS.pdf
[111] https://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/Victims%20Rights%20-%20Return%20of%20Property.pdf

information; to be told what is happening, at times agreed with the police, where the police are investigating the crime; to be interviewed by the police as few times as possible; to get property that you own back as soon as possible, if it is taken as evidence; and to deal with people who are trained appropriately in contact with victims. Under the Charter, an individual is entitled to receive information on:

- what to expect from the criminal justice system;
- decisions not to continue with or end an investigation;
- a decision not to prosecute someone;
- the offences for which the accused is being prosecuted;
- the date, time and location of key court hearings; and
- the outcome of relevant bail hearings and the trial.

Identification of complainers in the media and the issue of anonymity

4.27 Examination of steps which might improve the experience of complainers led to consideration of the current arrangements by which anonymity for complainers is provided in Scotland. This is an issue of particular pertinence given the proliferation of social media, its use in the reporting of criminal trials, and the phenomena of "new" journalism and blogging.

4.28 Section 1 of the Sexual Offences (Amendment) Act 1992 (1992 Act) provides:

> **"Anonymity of victims of certain offences.**
>
> (1) Where an allegation has been made that an offence to which this Act applies has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed.
>
> (2) Where a person is accused of an offence to which this Act applies, no matter likely to lead members of the public to identify a person as the person against whom the offence is alleged to have been committed ("the complainant") shall during the complainant's lifetime be included in any publication."

The offences to which the 1992 Act applies are numerous offences against the law of England and Wales which might generally be categorised as sexual offences. The 1992 Act applies to Scotland only to prevent publication in Scotland of information relating to complainers alleging contravention of the law of England and Wales; in other words, it has no application to the investigation or prosecution of sexual offences in Scotland. Although section 4(1) of the Sexual Offences (Amendment) Act 1976, appears on the face of it to extend a similar protection, in England and

Wales only, to complainers in rape cases in Scotland, further examination of the statute (section 7) shows this not to be the case.

4.29 In Scotland, complainers in cases of rape and other sexual offences give evidence under "closed court" conditions, whereby the public is excluded from the court during the giving of their evidence (see sections 92(3) and 271HB of the 1995 Act). This exclusion does not apply to *bona fide* journalists whose presence is permitted as an important aspect of open justice, to enable a public report of the proceedings to be made, to ensure that the proceedings are conducted properly and to contribute to informed public debate. As noted above, there is no statutory protection for complainers in Scottish cases against publication within Scotland of their identities or material likely to lead to their identification by the public as a complainer in a sexual offence. There is, however, a convention (*see X* v *Sweeney* 1983 SLT 48, at page 61) that the identity of complainers is withheld from publication. This is fortified by the Editor's Code published by the Independent Press Standards Organisation, paragraph 11 of which states:

> "The press must not identify or publish material likely to lead to the identification of a victim of sexual assault unless there is adequate justification and they are legally free to do so. Journalists are entitled to make enquiries but must take care and exercise discretion to avoid the unjustified disclosure of the identity of a victim of sexual assault."

4.30 Section 11 of the Contempt of Court Act 1981 provides:

> "In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

This is not a stand-alone provision; it depends on the court making an order withholding the name or matter in question from the public, which can then be enforced by the mechanism of a section 11 order, breach of which would constitute contempt of court. This is not done automatically, since in most cases reliance can be placed on the long-standing convention and the Editor's Code. Occasionally however, there may be concerns that this is not sufficient protection against the risk of identification, or a publication may have taken place, inadvertently or otherwise. In such cases the court will usually make a formal order, at common law withholding the identity of the complainer from the public, with a section 11 order prohibiting publication of the complainer's identity or material likely to lead to her identification as a complainer in the case.

4.31 The purpose behind allowing the witness to give evidence in closed court conditions is to enable the witness to speak freely, to limit the embarrassment and

awkwardness which may be felt, and to encourage complainers in other cases to feel able to come forward without concern that they may have to give evidence in a crowded court and before members of the public. It is, in short, largely the same as the justification for providing subsequent anonymity to complainers, whether that is achieved by legislation, convention, court order, the Editor's Code, or a combination of these. In *Brown* v *United Kingdom* (2002) 35 E.H.R.R. CD197, the conviction and fine of a newspaper proprietor for a breach of section 1 of the 1992 Act was found not to be a disproportionate interference with the right to freedom of expression under Article 10 of the Convention, notwithstanding the blanket, lifelong nature of the restriction imposed by the 1992 Act, and the limited circumstances in which it can be lifted. The court made this observation:

> "The Court recognises that the relevant provisions of the Act are designed to protect alleged rape victims from being openly identified. This in turn encourages victims to report incidents of rape to the authorities, and to give evidence at trial without fear of undue publicity. The Court recalls that the Commission has previously had regard to the special features of criminal proceedings concerning rape and to the fact that such proceedings are often conceived of as an ordeal by the victim (see SN v Sweden, No. 34209/96, para. 47). The Court considers that it must pay special regard to these factors when examining the proportionality of the restrictions at issue in the present case."

4.32 The Heilbron Report (1975) which had led to the first legislation on the matter in England and Wales, noted:

> "153. …public knowledge of the indignity which [a complainer] has suffered in being raped may be extremely distressing and even positively harmful, and the risk of such public knowledge can operate as a severe deterrent to bring proceedings.…….
>
> 154. We are fully satisfied that if some procedure for keeping the name of the complainant out of the newspapers could be devised, we could rely on more rape cases being reported to the police, as [complainers] would be less unwilling to come forward if they knew that there was hardly any risk that the judge would allow their name to be disclosed."

4.33 The reasons for granting anonymity to complainers in cases of sexual assault are obvious, and well known. The question is whether the current position in Scotland, relying on convention and the responsibility of the press, bolstered where necessary by orders at common law and under section 11 of the Contempt of Court Act 1981 provides adequate protection. Given the cumbersome nature of the steps which must be taken to secure anonymity, and the risk of inadvertent disclosure

which exists in a system which relies on convention rather than regulation, the conclusion must be that it does not. There may generally be little risk of publication of inappropriate matter in the main stream press, although it has occurred from time to time, but there is now a proliferation of sources of reporting and blogging which are not part of that main stream, and are not regulated by IPSO. The rise of "new" or "citizen" journalists, and the vast increase in the use of social media, suggest that the tools hitherto relied upon in Scotland are no longer adequate and that legislation is required to ensure the adequate protection of the identities of complainers making allegations of rape and sexual assault. The introduction of legislation providing anonymity to such individuals is accordingly recommended.

Independent Legal Representation

4.34 Whether sexual offence complainers should be afforded independent legal representation (ILR) and what it should cover, if provided, are questions which have caused much discussion and debate in recent years. In the context of section 275 applications the current position in Scotland is that a complainer has no statutory right to oppose or present their response to the court. A complainer is not entitled to notification of the application and should one be made in the course of the trial, the statutory provisions[112] provide that they must not be present during its consideration.

4.35 In her August 2020 report on "The use of sexual history and bad character evidence in Scottish sexual offences trials", for the Equality and Human Rights Commission, Scotland,[113] Professor Sharon Cowan suggested that there should be further research into the use of rape shield legislation in Scotland, the last substantive research having been carried out in 2007[114]. Professor Cowan also suggested that there was a need for consideration of further legal and procedural reform specifically exploring the benefits costs, and possible models for state funded ILR for complainers in section 275 hearings. In their academic report of the same year Keane and Convery[115] concluded that ILR for section 275 applications should be made available.

4.36 The Review Group agrees with Keane and Convery[116] that in very many cases, indeed the majority, the nature of the questioning proposed in a section 275 application will "represent a particularly intimate, sensitive and important aspect of a

[112] Section 275B(2) of the 1995 Act.
[113] A summary of which is accessible at: https://www.equalityhumanrights.com/sites/default/files/the-use-of-sexual-history-and-bad-character-evidence-in-scottish-sexual-offences-trials-summary.pdf
[114] Burman. M, Jamieson. L, Nicholson. J and Brookes. O, 'Impact of aspects of the law of evidence in sexual offence trials: an evaluation study', 2007.
[115] Keane. E.H.P, and Convery. T, Proposal for Independent Legal Representation for Complainers Where an Application is Made to Lead Evidence of Their Sexual History or Character, 2020, accessible at https://www.law.ed.ac.uk/sites/default/files/2020-09/ILR%20Report%20Final%20Version%20June%20_0%20-%20Acc.pdf
[116] Ibid page 17.

complainer's private life." Indeed the court has acknowledged[117] that a complainer's Article 8 rights are likely to be engaged when a section 275 application which relates to, for example, conduct remote from the events forming part of the libel, is allowed.

4.37 In reaching their conclusion, they recorded[118] that "a notable feature of many of these judgments … is the lack of Crown opposition". On review it is apparent that the lack of opposition in each of these cases was not because opposition would have been unstateable. Furthermore in a significant number of cases where a refusal or partial refusal resulted in a defence appeal on the point, the Crown having, at first instance, failed to oppose some, if not all of the application under appeal, nonetheless decided to do so on appeal. Examples of cases where one if not both of these occurrences has happened include *RN*, *CH*, *LL*, and *McDonald*[119]. It is not therefore surprising that complainers, who presently have no right to receive intimation of the making of such applications or to appear or be represented at such hearings, are unhappy with the current system[120] and see ILR as a desirable solution.

4.38 We noted elsewhere the fact that complainers frequently fail to understand the role of the Advocate Depute, erroneously expecting the Advocate Depute to act in some way as their own advocate, and the tension that flows from this. The current situation set out in legislation, where only the Crown can oppose section 275 applications made by the accused, combined with the inconsistent approach adopted by the Crown in respect of opposition, merely add to this tension. This highlights the obvious fact that the public interest which the Crown represents does not necessarily coincide with the private interests of a complainer. This was noted by Professor Fiona Raitt in her 2010 study: Independent Legal Representation for Complainers in Sexual Offence Trials (Rape Crisis Scotland):

> "7.11 Prosecutors cannot press the complainer's interests above the interests of others. They cannot take instructions directly from a complainer. There is no lawyer-client relationship between a prosecutor and a complainer – and thus none of the characteristics of that relationship based upon trust, confidentiality and legitimate partisanship.
>
> 7.12 The Crown's role as a public prosecutor and officer of the court inevitably restricts the scope for supporting the complainer. Her interests are subordinated to wider concerns, possibly without even the opportunity of being canvassed before a judge. This falls a long way short of what a

[117] *RR petitioner*, 7 October 2020, HCA/2020/4/XM (unreported).
[118] At page 12.
[119] *In RN* v *HM Advocate* 2020 JC 132; *CH* v *HM Advocate* [2020] HCJAC 43; *LL* v *HM Advocate* 2018 JC 182 and *McDonald* v *HM Advocate* [2020] HCJAC 21.
[120] Brooks-Hay. O, Burman. M, and Bradley. L, Justice Journeys: Informing policy and practice through lived experience of victim-survivors of rape and serious sexual assault, Scottish Centre for Crime & Justice Research, August 2019.

complainant in other countries is entitled to from a legal representative. It also falls a long way short of what complainers say they need in order to give their best evidence with confidence and without fear or humiliation."

4.39 This tension and the fact that the Crown are not always correct in their assessment of whether an application should be opposed – see for example *LL* v *HM Advocate*[121] is but one of the many arguments advanced for the introduction of ILR for complainers in trials and particularly in respect of section 275. It is, of course, the court which must apply the test and associated balancing exercise set out in section 275 for itself, irrespective of the lack of opposition or indeed any apparent agreement between the Crown and Defence, a point recently reiterated in *RN* v *HM Advocate*[122]. To allow it to do so, however, the court must be given sufficient information to make its determination, bearing in mind that the "interests of justice" test specifically includes "appropriate protection of a complainer's dignity and privacy"[123]. Furthermore before the court reaches that stage it must decide upon the admissibility of the evidence generally. In order to do that in most instances it will require to have information on the complainer's position in relation to what is alleged. It will be important to know, whether the alleged fact is accepted by the complainer or whether it is contentious. In the latter situation, if the evidence were admitted, the risk of the jury's focus being deflected from the events libelled onto a different and perhaps peripheral one will be of some importance in determining the application. In assessing whether and to what extent a particular line of questioning will impinge upon a complainer's dignity and privacy, and when carrying out a balancing exercise relative to probative value and prejudice to a complainer in the form of a potential interference with her Article 8 rights, it will normally be essential to know what the complainer's attitude to the line of questioning proposed is. That information is not determinative of the issue, since there are public interest considerations which apply, beyond the interests of any individual complainer, but at the least the information may help assess the extent to which the issue may be viewed as collateral, and the extent of the potential intrusion on a complainer's dignity and privacy.

4.40 The very recent case referred to in footnote 8 above[124] brought to the forefront the Crown's role, and failings, in the provision of this information to the court. It also highlighted issues in respect of the Crown's engagement with complainers in relation to section 275 applications, impinging on the extent to which a complainer may be enabled effectively to participate in the proceedings (2014 Act, section 1(3)). In this, perhaps extreme, example, the petitioner had only been told of the section 275 application some four months after it had been granted in part, when the Crown sought to precognosce her. In arguing that she had a right to challenge the application, the petitioner drew analogies with applications for recovery of medical

[121] 2018 JC 182, at paragraph [8].
[122] 2020 JC 132 at paragraph [20].
[123] Section 275(2)(b)(i).
[124] *RR petitioner*, 7 October 2020, HCA/2020/4/XM (unreported).

and sensitive data in which the Scottish courts have held that a complainer is entitled to be represented before the court.[125] The court rejected that argument, whilst nevertheless deciding that the original decision should be quashed. The court concluded that

> *"[51] … [Q]uite apart from section 1(3)(d) of the 2014 Act, in order to respect a complainer's Article 8 rights, the court must be given information on the complainer's position on the facts in, and her attitude to, any section 275 application. Neither the statutory provisions nor Article 8 carry with them a right for a complainer to be convened as a party. In the absence of statutory intervention, the system of criminal prosecution remains an adversarial one between the Crown and the accused. The complainer's status is still that of a witness to the facts libelled.*
>
> *[52] … [I]t is the duty of the Crown to ascertain a complainer's position in relation to a section 275 application and to present that position to the court, irrespective of the Crown's attitude to it and/or the application. This will almost always mean that the complainer must: be told of the content of the application; invited to comment on the accuracy of any allegations within it; and be asked to state any objections which she might have to the granting of the application... It is only by doing this that the principle that the complainer should be able to obtain information about the case and to participate effectively in the proceedings, along with her Article 8 right of respect for her privacy, can be upheld."*

4.41 The petitioner's experience in this case mirrors those of many of the complainers the Review Group heard from regarding a lack of information and engagement with COPFS. Having regard to the importance of this issue to complainers, and the fact that there may be significant tension between the interests of a complainer and that of the Crown we consider that ILR should be made available to complainers in respect of section 275 applications.

4.42 It is understood that following this recent decision, COPFS has updated its internal guidance and protocols. New guidance requires COPFS to notify the complainer of the application, seek comments on its accuracy and ascertain whether she/he has any objection to it. Crown Counsel's instruction will be needed if the procedure is deviated from. Following an application a complainer must be contacted and told about the outcome of the application and a further statement/precognition taken preferably with attendance of an advocacy support worker. COPFS encourage the attendance of advocacy support workers at earlier information gathering meetings with complainers. It is understood that the Covid-19 pandemic has caused

[125] *WF* v *Scottish Ministers* 2016 SLT 359.

practical challenges in collecting this information and engaging with complainers, which is largely being achieved by the use of telephone.

4.43 In the Republic of Ireland ILR, with appropriate legal aid funding, is currently available to complainers of rape and certain specified offences in connection with an application to question them about other sexual experiences, in terms of the Criminal Law (Rape) Act 1981[126]. A 2020 Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences by Tom O'Malley QC has now recommended this be extended to complainers of sexual assaults.[127] The provision of publically funded ILR up to but not including trial has been recommended for Northern Ireland in Sir John Gillen's Review into the law and procedures in serious sexual offences in Northern Ireland (May 2019) (the Gillen Report).

4.44 Keane and Convery examined the Irish experience and concluded[128] that the provision was beneficial in two important respects: (i) it allowed the prosecutor to focus on the application purely in terms of its significance for the prosecution; and (ii) it ensured that complainers could be satisfied that their views were heard by the court deciding the application. Such benefits would equally apply in Scotland, reduce almost entirely the tension between Crown and complainer discussed above, and assist the court in the determination of the application. It would not adversely affect the Article 6 rights of the accused, which would continue to be taken into account. The prospect of a third party opponent may well focus the minds of drafters of applications, improving their quality and focussing more directly on issues of relevance. In their research Keane and Convery[129] found that in Ireland not all complainers oppose applications once they have had such advice. There is anecdotal evidence to suggest that the mere provision of such advice and assistance may have a positive impact on complainers. The provision of ILR would be in line with the trauma-informed principle of 'choice' and engage several of the core values associated with trauma-informed practice including collaboration and empowerment.

4.45 There is a compelling case for the introduction of ILR for complainers in serious sexual offences to enable them to challenge applications made under section 275 (including appeals by the Crown or accused), and to appeal decisions made thereanent, with leave of the first instance court in terms of section 74(2A)(b). In circumstances where a motion under section 275(9) is made further to restrict the permissible evidence, most likely by the Crown, or when a judge *ex proprio motu* (at his own instance) considers it appropriate to do so, either at a subsequent Preliminary Hearing, or at trial, intimation to and representation of, the complainer may not be necessary. Whether it is required should be a matter for the judge's

[126] Section 4A, introduced via inserted by the Sex Offenders Act 2001 section 34.
[127] See O'Malley QC. T, Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences, July 2020, chapter 6.
[128] At page 19.
[129] See page 24, footnote 106.

discretion. Adequate recording in the court's records of the issues discussed before the Preliminary Hearing judge and, separately the recording of the Preliminary Hearing judge's reasons, in accordance with section 275(7), are critical for the trial judge's understanding of the basis upon which the original application was granted, and for any reconsideration under section 275(9). It is accordingly recommended that ILR should be introduced, with appropriate public funding, as soon as possible, recognising that legislative change will be required to effect this.

The Review Group recommends:

Recommendation 3

Improved communication with complainers should be developed jointly by relevant agencies, expanding upon obligations imposed under the Victims and Witnesses (Scotland) Ac 2014. General information could be provided in a written guide accessible on line and in hard copy and/or in video/webcast form. Specific information about the case should be provided by a single trauma-informed source of contact. Practical arrangements for the making of statements or the giving of evidence should be approved in the interest of the comfort and safety of complainers.

(a) General Information to be provided

A non-exhaustive list of information which should be conveyed includes:

i. Information on basic concepts, such as: the role of the Advocate Depute, the existence of rules regarding admissibility of evidence, sexual history evidence, and access to medical records; the typical stages of the court process such as indictment, bail applications, preliminary hearings; and explaining the kind of information which might be provided.

ii. An explanation of the process of giving a statement to the police including an explanation that it may be necessary for that process to be relatively challenging.

iii. Clear information about the retention and use of personal electronic devices, with information about how and when the devices will be returned.

(b) Single point of contact, and specific information

i. Complainers should have available to them a single appropriately trained and trauma-informed point of contact from the reporting of an alleged sexual offence until the conclusion of proceedings.

ii. The contact should be familiar with the criminal justice process and should be able to interact with the various justice agencies and, where necessary, access information required to support the complainer. Justice agencies, applying data protocols and guidelines, will need to co-operate and work together to facilitate such access.

iii. Adequate notice should be given of any VIPER procedure (use of the video identification parade electronic recording system), with a full explanation of the process. Complainers should be made aware of any special defence of consent where possible so as not to be ambushed when giving evidence by whatever means. They should have the opportunity to meet the Advocate Depute, and this should not be left to the day of the trial.

iv. Independent legal representation (ILR) should be made available to complainers, with appropriate public funding, in connection with section 275 applications and any appeals therefrom. Complainers should have a right to appeal the decision in terms of section 74(2A)(b) of the Criminal Procedure (Scotland) Act 1995. Representation at any review further to limit the permissible evidence under section 275(9), should be at the judge's discretion.

v. Current advocacy support services should be expanded in so far as possible to ensure greater support throughout the process, made available at the earliest opportunity, i.e. from the reporting of an allegation.

vi. A Charter for complainers in sexual offence cases should be developed, setting out standards and values adopted by key agencies in the criminal justice system, the way in which complainers in such cases may expect to be treated, the information to which they will be entitled, how they will be communicated with, what will happen to their property, and how and when they will get it back, and all the general information which is contained in the various Standards of Service, Protocols and the like referred to in paragraph 4.23, as well as the additional information recommended in this report. Such a document should include a sexual offence complainer's journey map as shown at annex 4. A cross sector group consisting of members of the key agencies in the criminal justice system discussed in this chapter plus representatives of third party sectors should be created to prepare and draft it. Guidance can be taken from the documents referred to above.

(c) Practical considerations regarding statements or evidence

i. Where a hand written statement is recorded by the police, and requires to be read back to the witness, the witness should be given a short break before this occurs.

ii. In the event that a witness requires to attend court to give evidence, measures for the comfort and safety of the witness should be adopted, including the provision of a separate entrance to the building from where the accused may enter, a separate waiting room and arrangements designed to prevent a chance encounter with the accused.

(d) Improving Efficiency

i. In the absence of any other effective structure within COPFS designed to achieve the same objective, early identification of the trial Advocate Depute, so far as possible, should be made, to enhance preparation of the case, identify the information to be provided to the complainer, accelerate disclosure, and facilitate engagement with the defence at an early stage of proceedings.

ii. Appropriate targets should be set by Police Scotland, COPFS and SCTS to achieve a reduction in the delay between reporting of an alleged sexual offence crime and conclusion of trial.

(e) Publication of information relating to the identity of complainers

Legislation should be introduced granting anonymity to those complaining of rape or other sexual offences, along the lines of the Sexual Offences (Amendment) Act 1992.

Chapter 5- THE JURY TRIAL

5.1 The Review Group examined the role of the Jury, and associated issues such as the judge's directions (also commonly referred to as 'the charge'), and "rape myths" within the prosecution of sexual offences. Given that jury deliberations take place in a situation of privacy protected by the Contempt of Court Act 1981 it is extremely difficult to take evidence based decisions within this area. However the Review Group was able to consider recent research involving both mock and real jurors which contributes towards expanding understanding of jury deliberation. The Review Group was also able to draw on the combined experience of its members.

Part I
Trial by Jury?

5.2 Trial by jury is long established for serious crimes in Scotland and seems to have the general support of the public, prosecution, defence lawyers and the Judiciary. The accumulation of knowledge and experience of life across wide sections of the community in the jury as the decision-making body is seen as one of the main advantages of trial by jury. In general it was felt that for almost all types of crime, trial by jury generally works well in Scotland with verdicts almost always having a reasonably obvious and logically justifiable basis. That general public confidence, however, would seem to be lower in respect of sexual offences. This may be the result of the lower number of convictions for sexual offences obtained in contrast to almost all other crime prosecutions in Scotland. Such concerns and statistics are not unique to Scotland with all corners of the UK experiencing a similar phenomenon to one degree or another. Concerns – whether justifiable or not - repeatedly surface about the role of the jury in sexual offence cases. In England and Wales this led to the University College London (UCL) Jury Project which we address below. Similar concerns have been expressed in other jurisdictions, for example New Zealand, and in Scotland. Consistent with its "clean slate" approach the Review Group examined the justifications for retaining the jury system, or for considering alternative approaches to the prosecution of sexual offences. It is clear that there is a strong historical and emotional attachment to trial by jury, and valid arguments in favour of the democratic benefit of community involvement. There are, however, also strong arguments in favour of conducting these trials in other ways. The primary consideration was given to trial by judge alone, as a concept with which the system is already familiar, but trial involving a panel of judges, or a judge with lay assessors or "professional" jurors were also considered.

5.3 Not surprisingly this was not an issue on which the Review Group was able to reach unanimity, views being fairly evenly split between retaining and dispensing with a jury. Accordingly, rather than seek to make a recommendation one way or the other, save for suggesting that the issue of whether trial by jury should continue for

serious sexual cases merits further consideration, this chapter focuses on identifying the main issues discussed and which would merit further consideration and research.

5.4. At least one member of the Review Group suggested that the real, and sole, purpose of considering the exclusion of sexual offences from jury consideration was "to secure more convictions" against a background of cases in which it was asserted that the prospects of success were so poor they should not have passed the prosecutorial test. It was suggested by the same member, that in some cases insufficient weight was given to that part of the prosecutorial test which provides that "where there are grave and substantial concerns as to the reliability of essential evidence, criminal proceedings will not be appropriate". It was pointed out that a legal sufficiency did not mean that the evidence was of a sufficient quality to convict. This is of course true. However, it is important to note that the test refers to "grave and substantial concerns", suggesting the existence of a fairly fundamental problem with the evidence, rather than something which is open to ordinary assessment by a jury. Furthermore, this point does not take into account the effect which trauma may have on the evidence or demeanour of a witness. There is research which suggests that as a result of trauma the behaviour and demeanour of complainers may be counter-intuitive. Judges, or a body of professional or trained lay jurors, can be trained to understand and recognise this phenomenon but effective education of the members of a jury selected for a single trial is likely to be more difficult to achieve.

5.5 Accepting that the conviction rate is not necessarily a good indicator, nor can it be in any way a determining factor, at the same time it cannot be ignored. That the low rate of conviction in such cases was a cause for concern, potentially indicating an underlying problem with the deliberations and attitudes of juries has been recognised for some time. In *MM* v *HM Advocate*[130] the Lord Justice Clerk, Lord Gill, noted that in the research report "Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials"[131]

> "The important judgment expressed in the report was that, notwithstanding the 1985 legislation, the acquittal rate, particularly in rape cases, remained 'extremely high at 78%' (para 6.8). The writers identified three problems, namely that the rules laid down in the former secs 274 and 275 were not being followed in the practice of the courts; that where sexual history or character evidence was being admitted legitimately, the legislation was not achieving its aims; and that there was a need to control subtle character attacks (para 6.9)."

[130] 2005 1 JC 102 at paragraph 11.
[131] Brown. B, Burman. M, and Jamieson. L, Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials, 1992

The Lord Justice Clerk recognised[132] that:

> "The policy priorities underlying law reform in this area have generally been to prevent juries from giving undeserved acquittals out of prejudice against the complainer, rather than on an objective view of the evidence, and to protect the complainer from being harassed by questions on intimate matters, in order both to protect her privacy and to prevent victims of such crimes from being deterred from reporting them."

5.6 In *R* v *A*[133] the low conviction rate in England and Wales, especially in cases where the complainer and defendant had previously been on terms of some intimacy, was noted by Lord Hope (page 70-71), particularly in respect of its effect on preventing complainers from coming forward. At page 82 he observed:

> "The law fails in its purpose if those who commit sexual offences are not brought to trial because the protection which it provides against unnecessary distress and humiliation of witnesses is inadequate. So too if evidence or questions are permitted at the trial which lie so close to the margin between what is relevant and permissible and what is irrelevant and impermissible as to risk deflecting juries from the true issues in the case. The high rate of acquittals in rape cases before section 41 was introduced suggests that juries are not immune from temptation, and that they are quite likely to draw inferences from evidence about a complainant's sexual behaviour on occasions other than that of the alleged rape which the law now recognises they should not draw."

In *DS* v *HM Advocate*[134], Lord Hope observed that the decline in the conviction rate in rape and other sexual cases have followed a similar pattern in Scotland. It remains the case that juries seem to return a significantly higher rate of acquittal in sexual offences than in other crimes. Scottish Government figures[135] suggest that the conviction rate for rape is lower in Scotland than for any other crime. The conviction rate for all crime in 2018-19 was 87%. For rape and attempted rape, it was 47%. These figures of course both relate only to cases which meet the threshold for prosecution. They indicate that the conviction rate for rape and attempted rape has been the lowest of all crimes in each of the last ten years. The figures cannot simply be ignored. The disparity is such that it cannot simply be explained away by poor prosecutorial decision making, rogue cases or the like.

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[132] At paragraph 7.
[133] [2002] 1 AC 45
[134] 2007 SC (PC) 1, paragraph 6.
[135] Scottish Government National Statistics Crime and Justice Criminal Proceedings in Scotland 2018-2019, accessible at: https://www.gov.scot/publications/criminal-proceedings-scotland-2018-19/pages/2/

5.7 As part of the information gathering process for the review, informal discussions took place with a number of members of the Judiciary who regularly preside over jury trials in sexual offence cases. Some judges reported cases in which the evidence led justified conviction of rape and where it was difficult to understand the rationale for the acquittal verdict returned. Some judicial comments suggested that this issue was particularly acute in the case of single complainer indictments, and even in cases with ample evidence of high quality. As one judge put it:

> "The cases in which it appears to me that, regardless of the quality and quantity of evidence juries do not convict with appropriate regularity, are cases where there is one complainer and a single charge of rape. In cases where there is evidence of a quality and quantity which for any other kind of crime would lead to a conviction, I see a number of acquittals each year in rape cases which, to my mind, are not explicable by rational application of the law to the evidence. Not all judges will agree with my views on this, but I have reason to believe that they are shared by at least a number of senior and experienced judges…..Every year I preside over several rape trials of this kind in which I would have no difficulty on the evidence in being satisfied beyond reasonable doubt of the guilt of the accused only to see the jury return a verdict of acquittal, usually not proven."

Defence representatives on the Review Group questioned this view, but the judge in question was not alone in expressing these views.

Alternatives to juries acting as finders of fact

Judge alone – pros and cons

5.8 Community involvement in the criminal justice system has the potential to enhance public understanding of, and respect for, the fairness of the administration of criminal justice. Jury service is an example of participatory democracy. The use of jurors drawn at random was the most democratic method of ensuring public participation in the criminal justice process in a diverse and representative way. 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 the judges will be "drawn exclusively from the top one per cent of earners, still predominantly male, always university educated and most likely aged between fifty and seventy". Allied with the well-established nature of the process, the number of decision makers is seen as conferring legitimacy and public acceptance of verdicts in most cases. The suggestion is that the number of decision makers ought

to guard against the effect of prejudices and unconscious bias. However, the 2019 Scottish Mock Jury Trial research[136] suggests that it may not be entirely successful in this regard.

5.9 The accused, if convicted, would know that the verdict was reached by a random selection of 15 peers. However, the content of post-conviction reports suggest that many, and perhaps most, convicted persons continue to dispute the soundness of their conviction which may undermine the force of this consideration.

5.10 It is a feature of trial by jury, and a defect, that the decision-maker does not provide written reasons, which can be both frustrating and damaging for a complainer in the case of acquittal or an accused in the case of conviction. However, whilst juries do not provide reasons for their decisions, judges are required to do so. Any forum in which a judge or judges participated in reaching a verdict, whether judge-alone, judge with lay panel or panel of judges, could be expected to produce written reasons. This would have the benefit of explaining to complainers and accused alike why the verdict was reached and would enhance the scope of an appeal by a convicted accused. It would also enhance public understanding of the process.

5.11 Trial by jury can be seen as a protection of the individual against oppression by the state. That being said, sexual offences are not conventionally political crimes which any faction of the state might seek to prosecute for improper reasons. The prosecution of sexual crime is a requirement of both the rule of law domestically which seeks to protect the personal and sexual autonomy of the individual from unwanted or improper interference, and international instruments to which this country is a party.

5.12 Jury trials are time-consuming and it is reasonable to suppose that a jury-less trial, certainly a judge-alone trial, would take about half the time. This would have favourable implications for how quickly all cases can be brought to trial and how efficiently all court business can be processed. The interval over which complainers and accused (and their dependants) alike feel that their lives are on hold would be progressively shortened. This proposition was disputed by some, but experience in examinations of fact[137], commissions and other judge alone procedures would suggest that the point is a valid one and that the savings of time would be significant.

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[136] Ormston. R, Chalmers, J, Leverick. F, Munro. Y, and Murray, L 'Scottish jury research: findings from a large scale mock jury study', Scottish Government (2019), accessible at: https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2019/10/scottish-jury-research-fingings-large-mock-jury-study-2/documents/scottish-jury-research-findings-large-scale-mock-jury-study/scottish-jury-research-findings-large-scale-mock-jury-study/govscot%3Adocument/scottish-jury-research-findings-large-scale-mock-jury-study.pdf ; plus additional, at the time unpublished, aspects of the research presented to the Review Group.

[137] This takes place when an accused is found to be unfit for trial in terms of section 54 of the 1995 Act. It is effectively a trial without a jury, with the rules of evidence and procedure and the powers of the court generally being the same as those applicable to a trial. It differs from a trial in that while it can result in an acquittal, it

5.13 Jury trials are disruptive of the lives of the members of the public who are called to serve on them, which has an impact on their personal and working lives and the services they would otherwise provide to the community. The process is cumbersome and expensive and a significant number of court days are lost on account of problems arising for individual jurors, and witnesses who fail to attend, in the course of trials which has an impact on the efficiency of the administration of justice. In a judge alone trial it would be much easier to interpose a witness pending arrival of another.

5.14 Some individuals within the Review Group expressed concern about the effect on individual judges of taking on the onerous responsibility of deciding the facts in these cases. This would place great pressure and responsibility on the shoulders of individual judges. On the other hand, in civil cases a single judge is already entrusted with applying the law to the evidence which can have highly significant and enduring consequences for parties, other members of the public, parliament and government, and which may also be on sensitive and or controversial issues. The right of appeal is a safety net in such cases as it would be in trial by single judge. The nature of any right of appeal in the event of judge-alone trials would require to be considered. Such appeals would require to be open on both the facts and the law. It was also noted that there may be a risk of "case-hardening"[138], but this is a matter which would be the subject of training, and of course the need to give reasons is itself a safeguard.

5.15 The experience of complainers noted above suggests that in many cases trial under the current system is associated with an appalling ordeal for complainers, often felt to be as bad as or worse than undergoing the commission of the alleged crime. The comments made by the High Court on appeal in numerous cases would seem to support that contention. It is difficult to conclude that the presence of a jury is not a factor contributing to this. For example, the manner and length of cross-examination is conspicuously different in an examination of facts and when evidence is given on commission before a single judge. Experience shows that in such cases advocacy is generally briefer, more focused on the central issues, more courteous and less confrontational than when the same evidence is led before a jury.

5.16 Rape Crisis Scotland drew attention to comments reportedly made in March 2020 by the then Dean of Faculty in a recent high profile trial that all he needed to do was "put a smell" on one of the complainers during her evidence. It was suggested

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cannot result in a conviction. Instead, the court, namely a judge sitting on his own, may make a finding that the accused did the act or made the omission constituting the offence. The court is required to determine (see section 56 of the 1995 Act), on the basis of the evidence led by either party, whether it is satisfied (a) beyond reasonable doubt in respect of each charge against the accused, that he did the act or made the omission constituting the offence; and (b) on the balance of probabilities, that there are no grounds for acquitting him.

[138] Sir George Baker (in his Review of the Operation of the Northern Ireland (Emergency Provisions) Act 1978, Cmnd 9222, HMSO 1984, at paragraph 122) explained the concept of hardening in the following terms: "I understand it to mean that the judge has heard it all before; therefore he does not believe the accused; therefore he is or becomes prosecution-minded or more prosecution minded."

that this is exactly the approach which is a significant factor in how violating and distressing rape complainers find the experience. It was also suggested that it is an approach which deliberately targets at any prejudices or rape myths that may exist amongst the jury. In contrast, the judiciary are trained to focus on the evidence in a case and disregard collateral issues, in a way that jury members are not.

5.17 Indications from the 2019 Scottish Mock Jury Trial research are that that rape myths may intrude on deliberations despite the giving of directions designed to counter them. This accorded with the view of many Review Group members that rape myths remain prevalent amongst jurors and are very difficult to displace. Professional judges on the other hand would apply the law dispassionately to the evidence.

5.18 The Scottish Jury Research working paper 2 of 2019[139], "The provenance of what is proven: exploring (mock) deliberation in Scottish rape trials" recorded that:

> "… the research found considerable evidence of jurors expressing false assumptions about how 'real' rape victims react, both during and after a rape. The belief was frequently expressed that a lack of physical resistance on the part of the complainer is indicative of consent. There was also a lack of clarity over the extent to which relatively neutral testimony from a medical expert, which did not exclude the possibility of alternative explanations for the complainer's injuries, could support the complainer's account. In addition, jurors also gave credence to the idea that rape allegations are often unfounded and easy to make.[140]"

5.19 Similarly, it was noted in the Scottish Jury Research working paper 1 of 2019[141],

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

[139] Chalmers. J, Leverick. F, & Munro. V, The provenance of what is proven: exploring (mock) deliberation in Scottish rape trials, Scottish Jury Research Working Paper 2 (2019). Accessible at: https://www.gla.ac.uk/media/Media_704446_smxx.pdf
[140] Ibid, introduction page 3
[141] Leverick. F, What do we know about rape myths and juror decision making: an evidence review, Scottish Jury Research Working Paper 2 (2019), accessible at: https://www.gla.ac.uk/media/Media_704445_smxx.pdf

> and prejudicial beliefs about rape victims are commonly expressed during jury deliberations and that even jurors who do not score highly on scales that measure attitudes in the abstract can express highly problematic views when discussing a concrete case[142]."

These observations are tempered by suggestions that some jurors were willing to challenge such views; that specific directions had some effect; and that there was widespread awareness of a Rape Crisis campaign about rape and consent. The conclusions of this research and the concerns arising from it are amongst the strongest reasons advanced for excluding these cases from consideration by a jury. We examine the research, as well as some research from other jurisdictions, below.

5.20 The 2019 Scottish Mock Jury Research also posed serious questions about a jury's ability to understand and properly apply the principle of corroboration. That corroboration required evidence which offers confirmation or support for the essential parts of a complainer's account rather than evidence which definitively established it was poorly understood. This may be a significant factor in cases of single rape complainers referred to above. In cases of trial by judge alone the concept of corroboration would be clearly understood and applied by the fact-finder.

5.21 That juries may not represent the best means of reaching decisions in these cases has at least been acknowledged in other jurisdictions. For example, in a 2015 report of the New Zealand Law Commission[143] ("The Justice Response to Victims of Sexual Violence, Criminal Trials and Alternative Processes") it was noted[144]:

> "We suggest in Chapter 6 that sexual violence, as a form of criminal offending, may be one that is not well-suited to fact-finding by a jury comprised of 12 laypeople. However, the design of an alternative needs to be carefully considered, and it would need to be justified as a reasonable limit on the right to jury trial in the New Zealand Bill of Rights Act 1990. At this stage we make no recommendation to change the fact-finder in sexual violence cases, but we suggest that the issue could be returned to when considering the future operation of a specialist sexual violence court. We also make some recommendations intended to put juries in a good position to fulfil their decision-making function in sexual violence trials."

It is understood that further consideration of this issue is anticipated.[145]

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[142] Ibid, introduction page 2
[143] Law Commission of New Zealand, The Justice Response to Victims of Sexual Violence. Criminal Trials and Alternative Processes, December 2015. Accessible at: https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC-R136-The-Justice-Response-to-Victims-of-Sexual-Violence.pdf
[144] Ibid, Executive Summary, paragraph 20
[145] New Zealand Ministry of Justice Proactive Release – Improving the justice response to victims of sexual violence, issued July 209, at [87], accessible at https://www.justice.govt.nz/ assets/Documents/Publications/7236-Proactive-release-SV-response-final.pdf

5.22 It goes without saying that the accused's right to a fair trial must not be compromised, but the concept of a fair trial does not hinge on involvement of a jury. Both in this jurisdiction and elsewhere there is considerable experience of judge only trials. In England and Wales for example, provision[146] exists for trials to proceed without a jury, or for the jury to be dismissed and the trial to proceed with a judge alone, in cases where jury tampering might be anticipated. This provision has been used in a rape case, where the Court of Appeal noted[147]:

> "In our view, the judge was right to be satisfied it was fair to the defendant that the trial continue without a jury and the interests of justice did not require him to terminate the trial. The assessment of credibility of witnesses is an ordinary part of a judge's duty. Furthermore, a defendant has under s.48(5) of the CJA 2003 the additional protection of the requirement of a reasoned judgment. Thus where credibility is assessed by a judge the assessment must be justified by careful reasoning. If the decision is adverse to the defendant, this court can subject that reasoning to careful analysis and scrutiny. The position of the defendant was therefore fully protected. It was entirely fair and in the interests of justice to continue the trial without the jury."

5.23 Provisions permitting trial by judge alone in certain circumstances in serious cases exist in many Commonwealth countries, for example Australia[148], South Africa[149], and Canada[150].

Juries to provide reasons

5.24 The Review Group gave some consideration to the possibility that to resolve some of the difficulties, juries might be asked to provide reasons. The majority view was that this would be highly impractical. However, there were those who considered that the suggestion was worthy of further consideration. There are examples where jurors are asked to provide reasons. In Belgium, for instance, where a jury of 12 sits in the most serious cases with a professional panel of three, the professional bench submits to the jury a list of questions, based on the indictment and issues raised during the trial, which the jury must answer. However, it must be noted that in this context the "trial" is not the oral exercise with which we are familiar in this jurisdiction. Rather the jury is presented with "the indictment, the reports establishing the offence and the documents in the file, other than the written statements of the witnesses."[151] This is far removed from the way in which jury trials in this country proceed. Moreover, the questions, are of necessity formed in a way which demands a "yes" or

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[146] See sections 44 to 50 of Part 7 of the Criminal Justice Act 2003.
[147] *R* v *McManaman* [2016] 1 Cr App R 24
[148] See for example Criminal Procedure Act 1986 (NSW); The Juries Act 1927 (South Australia); Criminal Procedure Act 2004 (West Australian).
[149] See for example the Abolition of Juries Act 34 of 1969.
[150] See for example the Criminal Code of Canada section 561.
[151] *Taxquet* v *Belgium* (2012) 54 EHRR 26, at paragraph 28.

"no" answer. To require a jury to answer, in writing, a series of questions of this kind would seriously risk inhibiting the jury's assessment of the evidence which may be disadvantageous for either the accused or the complainer or both. It would also run the risk of the jury's verdict being reduced to the result of a "checklist". Moreover, the fact that the questions are formulated by the bench is capable of providing a sort of "straightjacket" into which the jury must fit their deliberations, and, in a system such as ours, could result in the unsatisfactory position that neither the judges nor the jury have sole jurisdiction over the facts.

5.25 The issue was examined in a 2011 article in the Chicago – Kent Law Review[152], where it was noted that in Spain, where an even more elaborate system of jury reasons is operated,

> "a lively high-court jurisprudence has developed addressing the quality and sufficiency of jury reasons"

- in other words, it has resulted in more appeals.

5.26 A body of 15 people is not well-equipped to provide written reasons and requiring them to do so could make trials last even longer and could end in confusion if conflicting or erroneous reasons are given which may then impugn the verdict. The rigour which could be expected of such reasons would have to be very limited. The result would almost certainly be longer trials, greater rather than less uncertainty, and a significant increase in appeals.

5.27 In short, requiring juries to state reasons was considered by the Review Group to be an innovation which would be difficult to introduce and likely to cause more problems than it solved. The Review Group considered that so long as juries are retained, the absence of reasons was a matter which had to be addressed in ways other than seeking to obtain written reasons from them. The Review Group's discussion suggested that there remain opportunities for further enhancement of the current jury system to assist decision making and increase public confidence by the use of: plain language, educational materials, education about rape myths, clear and written directions, some form of route to verdict and other mechanisms, discussed below.

A panel of judges

5.28 So far as other options were concerned, the suggestion that cases might be determined by a panel of judges was seen to have the advantage of being potentially

[152] Thaman. S.C, Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in Taxquet v. Belgium, (2011) 86 Chi Kent L Rev 613, accessible at: https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=3797&context=cklawreview

more representative, possibly more diverse, and bringing greater confidence in the result, than in the case of a single judge. On the other hand, such a route could clearly not be managed within the current complement of judges and Sheriffs and the necessary increase in numbers would be difficult to justify, and would be very expensive. Practical issues would also rise in respect of how an appeal from a three judge decision would proceed, requiring a quorum of five judges[153], which would again be difficult to implement within the current complement.

Combined judge and lay panel

5.29 The possibility of the judge sitting with a number of lay persons was also considered. The advantages were seen to be the retention of lay input, and increased diversity, at least if these were drawn at random, as jurors are currently. The fact that they would sit with the judge and be directed by the judge might help eliminate the risk of acting on rape myths or prejudice. The possibility of lay representatives drawn from a panel of such, along the lines used for Children's Hearings was also considered. Similarly it might be possible to implement such a system utilising Justices of the Peace as the additional panel members, thus retaining a degree of lay involvement in the process. There could be benefits in the sense that panel members would be trained. Trials in this format may take longer than with a judge alone. It was suggested that whether chosen at random or from a panel the lay members sitting with the judge might be intimidated. It is not clear that this is the case, especially if the members were selected from a panel. In other circumstance lay members sit with judges in various tribunals (for example, the EAT) with no apparent difficulty.

Jury Research

2019 Large Scale Mock Jury study in Scotland

5.30 In October 2019 the Scottish Government published a research report on Scottish Jury Research: findings from a large-scale mock jury study[154] which was the outcome of a multiparty research project undertaken by Warwick University and the University of Glasgow with assistance from IPSOS Mori Scotland. That research was primarily to consider the distinctive features of the Scottish Jury system i.e.

[153] See e.g. *Megrahi* v *HM Advocate* 2002 JC 99 at paragraphs 20–27 in which further discussion and guidance is given on what such an appeal might look like.
[154] Ormston. R, Chalmers. J, Leverick. F, Munro. V, and Murray. L, 'Scottish jury research: findings from a large scale mock jury study', Scottish Government (2019), accessible at: https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2019/10/scottish-jury-research-fingings-large-mock-jury-study-2/documents/scottish-jury-research-findings-large-scale-mock-jury-study/scottish-jury-research-findings-large-scale-mock-jury-study/govscot%3Adocument/scottish-jury-research-findings-large-scale-mock-jury-study.pdf . Referenced earlier in this chapter as the 2019 Scottish Mock Jury Research.

three verdicts, 15 person juries and the simple majority decision[155]. The methodology used was to run 64 mock juries involving almost 1,000 participants. Each jury watched a one hour filmed trial which involved a charge of either rape or assault. They then deliberated for up to 90 minutes which was both filmed and audio recorded and returned a verdict (if able) and completed questionnaires before and after deliberating.

5.31 The researchers recognised that there were certain limitations inherent in the exercise they carried out. First, that although the mock jurors took the exercise extremely seriously, they were of course aware they were playing a role. One common criticism of 'mock' jury studies of this kind is that unlike a real juror the participant has chosen to be involved. Some academics refer to this as 'self-selection bias'[156]. In this study rather than using for example an advert requiring people to contact them, an obvious route to self-selection, the researchers recruited volunteers from members of the general public eligible for jury service from the streets of Edinburgh and Glasgow, using a recruitment questionnaire developed by the research team. Participants at the outset were reminded that they were volunteers and were free to leave at any time. They were not offered an incentive to participate. All mock jurors were given a £50 thank you payment to reflect the time they had given. Whilst 'self-selection' could not be removed entirely, quotas were used by the researchers so that those recruited would be broadly representative of the Scottish population aged 18-75 in terms of gender, age, education and working status and thus similar in demographic composition to the actual population eligible for jury service. Second, that whilst the use of a single scenario for the rape trials enabled them to say how jurors reacted to aspects of the evidence, it was not possible to say what differences these aspects made in the absence of similar studies without these specific features. It is thus relevant to note certain features of the scenario under consideration, namely (i) that the complainer and accused had recently ended an 8 month relationship; and (ii) that medical evidence showed bruising on the complainer's inner thighs and chest and scratches on her breast, consistent with the use of force, although an alternative explanation for the injuries could not be ruled out. There was no evidence of internal injury. The scenario included a period of 40 minutes from the alleged incident before the complainer called the police. How the mock jurors would have reacted in cases which did not have physical injury or where there had been no pre-existing relationship is thus not known. Finally, the scope of the case and the issues considered would clearly be constrained compared to those which might arise in a real trial. A one hour trial is virtually unheard of in practice.

[155] Namely requiring 8 out of 15 jurors for a verdict of guilt. Even if the number of jurors is reduced to the permissible minimum of 12, for example through illness, the accused can only be convicted if eight jurors support conviction.
[156] See for example the discussion and additional authorities cited therein in Thomas. C, The 21st century jury: contempt, bias and the impact of jury service, 2020 Crim LR 2020 987.

5.32 Professors Munro, Chalmers and Leverick attended the Review Group meeting in October 2019 to speak to matters relevant to the Review that were captured within the research but not reported in great detail within the published report (which focused primarily on post-corroboration safeguard issues). The researchers had reviewed transcripts of 32 mock rape trial deliberations (431 jurors) for evidence of the following attitudes:

- A lack of physical resistance may indicate consent.
- A lack of calling for assistance may indicate consent.
- A victim of rape may freeze in response to the attack.
- False allegations are routine.
- A delay in reporting is indicative of a false allegation.

5.33 The researchers examined the extent to which such views were expressed, and whether challenged, and reviewed the specific content of jury discussions on these points. The conclusions they drew were:

- There was a persistent focus on the existence of injury and resistance, along with a lack of clarity over the extent to which a medical expert's evidence could be used to corroborate the complainers account.
- The mock jurors gave credence to the idea that rape allegations are often unfounded, but there was evidence of a willingness by some to challenge the attitudes of peers and that included:
    - Drawing on personal experience.
    - Placing reliance on judicial instructions and awareness campaigns.
- Many of the mock jurors viewed the relationship between corroboration and standard of proof as being very close, and a perceived insufficiency of evidence often led to a verdict of "not proven".
- Many mock jurors saw delayed reporting as suspicious, although again there was evidence of a willingness by some to challenge this by linking back to the judicial directions.

5.34 The view that a failure physically to resist might indicate consent was expressed in a significant majority of cases, 28 out of the 32. In 22 of these, the views were challenged, but that means that in just over 20% of the cases in which such a view was expressed it was not even challenged. The expectation that someone who was the subject of a sexual attack would be expected to scream or call for help was expressed in 16 out of the 32 cases. That view was challenged in only 7 of those cases, so in 56% of cases in which the view was expressed it was left unchallenged. In 25 of the 32 cases it was suggested that the victim of a sexual assault might "freeze", although for some jurors the possibility of this was more questionable in a case where there was a prior relationship between the complainer and accused. In the course of the discussions on this issue there was some

recognition that it was difficult to predict how anyone would react. The suggestion that false allegations were routinely made was expressed in 19 of the 32 cases, with some going as far as to suggest the injuries might have been self-inflicted. That view was challenged in 14 of the cases, although it seems that it was an issue which continued to loom large for some jurors. As noted above, the rape case scenario included a 40 minute delay in reporting. In 13 of the cases the suggestion was made that this might indicate the allegation was false, although that view was challenged in a reassuringly high percentage of cases (76%).

5.35 As to legal concepts, the nature of the case scenario meant that those which arose were fairly limited. However, the researchers found that jurors' understanding of the not proven verdict was variable, and that jurors often struggled during deliberations to recall legal tests with accuracy. A significant issue arose in relation to issues of sufficiency and corroboration. In 23 of the 32 cases the view was expressed that the evidence led was insufficient for conviction. Although this was challenged in 17 of the 23 cases, there was evidence to suggest that in respect of corroboration some jurors were looking not merely for evidence which was consistent with the complainer's account but for evidence which was "definitive". It appears that jurors were looking for independent evidence of rape, rather than corroboration as defined for them in the sense of providing support for the complainer's account. Since the doctor in the case scenario could not definitively say the injuries were the result of rape, the medical evidence was not viewed as providing strong support for the crown case.

5.36 The researchers were at pains to point out that translation from attitudes to verdicts is always complicated. They noted that research in England and Wales based on post-deliberation juror interviews with actual jurors (although not always jurors who had served in rape or sex cases -see below) may seem to present a different picture, subject to the limitations inherent in such research. However, they also noted that previous research[157] indicates that even those with low "rape myth acceptance" may rely on stereotypical tropes to justify a verdict within deliberations.

University College London Post discharge interviews with Jurors

5.37 Professor Cheryl Thomas QC, Professor of Judicial Studies at University College London (UCL) attended the Review Group meeting in October 2019 to speak to her (at that time) unpublished research[158]. In England and Wales public policy and research had led to numerous calls to remove juries from rape trials.

[157] As discussed further in Leverick. F, What do we know about rape myths and juror decision making: an evidence review, Scottish Jury Research Working Paper 2 (2019) and Leverick.F, What do we know about rape myths and juror decision making? 2020 International Journal of Evidence & Proof 255 and the research cited therein.
[158] See now Thomas. C, The 21st century jury: contempt, bias and the impact of jury service, 2020 Crim LR 2020 987.

These calls were based on opinion polls on public attitudes, research undertaken with volunteer mock jurors, and views publically expressed by some prosecutors. This led to a public petition to Parliament which attracted the required 10,000 signatures and in turn led to the Professor Thomas's research being commissioned.

5.38 The UCL research has involved "post discharge interviews" with real juries in:

- *Three court areas in London (South East, North and London)* – that exercise involved 63 discharged juries (746 jurors) with a 100% participation rate; and
- *One court area in Northern Ireland (Laganside in Belfast)* - that exercise involved 63 discharged juries with a 100% participation rate and was reported on in the Gillen Review.

5.39 The jurors had served in cases involving a wide variety of crimes, including sexual offences. The research emphasis was to obtain views of those with recent real life experience of the process of working with their peers to deliberate on a crime and reach a verdict, in the knowledge that their decisions would have real life consequences for the participants. The research aims were to establish:

- whether those who served on juries believe rape myths and stereotypes;
- whether it is valid to use public opinion polls and research with "proxy jurors" to make assumptions about the views of actual jurors; and
- any correlations between juror attitudes about sexual offences and juror age, gender, religion, ethnicity or socio-economic group.

5.40 Those who had been interviewed were guaranteed complete anonymity and told that there was no right or wrong answer to the questions posed. The researchers were of the view that the discharged jurors took their role seriously and when interviewed immediately after conclusion of the trial, they were still in that serious mind set. Nevertheless, as with the Scottish research there were some limitations inherent in the research. Those who were interviewed had just completed jury service and would to some extent be expected to know what they were meant or expected to do, or say. The jurors were not making actual decisions, nor were they left in general discussion of the issues, but were asked questions which had been framed for them. As the researchers have themselves acknowledged[159] with respect to the extent to which juries believe myths and stereotypes aspect of their research, the reliability and validity of surveys are known to depend on questions being clear and relevant to the respondent answering them. Accordingly, where necessary the questions in this research were tailored. For example some of the questions related to topics with a clear and agreed factual basis (e.g. occurrence of stranger versus

[159] Thomas. C, The 21st century jury: contempt, bias and the impact of jury service, 2020 Crim LR 2020 987, at 1001.

acquaintance rape), while others related to topics where no agreed factual basis exists (e.g. the prevalence of false allegations against famous people). The jurors had just exercised responsibility in a case, although not necessarily a sexual one, so the criticism sometimes made of mock jury research, that they had not been given responsibility to try a case, applies only to a much more limited extent. However, as with mock jurors there were no consequences to their involvement with the research. On a similar note many argue there is scope for deliberate misrepresentation in the answers given, perhaps because the individuals concerned do not want to admit to any behaviour or belief which presents him or her in a negative light. Guaranteed anonymity, as occurred in this research, may mitigate that. It has been suggested that surveying jurors immediately after their case runs the risk that they hurry to complete the questionnaire so that they can return home, thus the time to fully consider, reflect and answer may be limited. This can be mitigated by ensuring that any interview or questionnaire is relatively short.[160] Some of the general themes from the research were that:

- Some jurors believe the obvious myths.
- Most jurors believe what they should believe but on some important issues substantial proportions of jurors are uncertain what to believe.
- Previous claims and perceptions of "juror bias" are not valid as the jurors at court do not hold the same views as those reported in public opinion polls or by those volunteers who have participated in mock juries.
- There are no significant differences between those who served on sexual offence cases and those who served on non-sexual offence cases.
- There was no evidence of jurors suffering trauma as a result of their experience.

5.41 To some extent these findings may offer reassurance in respect of juror views, recognising the limitations of the research. However, closer examination of the findings shows that in certain respects the findings echoed some of the Scottish research and threw up similar areas of concern. Although a significant majority of jurors interviewed did not believe, or did not appear to believe, for example, that the absence of bruises or marks indicated that no rape had occurred, 13% either did not know or agree with the opposite viewpoint. Similar figures applied to the question of physical resistance. When it came to the assertion that it was difficult to believe an allegation of rape which had not been made immediately, the "don't know/agree" figure rose to 27%. As with most other figures, the majority of that 27% were the "don't knows", but 7% still agreed with the assertion, in other words the equivalent of one person in a jury of 15. 23% either agreed or were uncertain whether rape within a relationship could take place over a long period of time before a complaint was made. Again, although the majority agreed that there are good reasons someone

[160] See discussion of and authorities cited therein in Chalmers. J, and Leverick. F, How should we go about jury research in Scotland?, 2016 Crim LR 697 at 706.

who has been raped may be reluctant to report the fact to the police, 20% either disagreed or were uncertain about this assertion.

5.42 This pattern was identified by the researchers who noted that on some issues a substantial percentage of jurors are uncertain what to believe. Some of the figures they produced were striking. 43% of jurors said they would expect someone who had been raped to be emotional when giving evidence, and 35% were uncertain – only 22% disagreed with the proposition as a generality. On the question whether someone was more likely to be raped by a stranger than by someone they know 5% agreed, but 31% were in the uncertain category. 59% were in the uncertain/agree camp on the assertion that many women who claim they were raped agreed to sex and then regretted it.

5.43 The conclusion reached in the research was that juror guidance on myths and stereo types was "clearly needed on some topics where there is agreed empirical evidence (eg, stranger vs acquaintance rape, emotion when giving evidence)", whilst recognising that guidance may be difficult on other issues where empirical evidence was limited or non-existent. An example of the latter being on the issue whether some people make up allegations about a famous person, which had been one of the questions asked.

5.44 The UCL Jury Project has been continuing its research with real juries to determine the most effective means of directing juries on these issues. What this further research is designed to answer is whether "new tools can help reduce the proportion of jurors who say they are 'not sure' about these factual issues and reduce the very small proportion of jurors who currently believe some myths and stereotypes[161]. In this regard a pilot project in England and Wales has been testing film, written guidance and additional judicial directions with discharged jurors which covers issues where there is a clear factual basis to counteract myths. The film played, entitled "Avoiding Myths and Stereotypes in Rape Case: A Guide for Jurors", is introduced by the chair of the Judicial College. While initial indications from the research were positive, its progress has been delayed owing to the postponement of trials in line with Covid-19 public health guidance. Given the importance of the issues which the research is seeking to address the research conclusions are anticipated to be informative for the approaches recommended later in this chapter.

Research – New Zealand

5.45 The Review Group also considered the approach adopted in New Zealand,

[161] Thomas. C, The 21st century jury: contempt, bias and the impact of jury service, 2020 Crim LR 2020 987-1011, at 1005.

with the work of the New Zealand Law Commission[162] and the associated research commissioned from the Victoria University of Wellington.

5.46 By way of context the New Zealand Bill of Rights Act 1990 guarantees the right to trial by jury where the offence charged carries a penalty of imprisonment of two or more years, and most defendants charged with a sexual offence do choose trial by jury. Notwithstanding the right of jury trial election, judges in New Zealand can in certain circumstances order a trial by judge alone.

5.47 Between 1998 and 2001, the New Zealand Law Commission undertook a project relating to the use of juries in criminal trials. Its work was influenced[163] by research carried out by academics at Victoria University. The Victoria University research covered 48 trials over 9 months over a range of offences.[164] Data was collected using written questionnaires, observing trials, interviewing judges and, where consent was given, interviewing jurors after the trials had concluded. Those juror interviews covered the adequacy of pre-trial information, jurors' reactions to the trial process, their understanding of the law, their decision making process, the basis of the verdict and the impact of pre-trial and trial publicity. One of the conclusions of the research was that juries were not necessarily to blame for any dissatisfaction with verdicts.

5.48 The conclusions reached by the New Zealand Law Commission in 2001 were that it was important that juries continue to be utilised in cases: where the most serious matters were alleged; which "most grievously offend against community values"; and which "most affect the rights of citizens in a free and liberal democratic society". There was a "powerful community interest" in having cases of this kind decided by members of the community, even though trial by jury might be difficult for the complainer[165].

5.49 However, in 2015 the New Zealand Law Commission[166] was asked to consider "how the position of complainants might be improved, but without compromising the trial rights of defendants" and to make recommendations on this subject. The work conducted involved a review of the whole criminal justice system and that system's response to complainers in sexual offences cases. The Law

[162] Law Commission, The Justice Response to Victims of Sexual Violence. Criminal Trials and Alternative Processes, December 2015. Accessible at: https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/NZLC-R136-The-Justice-Response-to-Victims-of-Sexual-Violence.pdf

[163] The research informed aspects of the Law Commission's reports, particularly New Zealand Law Commission, Preliminary Paper on Juries in Criminal Trials: Part I,1998, and New Zealand Law Commission, Discussion Paper on Juries in Criminal Trials: Part IIc, 1999.

[164] A summary is provided in New Zealand Law Commission, Juries in criminal trials. Part two: A summary of the research findings (Preliminary Paper), 1999 and also in the publication McDonald. E and Tinsley. Y (eds), From "Real Rape" to Real Justice: Prosecuting Rape in New Zealand, Victoria University Press, Wellington, 2011

[165] New Zealand Law Commission, Juries in Criminal Trials, 2001, at paragraph [127].

[166] Law Commission, The Justice Response to Victims of Sexual Violence. Criminal Trials and Alternative Processes, December 2015.

Commission revisited the issue of the continued use of juries in sexual offence cases, and concluded that there was a case for conferring the decision-making function in sexual violence cases on some entity other than a jury. Nevertheless, it made no recommendation to alter the *status quo,* on the basis that further consideration would be required to determine the most appropriate alternative, particularly given the statutory right to a jury trial. The Law Commission did recommend that future consideration be given to the issue as part of the evaluation of a new specialist court, the setting up of which it also recommended via a pilot.[167] A pilot sexual violence court was subsequently set up in two court districts, the details of which are noted in the previous chapter of this report. The Ministry of Justice intends to re-visit the issue of changing the decision making arrangements in cases of sexual violence.[168]

5.50 As an interim measure[169] the New Zealand Law Commission proposed the following measures to improve jury decision making:

- better pre-trial education for jurors;
- enhanced judicial directions; and
- the leading of expert or counter intuitive evidence.

The Law Commission's report also recommended a wide range of changes in the prosecution of sexual offences, including:

- reducing the delay in proceeding to trial;
- adopting less traumatic methods of taking evidence from complainers;
- specialist training for judges;
- the increased use of counter-intuitive evidence to combat rape myths;
- increased support for complainers attending court; and
- the piloting of a specialist District Court for sexual offences

Several of these recommendations have been included within the terms of the Sexual Violence Legislation Bill, introduced on 11 November 2019, which is progressing through the New Zealand legislative process.[170]

Part I conclusions

5.51 It was understood by the entire Review Group that the option of withdrawing sexual offences from the consideration of juries would be controversial and

[167]New Zealand Law Commission, The Justice Response to Victims of Sexual Violence. Criminal Trials and Alternative Processes, December 2015, paragraphs 6.48- 6.49.
[168] New Zealand, Under Parliamentary Secretary , Proactive Release – Improving the justice response to victims of sexual violence, issued July 209, at [87], accessible at: https://www.justice.govt.nz/assets/Documents/Publications/7236-Proactive-release-SV-response-final.pdf
[169] New Zealand Law Commission, The Justice Response to Victims of Sexual Violence. Criminal Trials and Alternative Processes, December 2015, at paragraph 6.50.
[170] See https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/BILL_93010/sexual-violence-legislation-bill

unpopular with many people. By and large, defence representatives felt strongly that whatever criticisms might be made of the understanding by juries of what trials are about – legally and factually – there were none which could not be addressed by better education of all participants, including the juries themselves, possibly using measures of the kind adopted in New Zealand. Rape Crisis Scotland noted that the Review offered a once in a generation opportunity to consider how best to address the seemingly intractable problems in delivering justice in sexual crime cases, and gave Scotland an opportunity to lead the way internationally in how to address these cases. They expressed the view that without firm, and even radical action, the improvements were likely to be marginal to the experience of complainers and witnesses, and were unlikely to address the perceived and actual barriers in accessing justice in Scotland following rape or sexual assault.

5.52 It must be acknowledged that nearly forty years after the introduction of the first rape shield legislation, and two decades after the publication of "redressing the balance" many of the same issues are still having to be considered. As is noted at paragraph 3.2 above, many of the concerns expressed by complainers precisely echo the concerns which were being expressed 20 and even 40 years ago. The passages from the Scottish Law Commission report in 1983, referred to at paragraph 3.3 above, would require little editing to be apposite to 2021. Without profound reform there is a real possibility that our successors will be examining the same issues forty years hence. The traditional arguments in favour of juries are met by equally compelling arguments for trial by judge alone, which cannot be left unexamined and ignored. They are summarised or illustrated throughout this chapter. This is a question which ought to be examined in much greater depth, with further jury research, and a fully evaluated pilot scheme to support an evidence based approach, assessing any longer term changes to trial procedure introduced following this Review. This would enable the issues to be assessed in a practical rather than a theoretical way. The fact that a system has been sanctified by usage may make it difficult to change, but it should not make it exempt from thorough examination of its suitability.

Part II
Improvements to the present system

5.53 Whatever view is ultimately reached in this jurisdiction in relation to the use of juries there is no doubt that as long as they are retained in sexual offence cases there is a pressing need for reform in relation both to the information provided to jurors and the means by which it is provided. On the assumption that in the meantime juries will continue to be used, the Review Group turned to consider what changes might be effected in order to guard against reliance on rape myths, and to improve juror understanding of the process upon which they were engaged.

Providing pre-trial information regarding rape myths and stereotypes

5.54 The results of the Scottish and the UCL jury research both suggest that it is necessary for information on certain rape myths to be communicated to the jury in an objective and clear manner. There seemed to be little disagreement about this, in principle, within the Review Group: what seems to be less settled relates to identification of the circumstances in which this should be done, and the best means of doing it. The Review Group noted that the Scottish Parliament had sought to address certain entrenched rape myths with the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, section 6, what we now know as sections 288DA and 288DB of the 1995 Act, in respect, respectively, of lack of communication about and of lack of physical resistance to or physical force from a complainer during the commission of an offence. At present, the need for a direction on such issues only arises in certain circumstances and occurs effectively at the end of the trial in the course of the judge's directions. However, given the findings of the research as to the possibility of a lack of resistance (or a failure to call for help) indicating consent, there was support for the view that instruction about such issues required to be given generally to jurors, and should be given at the outset of the case. The Review Group considered that there was no default presentation to be expected from someone who has been raped. She or he may show little emotion or may show considerable emotion. Given the importance which the law attaches to a witness's demeanour, this is one example of the need to address the potential for misconceptions to feature in jury deliberations.

5.55 There is no conclusive research on the best way of communicating such matters to a jury. Some members of the Review Group expressed a preference for the use of video given its ability to provide uniformity, and that it would provide a "buffer" from the circumstances of the individual trial and the judge presiding over it. There was a suggestion that the video could feature an authoritative member of the judiciary, such as the Lord Justice General. A carefully worded video, debunking such myths, could have considerable value. It could be played to the jury as soon as they were empanelled in any sexual offence case to which it has potential relevance. Equally, written material could be provided to the jury, instead of or along with, an appropriate video. The eventual steps taken to address myths may be informed by research currently underway elsewhere.

5.56 The research available to the Review Group suggested that rape myths which may intrude on jury deliberations include expectations:

i. that a person, and perhaps in particular a woman, who is sexually assaulted will always fight back, scream or shout for help;

ii. that a sexual assault would be immediately reported;

iii. that a genuine rape victim will always show emotion in the aftermath or on giving evidence; and

iv. that false accusations are commonly made.

The Review Group envisaged that such topics would be addressed in the eventual material provided to the jury, whatever form it takes. As noted at paragraph 5.44 above, UCL have commenced research in to the use of a pilot video on real juries in light of its own findings on myths. The video is used in combination with a written handout and jury directions. Notwithstanding the legal and procedural differences between the two jurisdictions, particularly the existence of opening speeches, its findings are likely to be very informative in determining the best approach to adopt in Scotland. In Northern Ireland, Sir John Gillen has recommended,[171] subject to the findings of UCL's research, that the use of a jury video coupled with early directions by the judge, particularly if they are in written form, about rape myths have the potential to be the preferable method of combatting the issue there. While the benefits of using a video appear significant, given the importance of the matter, the Review Group was cautious in recommending the immediate and universal introduction of what would be a yet untested video in Scotland. It therefore recommends that there should be further discussion on the best means of providing the information to a jury, with a view to introducing a pilot programme in the first instance, drawing as appropriate upon the findings of the UCL research.

Providing standard directions regarding rape myths and stereotypes

5.57 Whether or not a trial begins with the playing of a video recording of the kind discussed above, there may be much to be said for relevant directions on rape myths being given by the judge both in their introductory remarks at the start of the trial, or otherwise as soon as such points arise. Again this is a topic that should be considered further in the discussions recommended above. In the meantime the use of current statutory directions regarding rape stereotypes and myths should be utilised whenever appropriate.

5.58 A study examining "Methods of conveying information to jurors: evidence review" was published in 2018 by the Scottish Government[172] (the 2018 review) as part of its Jury Research Project, following comments about this issue made in the 2015 Post-Corroboration Safeguards Review (the 2015 review). The 2015 review, chaired by Lord Bonomy,[173] noted that there may be "scope for clarifying and

[171] See paragraph 6.109 of the Gillen Report.
[172] Chalmers. J, and Leverick. F, Methods of conveying information to jurors: evidence review" , Scottish Government, 2018, accessible at: https://www.gov.scot/publications/methods-conveying-information-jurors-evidence-review
[173] It looked in to safeguards against wrongful conviction in the context of the potential abolition of the requirement for corroboration in criminal cases.

simplifying the language used in some aspects of jury directions, and varying the means of communicating these directions"[174]. The 2015 review also indicated support for improving the "quality and effectiveness of the information that is communicated to jurors".[175] The 2018 review identified a number of ways in which methods of communicating with jurors might be improved, assessing the empirical evidence of the effectiveness of these methods and the extent to which they have been adopted elsewhere. The review noted that the way in which trials are currently conducted in Scotland:

> "poses a number of challenges for jurors. Memory - both for the evidence and for the content of the directions - is likely to be a particular challenge, especially in a lengthy and/or complex case. The absence of specific preliminary directions or opening speeches means that jurors are not given any kind of organising framework before they hear the evidence, beyond the indictment and any special defence that has been lodged. This may affect jurors' ability - at the point at which they hear it - to understand how a particular piece of evidence fits into the overall picture. This may, in turn, have a detrimental effect on the degree of attention they devote to it and/or their memory of it. There may also be challenges in terms of comprehension. This might be in relation to particular types of evidence, such as complex scientific evidence [9] or in relation to understanding the legal tests that jurors are required to apply."

5.59 The 2018 review noted serious concerns identified in the research as to jurors' ability to grasp legal concepts, noting that jurors think they understand legal concepts better than they actually do[176] and that confidence does not necessarily equate to accuracy[177]. The review noted that there was some evidence to suggest that deliberation by the jury as a group can be effective in correcting factual errors relating to the evidence. However, the evidence did not suggest that this also applied in respect of legal directions. The key finding of the review, at paragraph 2.1 was that:

> "The empirical evidence suggests that the most effective ways of enhancing juror memory and understanding are juror note-taking, pre-instruction, plain language directions and the use of written directions and structured decision aids (routes to verdict). Each of the methods targets different issues (some improve memory, some improve understanding and application of legal tests)

[174] The Post-Corroboration Safeguards Review, Final Report, 2015, at paragraph 13.3, accessible at: https://www2.gov.scot/resource/0047/00475400.pdf
[175] The Post-Corroboration Safeguards Review, Final Report, 2015, at paragraph 13.5.
[176] Hope. L, Eales. N, and Mirashi. A, Assisting jurors: promoting recall of trial information through the use of a trial -ordered notebook, (2014) 19 Legal and Criminological Psychology 316 at 326.
[177] Saxton. B, "How well do jurors understand jury instructions - a field test using real juries and real trials in Wyoming", (1998) 33 Land and Water Law Review 59 at 92.

and there is evidence to suggest that they are best used in combination, rather than as alternatives."

5.60 We will examine each of these in turn.

Juror note-taking

5.61 Jurors in Scotland are routinely provided with the means of taking notes and are advised by the judge at the outset of the trial that it is desirable for them to do so, since they will ultimately be called upon to decide the case according to their own recollection of what the evidence was. Experience shows that some jurors are assiduous in note taking, others less so. The 2018 review suggests that structured notebooks which help jurors to organise their notes may be beneficial in this respect and may assist jurors who are not skilled at note-taking. The example given was a notebook with separate headings for the evidence in chief of each witness, cross-examination (and presumably re-examination), speeches and charge. This is based on a study which found that recall seemed to be assisted where notes were detailed and well organised. Whether this is best achieved by presenting jurors with a structured notebook which they are expected, if not pressurised to complete, may be questioned. Even with the aid of a structured notebook some jurors will be more capable of, and better at, taking notes than others. Some may find this a particularly difficult exercise, but it may as a result enhance their ability to recall information provided orally. There may be issues for individual jurors which make it more difficult for them to take an accurate note of the evidence, and reliance on their memory, assisted by the notes taken by others, is not necessarily a problem especially when one considers the apparent corrective effect of communal deliberation in respect of the facts. Further, such jurors may have developed strategies which enable them to retain information without recourse to notes. Presenting them with a structured notebook to record notes may not be beneficial. We are not therefore convinced of the need for such an aid. If further research on this issue emerges it can of course be considered again. Nevertheless, we are of the view that perhaps more could be done to encourage note-taking by jurors, since the evidence does seem to show a clear correlation between note-taking and recollection[178]. There may also be a benefit in suggesting that jurors take a short period of time to review their notes at the start of their deliberations[179], or gather their reflections of the evidence they have heard.

[178] Chalmers. J, and Leverick. F, Methods of conveying information to jurors: evidence review", Scottish Government, 2018, at paragraph 2.3.1.
[179] Chalmers. J, and Leverick. F, Methods of conveying information to jurors: evidence review", Scottish Government, 2018, at paragraph 2.3.1.

Pre-instruction

5.62 Until recently, the extent to which jurors were given instructions pre-trial was relatively limited. Generally speaking, the jury would be told, via oral instruction, that their task is to listen to the evidence with care, and on that evidence and directions from the judge, to determine whether the case has been proved beyond reasonable doubt; that they must proceed only on the basis of the evidence led in court; that as a consequence they will probably want to take notes of the evidence as the case progresses, since the judge will not be summarising the evidence for them; and that they must take the law from the judge. A cursory outline of procedure was usually given.

5.63 As part of their overall consideration of written directions, the judicial Jury Manual Committee has for some time been examining ways in which the initial pre-instruction of jurors might be expanded. One issue considered has been the possibility of information on key concepts such as the burden and standard of proof, corroboration, and so on being provided to the jury at the outset of the trial so that they have a sort of "road-map" to guide them through the trial as the evidence unfolds. The Jury Manual Committee has prepared written pre-instruction of this kind for the benefit of jurors, and the Lord Justice General has approved their use. These have been used in all jury trials which have taken place since the restarting of trials following the Covid-19 lockdown in the early part of 2020. A copy of the current pre-instruction is attached as an annex (annex 5). This continues to be revised and refined to make it as relevant and clear as possible.

5.64 There is, of course, a limit to the extent to which pre-instruction may be given in any given trial. It will generally be of most use in explaining the basic legal concepts which apply to every trial, and other concepts clearly anticipated to arise in the course of the given trial, such as concert, for example. We do not think the fact that charges may be withdrawn from the jury before they deliberate would cause an issue here: the pre-instruction is designed not simply to help deliberations but to help follow and make sense of the evidence as it emerges. In any event, even when charges are withdrawn it may often be the case that charges, involving similar concepts, remain on the indictment. The issue of providing jurors with pre-direction on the specific requirements of individual crimes does pose problems. In simple cases (where of course the need is less acute) it may be relatively straightforward to do. However, in many cases the way in which a crime is defined, is usually refined by a judge in light of the evidence led and the way that the case is presented. This is particularly so with statutory offences with many alternative modes of commission and components, as sexual offences now generally are. In addition, in lengthy indictments with 30 or more charges, of many different kinds, many of the charges may in fact be evidential, in other words listed to provide notice but not expected to be remitted to the jury for consideration in due course: in such cases defining all of the crimes in advance may be very time consuming and disproportionate to the utility

of the exercise for the jury. There may be a particular difficulty with offences under part 1 of the Sexual Offences (Scotland) Act 2009, under reference to absence of reasonable belief, since it most cases, that issue does not arise for consideration (*Maqsood* v *HM Advocate* 2019 JC 45), as the Jury Manual makes plain[180]. It may be distinctly unhelpful and counterproductive to introduce a concept of this kind at the start of the trial when it is in most cases unlikely to arise for consideration. This would be a matter for the Jury Manual committee to consider. There would, of course, be no real difficulty at the start of the judge's charge, in providing the judge's directions on specific charges in writing.

5.65 The 2018 review noted that there was a considerable body of evidence from good quality empirical studies suggesting that pre-instructing jurors on the substantive legal issues in the case improves comprehension and memory for the evidence. Despite concerns that it might cause jurors to reach their verdict decisions prematurely, there was no evidence that this is the case. This method of communication has already been introduced in Scotland and we consider that its use should continue, with regular assessment of its content and format by the Jury Manual Committee.

Plain language directions

5.66 The importance of clear communication to juries has long been recognised by the Scottish judiciary, as reflected in the existence and content of the Jury Manual which is maintained, reviewed and updated regularly. The Jury Manual explicitly recognises the importance of using words and expressions that are clear and simple.[181] In giving directions to the jury the judge is seeking to explain legal concepts, often fairly complex ones, in clear and comprehensible language. The findings of the 2018 review that simplifying jury directions can improve juror comprehension of legal concepts are hardly surprising. The task is not always easy, but judges do take care to try to use clear and simply language for this task, sometimes accompanied by analogies or examples where this may help. It is vital that in using simpler language the true meaning of the concept in question is not distorted or lost. Nevertheless the Review Group accepts that yet more could be done in this area and urges both the Jury Manual committee and individual judges to redouble their efforts in this regard.

[180] Judicial Institute for Scotland, Jury Manual, June 2020, page 57.3 /117, accessible at: https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/judicial-institute-publications/export_jury_manual_2020-06-12_1429.pdf?sfvrsn=8c9918e4_2

[181] In particular, care should be taken to use words and expressions that are clear and unambiguous and simple, that conciseness so far as possible must be achieved, and that the exercise of communication should be as natural as possible. Judicial Institute for Scotland, Jury Manual, June 2020, page 4.5 / 117.

Written directions and structured decision aids (routes to verdict)

5.67 The Jury Manual committee has already started to develop written directions on specific topics to be used by trial judges where appropriate, expressed as simply as possible. The 2018 review noted a substantial evidence base to show that providing directions in writing helped jurors to remember and re-state those directions but noted also that the evidence on whether they help jurors to gain a deeper understanding of directions was more equivocal. However the overall conclusion was that:

> "There is no real debate over the question of whether written directions improve juror memory – they clearly do, as jurors no longer have to rely on their own recall of what the trial judge has said. There is, however, a substantial body of evidence that written directions also improve juror comprehension of the law. The vast majority of studies have demonstrated improvements in comprehension from written directions and most of the studies that have not done so have suffered from methodological flaws. Studies of juror deliberations demonstrate that jurors who are given written directions frequently refer to them and use them to correct mistakes of law made by other jurors."[182]

The Crown Court Compendium, published by the Judicial College for England and Wales (the equivalent of our Jury Manual) states:-

> "The argument in favour of providing juries with written directions is now overwhelming".

Their use in that jurisdiction has been encouraged.[183] The findings of the Scottish Mock Jury Trial research that jurors often struggled to recall legal tests accurately during deliberations confirms the need for clear, written directions. That research suggested a real issue over the understanding of what is meant by corroboration, as well as concern over the meaning of the not proven verdict. Without entering into the debate about the utility of this verdict, at least providing in writing such explanation for its existence which may be reasonable can only be beneficial.

5.68 The 2018 review also noted developing studies in relation to "routes to verdict", by which is meant "a written aid that provides a series of primarily factual questions that gradually lead the jury to a legally justified verdict." That review also noted that

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[182] At paragraph 2.8.
[183] *AB* v *CD* [2010] EWCA Crim 1622; *Atta-Dwanka* [2018] EWCA Crim 320; *R* v *N* [2019] EWCA Crim 2280; and Sir Brian Leveson, Review of Efficiency in Criminal Proceedings, January 2015, at paragraphs 284 and 288 in particular, accessible at: www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf

> “Routes to verdict, in this sense, are not routinely used in Scotland, although the researchers understand that individual judges have occasionally chosen to employ them in specific cases where jurors will be required to consider a complex set of questions in their deliberations. Scottish courts do use the term "route to verdict", but with a different meaning”.

This latter sentence is a reference to *H* v *HM Advocate* [2016] HCJAC 4 at [13], where the court noted that:

> "The terms of a trial judge's charge to the jury should be such as to enable the informed observer, who has heard the proceedings at the trial, to understand the reasons for the verdict. In other words, there must be a discernible route to the verdict."

5.69 The 2018 review indicated that such limited research as there is seems to suggest that structured routes to verdict are more effective than written directions in improving applied comprehension, so long as the accompanying oral directions are tailored to the route to verdict provided, otherwise there is a danger that jurors ignore the route to verdict. We recognise that there is merit in providing the jury with the means to find what the court in *H* v *HM Advocate*[184] referred to as “a discernible route to the verdict”. We are not entirely convinced that this need be in a formal or structured way. The evidence base for formalised routes-to verdict is very limited[185]. Such formal approaches may run the risk of inhibiting the jury’s consideration of the evidence as a whole, and may have some of the risks associated with the posing of specific questions designed to obtain a reasoned verdict from a jury, as discussed above. There is a risk that the case is presented to the jury on the basis of an unduly limited hypothesis. We accept that this is another issue which might benefit from further research. We also consider that judges should be encouraged to formulate their directions in a way which more clearly provides for the jury the “road map” to help them find a route to verdict. No doubt this is a matter which the Jury Manual Committee would wish to address at the earliest opportunity.

Data in relation to convictions in Scotland

5.70 The Review Group has examined the latest statistical material (for 2018-2019 discussed at paragraph 5.6 above) which supports the conclusion that the proportion of accused persons found guilty of rape and attempted rape after trial in the High Court is lower than for any other crime- 47% compared to a conviction rate for all crime in 2018-19 of 87%. Both figures of course relate only to the cases which are reported and which meet the threshold for prosecution. Some have suggested that

[184] [2016] HCJAC 4 at [13].
[185] Chalmers. J, and Leverick. F, Methods of conveying information to jurors: evidence review, Scottish Government, 2018 at para 2.9.1- 2.9.2.

the conviction rate is particularly low in cases in which there is a single complainer, although the data to examine this contention is not available. The Review Group cannot and does not suggest that there is an appropriate percentage rate of conviction. However, where it is suggested that low conviction rates are contributed to not by poor cases alone but by efficiencies in procedure, it is difficult to ascertain whether measures designed to rectify such deficiencies are effective without access to detailed data. Accordingly there is much to be said for annual collection and review of data of the outcome of sexual offence cases tried by juries particularly following the implementation of recommendations made in this Review and particularly this chapter. Justice and third sector agencies, as relevant, may wish to give further consideration to the implementation of such a practice. If the recommendations made by the Review have, in due course, no effect on the rate of convictions then Parliament may have to decide whether it is acceptable that such a high proportion of trials for rape end in acquittal, given the nature of the crime which represents the most profound invasion of personal autonomy, the ordeal for complainers of giving evidence and the enduring consequences of such crimes.

The Review Group recommends:

Recommendation 4 – Steps to enhance the quality of jury involvement

This recommendation proceeds on the assumption that juries will continue to be utilised for the resolution of serious sexual offences (as to which however, see recommendation 5)

(a) Myths and preconceptions

A pilot programme should be developed to communicate information to juries regarding certain common rape myths and stereotypes, possibly in the form of a video, drawing upon the research findings referred to in the report, and the equivalent pilot programme commenced in England and Wales. In the meantime the current statutory directions to address rape stereotypes and myths should continue to be utilised whenever appropriate.

(b) Jury note taking

To encourage greater jury note taking, or engagement with the evidence, the trial judge should direct jurors to take a short period of time to review their notes or reflect on the evidence they have heard, at the start of their deliberations; and the pre-trial instruction should advise them that they will be expected to do this. This is a matter which should be taken forward by the Jury Manual committee.

(c) Pre-instruction of the jury

The recently adopted method of pre-instruction of juries on key concepts, and in writing, should continue, with regular assessment of its content and format by the Jury Manual committee.

(d) Plain language directions

The Review Group accepts that yet more could be done in this area and urges both the Jury Manual committee and individual judges to concentrate their efforts in this regard.

(e) Route to verdict

The Review Group considered the use of what are known as "routes to verdict", structured aids to assist juries in reaching a verdict. The Review Group concluded that the Jury Manual committee should consider ways to assist judges to formulate their directions in a way which more clearly provides the jury with the "road map" helping them find a "route to verdict", but without necessarily introducing structured "routes to verdict".

Recommendation 5: As noted above, this is an issue on which the Review Group was strongly divided. Accordingly the wording of the recommendation reflects that division.

Consideration should be given to developing a time-limited pilot of single judge rape trials to ascertain their effectiveness and how they are perceived by complainers, accused and lawyers, and to enable the issues to be assessed in a practical rather than a theoretical way. How such a pilot would be implemented, the cases and circumstances to which it would apply to and such other important matters should form part of that further consideration.

Chapter 6- THE CHILDREN'S HEARINGS SYSTEM

6.1 The Children's Hearings System is a unique facet of Scotland's approach to child protection and youth justice. In addition to the system's responsibilities for considering whether compulsory measures of care and protection are needed in welfare cases, it provides a mechanism designed to keep children accused of an offence out of the 'traditional' criminal justice system by treating as a paramount consideration their welfare and interests[186]. The Hearings System recognises that a child or young person who has committed an offence, may require care and protection as well as measures to address their behaviour. With regard to sexual offences, it has over the last 4 years seen a general increase in the volume of sexual offences referred to the Principal Reporter and in the seriousness of the sexual offences referred, reflecting the similar situation encountered within the criminal justice system.

6.2 As identified earlier in this report, although the Review's primary focus was on solemn trials before the High Court and Sheriff Court, it was recognised that some of the issues pertinent to the review also had a bearing on the Children's Hearings regime. Proceedings within the scope of the Children's Hearing regime routinely relate to sexual offences, whether committed by or against a child. Wherever possible material improvements to the experience of complainers within the criminal justice system should be replicated for the benefit of complainers in cases referred to the Principal Reporter. A sub-working group set up to address this issue identified that in addition to the need to finesse, where applicable, the Review's key recommendations to fit the Children's Hearing system, there were specific areas currently within the system where additional improvements could also be made. The Review Group was mindful of the forthcoming incorporation of the United Nations Convention on the Rights of the Child (UNCRC) into domestic Scots law[187]. While the incorporation is anticipated to bring further changes to strengthen children's rights in the long term, the following chapter and recommendations are based on the present legislative situation. The Review Group's focus was on the process applicable where an accusation of a sexual offence is made against a child, and referral proceedings in the Sheriff Court follow to determine the grounds of referral.

[186] Section 25 of the Children's Hearings (Scotland) Act 2011 (2011 Act). Section 26(1) provides that a decision can be made which is inconsistent with the welfare of the child if the departure from the principle is necessary to protect the public from serious harm. Subsection (2) provides that, in keeping with the United Nations Convention on the Rights of the Child, when making such a decision the welfare of the child must still be treated as a primary consideration, rather than as the paramount consideration.

[187] Via the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill introduced to the Scottish Parliament on 01 September 2020. For details on its progress see https://beta.parliament.scot/bills-and-laws/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill#target4

Background

6.3 Where a sexual offence is alleged to have been committed by a child[188], Police Scotland, providing the statutory requirements are met[189], will report the case to the Principal Reporter and, in some cases to COPFS for further consideration and investigation[190]. In the majority of instances consideration of the allegation and any action to be taken in relation to the child said to have committed it will be carried out by the Principal Reporter and the Scottish Children's Reporter Association (SCRA) through the processes of the Children's Hearing system, including referral, rather than through the traditional criminal justice system. Where a child has pled guilty to or been convicted of an offence in the criminal court, whether or not they are already subject to a compulsory supervision order,[191] the case may also be referred to the Principal Reporter. Where the complainer is a child, examination of the circumstances, including the home and family circumstances of the child, may result in that child being referred to the Principal Reporter as being in need of protection. Other children connected to the child offender or the child complainer can also be referred.

6.4 The SCRA must investigate and assess whether there is sufficient, relevant evidence to support a ground of referral and if so, whether it is necessary for a compulsory supervision order[192] to be made in respect of the child. For present purposes the relevant ground of referral is that contained within section 67(2)(j) of the Children's Hearing (Scotland) Act 2011 (2011 Act)- namely that the child is said to have committed an offence[193]. When such a referral is made by the Principal

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[188] 'Child' for the purposes of this discussion of the Children's Hearing system is a person who has not attained the age of 16 years, or a person between 16 and 17 who is under a compulsory supervision order, or one is being considered. The statutory definition is contained at section 199 of the 2011 Act.

[189] See section 61 of the 2011 Act, namely where a police constable considers that (a) a child is in need of protection, guidance, treatment or control, and (b) that it might be necessary for a compulsory supervision order to be made in relation to the child.

[190] A report to both COPFS and the Principal Reporter is likely to occur when the child (i) is 16 or 17 but is already involved in the Children's Hearing system either as a consequence of being subject to a compulsory supervision order or where another referral to the Principal Reporter is still being considered; or (ii) where the child is under 16 but the offence is of a serious nature and falls within the Lord Advocate's guidelines (accessible at www.copfs.gov.uk) with regard to the interpretation of such a definition. Where a child is jointly reported it is for COPFS to determine whether that child should be prosecuted or whether the Principal Reporter is to consider the child's case.

[191] For further details see section 49 of the 1995 Act.

[192] A compulsory supervision order (defined in section 83 of the 2011 Act) is an order that requires a child to comply with specified conditions and requires the local authority to perform duties in relation to the child's needs. It may require the child to reside at a place specified in the order. Other examples include a movement restriction condition, a secure accommodation authorisation, a contact direction (between the child and a specified person or class of person) and a requirement that the child must comply with any other specified condition. The order may also specify duties which must be carried out by the implementation authority in respect of the child. Subsection (2)(f) of section 83 of the 2011 Act provides that the order may contain a requirement that the authority arrange a specified medical examination or treatment of the child.

[193] Presently in terms of section 3 of the Age of Criminal Responsibility (Scotland) Act 2019 where an offence is committed and the child was under the age of 12 at the time it was committed the child cannot be referred by Principal Reporter to a Children's Hearing under an offence ground (section 67(2)(j) of the 2011 Act). The provision does not prevent the police from making a referral in respect of 8-11 years suspected of committing an offence nor for the Principal Reporter to make a referral on other grounds under section 67.

Reporter, a Children's Hearing must take place where the ground(s) of referral are placed before a Children's Hearing, together with a statement setting out which of the ground(s) for referral the Reporter believes apply in relation to the child and the facts on which that belief is based. The child (as well as parents or others looking after the child) will be asked at the hearing whether they dispute the ground(s).

6.5 Disputed grounds, unless discharged by the Children's Hearing at the hearing, are referred to a Sheriff for determination.[194] When grounds are found to be established, the Sheriff will direct the Principal Reporter to arrange a Children's Hearing to decide whether a compulsory supervision order is necessary. In any other case, the Sheriff must dismiss the application and discharge the referral to the Children's Hearing.[195]

6.6 Specific rules of evidence and procedure are followed and a referred child's Article 6 rights require to be protected throughout.[196] The proceedings are not criminal proceedings,[197] but the standard of proof in a referral under section 67(2)(j) is proof beyond reasonable doubt[198] and the rules of criminal evidence apply. The procedure is summary and intended to be succinct where possible. The case is presented by the Reporter. The child must be in attendance, and is entitled to legal representation. Witnesses may be called to give evidence, including the complainer. Neither referral hearings before the Sheriff or Children's Hearings are held in public.

6.7 The protections afforded to complainers in solemn proceedings under sections 274 and 275 of the 1995 Act are available in the procedure adopted in referral proceedings[199]. Prior statements may be used for evidence in chief,[200] and evidence may be taken on commission.[201] The Sheriff can use powers under either the common law or as contained in rules of court[202] to discourage prolixity or repetition or to restrict the issues for proof in order to prevent the leading of evidence that is unlikely to assist the court in reaching a decision. The applicable rules of court do not place a specific duty to do so, but rather provide that the Sheriff 'may' make

[194] A referral to the Sheriff for determination can also occur where the child or relevant person is unable to understand the ground(s) (see section 94 of the 2011 Act); and where at least one of the grounds specified in the statement of grounds is accepted but the Children's Hearing does not consider that it is appropriate to make a decision on whether to make a compulsory supervision order on the basis of the ground(s) that have been accepted (see section 93(1)(a) of the 2011 Act).
[195] Section 108 of the 2011 Act.
[196] *T* v *UK; V UK* (2000) 30 EHRR 121, at paragraph 86.
[197] *McGregor* v *T & Anr* 1975 SLT 76; *McGregor* v *D*, 1977 SC 330, per Lord President Emslie at 336; *S* v *Miller (No.1)* 2001 SC 977, per Lord President Rodger at [19], Lord Penrose at [30], [33] and [50], and Lord Mcfadyen at [38].
[198] Section 102(3) of the 2011 Act.
[199] Sections 173 – 175 of the 2011 Act.
[200] See section 176 (5) which inserts a new section 22A into the 2004 Act which provides for evidence in chief to be given by prior statement in any hearing by a Sheriff of an application under sections 93 or 94 of the 2011 Act to establish whether or not a ground for referral is established
[201] Under section 19 of the Vulnerable Witnesses (Scotland) Act 2004.
[202] Rule 3.46A, Act of Sederunt (Childcare and Maintenance) Rules 1997.

such orders. However, there is an inherent obligation on the Sheriff to ensure efficient management of business.

Obtaining best evidence

6.8 In cases where the complainer is a child, there may be child protection issues in respect of the complainer as well as the child who is the subject of proceedings. In such cases the evidence of the complainer will be captured by a video recorded JII. As noted earlier, JIIs continue to present problems. The Review Group endorses the recommendations already made within the 2017 EPR Report for improvement of the quality of JIIs and emphasises the need for action and progression. It is recognised that issues of training may take time to be reflected in improvements to the quality of the interviews, but practical and technical issues, such as poor positioning of cameras, or poor sound quality should be relatively straightforward to resolve. It is understood that as part of ongoing work in relation to the implementation of the EPR recommendations, Police Scotland do remind joint investigative interviewers to undertake appropriate checks on the set up of equipment prior to and in the course of interviews. The Review Group welcomed the commencement of two pilots by Police Scotland, and Social Work authorities, with support from COPFS and SCRA, introducing an enhanced training programme for those involved in taking JIIs. It is understood that a strong focus of the first pilot programme is on the planning and preparation for interview in order to meet the needs of the individual child being interviewed, and to ensure that the resultant interview is in a format suitable to be presented in court as evidence in chief.[203] The pilot will be evaluated on an ongoing basis. The Review Group considers that a training scheme of this kind should be rolled out across the country.

6.9 The opportunity to cross-examine complainers by means of taking evidence on commission is already available in referral proceedings, and indeed encouraged, but the experience of some members of the working group is that it is not used enough. The benefits of the use of pre-recorded evidence, particularly for child complainers cannot be stressed enough. While improvements to JII are supported the Review Group concludes, for the avoidance of doubt, that Recommendation 1(a) above - that all sexual offence police interviews and statements should be visually recorded - should extend to and include complainers where the allegation made is against a child and the action to be taken, if any, becomes the subject of the Children's Hearing system. Where evidence in chief has been captured by JII or otherwise visually recorded, cross-examination or any further examination should take place on commission, at as early a stage as possible in the proceedings.

[203] As discussed at page 16 in Standards of Service for Victims and Witnesses Annual Report on Performance 2019 – 2020, accessible at https://www.copfs.gov.uk/images/Standards%20of%20Service%20for%20Victims%20and%20Witnesses%20Annual%20Report%202019-20.pdf

6.10 Aside from the ordinary duty to promote the efficient dispatch of business, in referral proceedings the Sheriff does have the power in terms of the Rules of Court[204] to make orders to discourage prolixity or repetition or to restrict the issues for proof in order to prevent the leading of evidence that is unlikely to assist the court in reaching a decision. The exercise of this power is not obligatory. The Review Group considered that Sheriffs should be further encouraged to exercise this power to apply appropriate case management skills to referral hearings given the importance of minimising the potential for unnecessary delay. In respect of the increased taking of evidence on commission which is to be anticipated, there should in each case where a commission is to take place, be a GRH at which issues of the kind identified in High Court Practice Note No 1 of 2017 and Practice Note No 1 of 2019 are addressed.

Trauma-informed Practice

6.11 A full discussion of the importance of training on, and the adoption of, trauma-informed practices is included elsewhere this report (chapter 3). Some of the research behind that discussion has been conducted in the context of the effect of trauma on children. As identified by the EPR, research indicates that children are particularly susceptible to trauma and re-traumatisation. The recommendations made within the body of this report in relation to the adoption of trauma-informed practices and procedure apply with at least equal force in the context of Children's Hearings.

6.12 Trauma-informed training should be required of Sheriffs who conduct referral proceedings, SCRA staff, SCTS staff in referral proceedings before a Sheriff and practitioners appearing in these proceedings, specifically solicitors, solicitor advocates and counsel. For the purposes of legal aid there is already a requirement for solicitors providing children's legal assistance, and the firms they are connected with, to be registered, comply with the code of practice, along with the requirement of quality assurance of them.[205] The requirement to attend accredited courses could feature as an additional requirement for registration.

6.13 In circumstances in which, for whatever reason, the complainer requires to give evidence in person in court, the observations made earlier in this report about attending to the needs of the witness, arranging for evidence to be given in as much comfort and safety as possible apply with equal measure. The Review Group encourages SCRA to review the position with the parties to whom control of the relevant buildings is held, and develop the improvement of current arrangements in

[204] Rule 3.46A, Act of Sederunt (Childcare and Maintenance) Rules 1997.
[205] See in particular part 5B of the Legal Aid (Scotland) Act 1986.

so far as possible. There should be no difficulty in making suitable improvements within court buildings for referral proceedings before the Sheriff.

Provision of information to complainers

6.14 As identified earlier in this report the provision and lack of information is a significant area of concern for complainers generally. It is recognised that in Children's Hearing proceedings there are limits on the information which may reasonably, and legally, be communicated. A critical difference between proceedings in the Children's Hearing system and criminal proceedings, is that in the former the welfare of the child who is subject of the proceedings is paramount, and information relating to the child's involvement in the proceedings is highly sensitive. The public nature of criminal proceedings means that a complainer would be entitled to access a wide range of information about the progress of the case, and at trial, after giving evidence they could, if they wished, remain to follow proceedings. This is not possible in the different context of the Children's Hearings and related court proceedings. For example, proceedings at court and Children's Hearings are conducted in private; complainers cannot attend court other than to give evidence; and there is a prohibition on the publication of information relating to proceedings, breach of which constitutes an offence. These are measures designed to ensure that the child's circumstances are kept as confidential as possible[206]. Moreover, decisions made in the course of the proceedings, by the panel or by the court, will be decisions which reflect the best interests of the child, which may not accord with those of the complainer.

6.15 The desire to know what is happening is entirely understandable, and complainers may often be unsympathetic to these restrictions and the reasons for them. They may not understand why the restrictions are both necessary and appropriate. Sections 179A to 179C of the 2011 Act give powers to the Principal Reporter to give complainers the opportunity to receive certain information about the action taken in relation to a sexual offence(s) committed against them by a child over 12 or what is termed the harmful behaviour when the child was under 12 when it was committed, upon request, whilst also protecting the child's right to confidentiality. When the child is referred to the Reporter, Victim Information Co-ordinators write to the complainer at the initial stage of the investigation. The complainers may then opt in to receive further information regarding key stages of the investigation and the final decision. In summary and for the purposes of the present discussion the only case specific information that can be provided[207] is in relation to (i) a decision

[206] Furthermore article 40 of the United Nations Convention on the Rights of the Child provides *inter alia* that a child who is alleged to have infringed the penal law has a right "to have his or her privacy respected at all stages of the proceedings".
[207] For further specific detail on the information that can be requested and the Principal Reporter's discretion in relation to its release see section 179B and 179C of the 2011 Act.

whether to refer the child to a hearing; and (ii) the final outcome of any hearing that does take place, namely (a) whether the ground was not held established in court or (b) where it was established, whether the referred child has been placed on a compulsory supervision order or not. Perhaps somewhat understandably complainers continue to feel frustrated and under-informed. One way of addressing this would be to provide further information to complainers on how the Children's Hearing system works. Broader information on how the Children's Hearing system, and associated referral proceedings, work and explaining the restrictions on the provision of information and the reasons for that could help mitigate complainers' concerns, and help them understand the requirement of confidentiality. As discussed elsewhere in this Report, the stage at which information is given, and by whom, is as important as the provision of information generally. Given the limits on the information that can be given to a complainer in the Children's Hearing system in contrast to that under the criminal justice system, it is key in the Review Group's view, that where there is a possibility that an allegation made to the police may be referred to the Children's Hearing system, the complainer is advised of this possibility, with an explanation that different procedures and restrictions on the provision of information will apply. Given the importance of timing, the Review Group envisages that Police Scotland, and where appropriate COPFS would be best placed to do so. The single point of contact, recommended elsewhere in this Report, advising of this may also be desirable in this context. The Review Group is of the view that the SCRA should review the information it currently provides and the means by which it does so to reflect the views expressed in this chapter, and to assist complainers to understand the process. Police Scotland and COPFS are similarly encouraged to review their own materials in so far as reference is made to Children's Hearing proceedings. All agencies may wish to consult on the matter. The draft complainer's journey map produced in the course of this review (see annex 4) may assist SCRA, in particular, with its review. As in the context of the criminal justice system, a range of accessible formats may be of assistance in conveying the necessary information. The creation by SCRA of updated documentation, assuming the content would address as far as possible the expectations of complainers, explain how they would be treated, and provide necessary information about the Children's Hearing system and its ethos, could take the place in that system of the proposed charter referred to in the context of the criminal justice system in chapter 4.

6.16 Some members of the sub-working group specifically identified inter-agency provision and exchange of information as a potential cause of delay. While no formal recommendation is made, given the importance of avoiding any potential causes for delay at any stage the Review Group encourages all the justice agencies to review the processes for communication between the parties involved in the referral process and in the conduct of hearings more generally.

Independent Legal Representation (ILR)

6.17 There is clearly a strong case for the introduction of ILR in respect of any applications to recover medical records and the like, as well as in respect of applications for permission to lead evidence of prior sexual conduct or character in relation to sexual matters under the 2011 Act. This is particularly so given that there is a wider range of individuals who may make the latter applications in Children's Hearing proceedings. The issue is not as straightforward in this context as it is in the criminal justice context, because of the elements of confidentiality which apply. However, the Review Group considered that it should be possible to devise a system whereby a degree of ILR was made available for this purpose within proceedings in the Children's Hearing system. However, rather than simply recommend the introduction of ILR, and particularly in light of the forthcoming incorporation of the UNCRC which will include a right to express a view and to have that view taken into account (Article 12) the recommendation is that the best way of achieving this without compromising critical features of the system should be explored with SCRA, in consultation with associated justice agencies. The public funding of ILR will also require to be addressed.

Communication Generally

6.18 The provision of adequate and timely information, discussed earlier in this report, applies equally to Children's Hearing proceedings. Clearly, complainers should be told at as early a stage as possible of a decision to progress the case through the Children's Hearing system, given, as discussed earlier, the limited information that can be provided under the system. A single point of contact and advocacy support, as discussed at chapter 4 should also be available to complainers throughout the Children's Hearing process, again recognising the limitations which will exist.

Improving Efficiency

6.19 It was acknowledged in submissions to the Review Group that there is the potential for delay at some stages of the Children's Hearing process. As noted at paragraph 6.16 some members of the sub-working group specifically identified inter-agency provision and exchange of information as a potential cause of delay generally. The current journey time from receipt of a referral to an assessment decision by the Reporter in cases alleging rape or serious sexual assault is on average between 12 and 14 weeks. Delays may arise thereafter, when, after the Reporter decides to arrange a hearing, the grounds of referral are contested and court proceedings are necessary.

6.20 The general conduct of proceedings may be a relevant cause of any subsequent delay that occurs. Although there are strict statutory time limits within which a referral hearing before the Sheriff must commence[208] delays may often occur thereafter. The setting of targets within which proceedings before the Sheriff should be concluded is recommended. It is a welcome development that some Sheriffdoms have taken steps to introduce case management requirements, promote early and sufficient disclosure, and arrange timetabling to assist with the efficient preparation for evidential hearings and final determination. In this regard we consider that the use of GRHs, and enhanced case management, would be extremely beneficial.

6.21 The benefits of judicial case management have been clearly demonstrated, in particular in cases involving children or vulnerable witnesses. Practice Notes and protocols in place in Sheriffdoms across the country and in particular those of Glasgow and Strathkelvin and Lothian and the Borders[209], including a Protocol for Complex Cases referred under the 2011 Act, are significant steps forward. The Review Group recommends the continued development and use of such Practice Notes and protocols across the entire country, on a consistent basis and made readily accessible. In complex cases it would help for the proceedings to be managed by one Sheriff in so far as possible. The need for judicial case management was seen to be particularly acute in cases involving a proliferation of expert reports, with the added potential for delay and complexity. Enhanced judicial management of such cases and those relating to sexual offences should assist in reducing delay and avoiding the "drifting" of the process. There would also be benefit at an early stage in setting more focused timetables with deadlines for notification and production of documents, reducing the need for continued diets and ensuring timely preparation of cases.

The Review Group recommends:

Recommendation 6- Children's Hearing System

Recording of Evidence

i. Having endorsed the recommendations already made within the Evidence and Procedure Review Pre-recorded Further Evidence Work-stream report of September 2017 for improvement of the quality of Joint Investigative Interviews (JIIs) (see paragraphs 2.8 and 6.8), the Review

[208]Section 101 of the 2011 Act sets a time limit of 28 days after the day of lodging for the hearing by the Sheriff to commence to consider the application by the Principal Reporter to determine whether the ground(s) for referral are established or not.

[209] Sheriffdom of Glasgow and Strathkelvin, Practice Note No.1 of 2018: Children's Referrals under the Children's Hearings (Scotland) Act 2011, and Sheriffdom of Lothian and Borders, Practice Note No.2 of 2018: Children's Referrals, both accessible at: http://www.scotcourts.gov.uk/rules-and-practice/practice-notes/sheriff-court-practice-notes-(civil)

Group emphasises the need for further action and progression of these recommendations. While issues of training may take time to be reflected in improvements to the quality of the interviews, practical and technical issues, such as poor positioning of cameras, or poor sound quality should be relatively straightforward to resolve and steps taken now to address this.

ii. A training programme of the kind currently piloted by Police Scotland and Social Work authorities with support from COPFS and SCRA, which focuses on enhanced training for those involved in taking JIIs, discussed further at paragraph 6.8, should be rolled out nationally.

iii. Recommendation 1(a) of this Report, regarding the visual recording of police interviews with complainers in sexual offences, should extend to and include complainers where the allegation is made against a child, and may be addressed within the Children's Hearing system, and related court proceedings. Similarly where evidence in chief has been captured by JII or otherwise visually recorded, cross-examination or any further examination of the witness should take place on commission, at as early a stage as possible within the relevant proceedings. In each case of a commission to take the evidence of a complainer, there should be a GRH or equivalent at which issues of the kind identified in High Court of Justiciary Practice Note No 1 of 2017 and Practice Note No 1 of 2019 are addressed.

Trauma-informed Practice

iv. The recommendations made in relation to the adoption of trauma-informed practices and procedure in this report should be adopted within the Children's Hearing system. Trauma-informed training, as discussed in chapter 3, should be required of Sheriffs who conduct referral proceedings, SCRA and SCTS staff, and practitioners appearing in these proceedings specifically solicitors, solicitor advocates and counsel. To facilitate the uptake of such training by practitioners a requirement to attend accredited courses could feature as an additional requirement for registration to provide children's legal assistance.[210] Other practitioners appearing who are funded by other means would require to provide evidence of attendance at accredited courses.

v. In circumstances where, for whatever reason, the complainer requires to give evidence in person at related court proceedings, measures for the comfort and safety of the witness should be adopted, including the provision of an entrance to the building separate from that from which the referred child may enter, a separate waiting room and arrangements

[210] For current requirements, see in particular part 5B of the Legal Aid (Scotland) Act 1986.

designed to prevent a chance encounter with the referred child. To facilitate this SCRA is encouraged to review the position and to give consideration in conjunction with relevant justice agencies to improve current arrangements in so far as possible.

Provision of Information

vi. Broader information for complainers is required, addressing how the Children's Hearing system, and associated referral proceedings, work, explaining in particular the restrictions applicable to the provision of information and the reasons for these, all with a view to helping mitigate complainers' concerns, and enabling them to appreciate the requirement of confidentiality in these proceedings. To facilitate this the Review Group recommends that the following should occur:

(a) In appropriate circumstances (i.e. where the allegation is made against a child) and at the earliest opportunity Police Scotland, and COPFS as required, should raise with complainers the possibility that allegations may proceed via the Children's Hearing system and that different rules limiting the provision of information may apply. The possibility of the single point of contact, the introduction of which is recommended elsewhere, facilitating the provision of this information should be explored. Complainers should be advised as soon as practicably possible that a referral has been made.

(b) The SCRA should undertake a review of its currently available information and the means by which it is provided, with a view to further advancing understanding of the process and ensuring provision of the abovementioned information.

(c) Other justice agencies, particularly Police Scotland and COPFS, are similarly encouraged to review and update any references in respect of the Children's Hearing system procedure within their own publicly available information.

The draft complainer's journey through the Children's Hearing system produced in the course of the Review process (see annex 4) may assist all agencies in this process of review. As in the context of the criminal justice system, a range of accessible formats may be of assistance in conveying the necessary information. The creation by SCRA of more detailed and updated documentation addressing in so far as possible the expectations of complainers, explaining how they should be treated, and providing necessary information about the Children's Hearing system and its ethos,

could take the place of the proposed charter referred to in the context of the criminal justice system in chapter 4.

Independent Legal Representation

vii. The Review Group recommends that a means of introducing the right to independent legal representation (ILR) to oppose applications under section 175 of the Children's Hearing (Scotland) Act 2011 should be explored with SCRA in consultation with relevant justice agencies to determine the best way of achieving this without compromising critical features of the system.

viii. The implementation of single points of contact and separately the continuation and expansion of advocacy support discussed in chapter 4 of this report should also be available to complainers throughout the Children's Hearing process, again recognising the limitations required by the particular nature of proceedings of this nature.

Improving Efficiency and Case Management

ix. The setting of targets within which referral proceedings before the Sheriff, as discussed in chapter 6, should be concluded is recommended. Given the necessity and importance of avoiding the potential for delay at all stages including, for example, initial referral by Police Scotland, decisions by COPFS, and conduct of court hearings, the Review Group encourages all the justice agencies to review the processes for inter-agency communication.

x. The Review Group recommends the continued expansion of current Practice Notes and protocols in place in certain Sheriffdoms,[211] but on a consistent and nationwide basis. Complex cases should throughout be dealt with wherever possible by the same Sheriff using case management powers, including the powers available under the Rules of Court[212] and particularly Rule 3.46A.

[211] Sheriffdom of Glasgow and Strathkelvin, Practice Note No.1 of 2018: Children's Referrals under the Children's Hearings (Scotland) Act 2011, and Sheriffdom of Lothian and Borders, Practice Note No.2 of 2018: Children's Referrals, both accessible at: http://www.scotcourts.gov.uk/rules-and-practice/practice-notes/sheriff-court-practice-notes-(civil)

[212] Rule 3.46A, Act of Sederunt (Childcare and Maintenance) Rules 1997.

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ANNEX 1 – TERMS OF REFERENCE

The Terms of Reference agreed at the Review Groups first meeting:

Terms of Reference

Judicially led review: “Improving the management of sexual offence cases”

The aim of this review is to improve the experience of complainers without compromising the rights of the accused and evaluate the impact that the rise in sexual offence cases is having on courts and consider whether the criminal trial process as it relates to sexual offence cases should be modified or fundamentally changed. The review will then generate proposals for modernising the courts’ approach. The review will examine potential changes to the court and judicial structures, procedure and practice as well as determining recommendations for changes to the law.

The scope is:

To research the operational impacts that have arisen from the significant increases in the volume and complexity of sexual offences prosecuted in the High Court and Sheriff Courts, and then identify the key challenges that need to be addressed to improve the current system.

To take a clean sheet approach to identification of the future options now available for managing sexual offences, and any valid options will need to:
Provide a modern system fit for purpose in the 21st century;
Support the efficient disposal of business with fair, fast and just outcomes delivered at the earliest opportunity;
Enable the sexual offences caseload to be progressed in a way that delivers tangible improvements in the experience for complainers;
Consider all aspects of the trial process and the estate, structures, systems and training required to support the effective management of sexual offence cases. It will not consider sentencing policy, as that is a matter for the Scottish Sentencing Council and Build on all of the existing work that is being under-taken to promote a “greater use of pre-recorded evidence”.

To prepare recommendations on the most appropriate options for change.

The working group is expected to commence its work in April 2019, and will look to report on its recommendations by December 2019.

Scottish Courts and Tribunals Service
June 2019

Exclusions:

The following items were “out of scope” for the review of sexual offence cases:

Sentencing Guidelines – The issue of any guidance on sentencing is rightly a matter for the “Scottish Sentencing Council” to progress.

ANNEX 2 – REVIEW GROUP MEMBERS

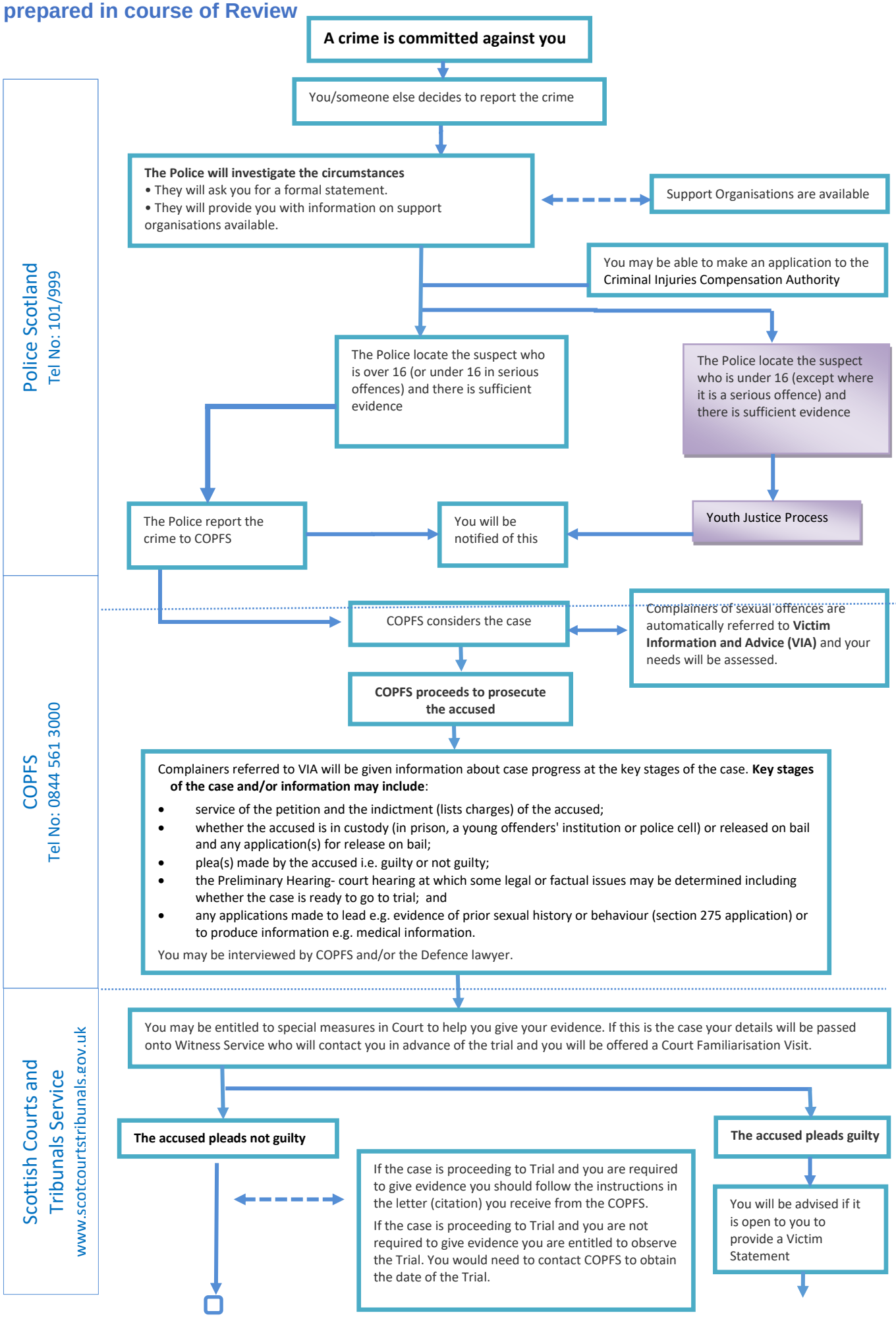
The review was led by Lady Dorrian, the Lord Justice Clerk, who was supported by all members of the Review Group:

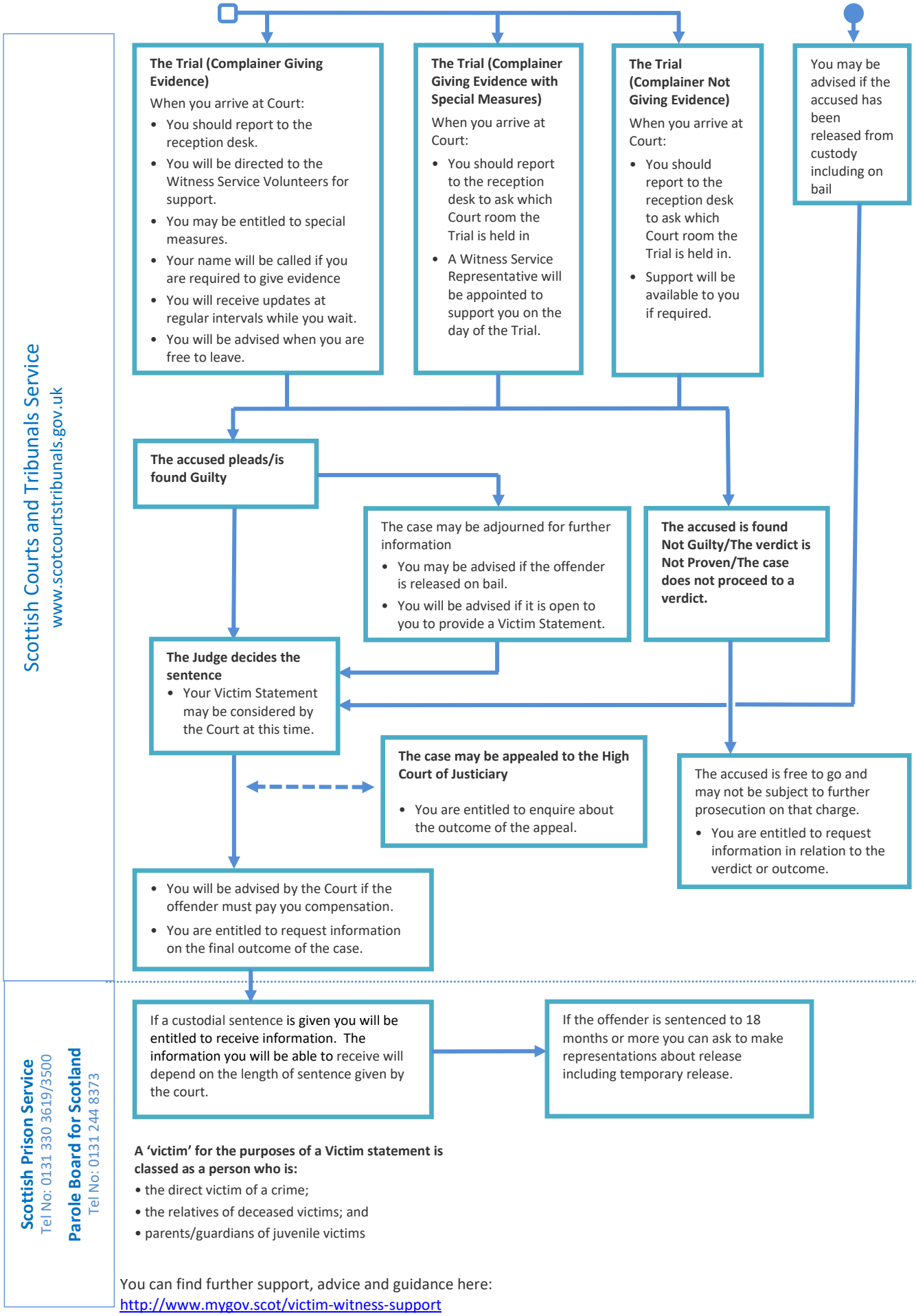
Area	*Review Group Member*
Judiciary	Lady Dorrian *(Chair)* Lord Beckett Sheriff Principal Lewis Sheriff O'Grady Sheriff Duff
SCTS	David Fraser, *Executive Director Court Operations* Tim Barraclough, *Executive Director Judicial Office for Scotland (to Jan 2021)/ Executive Director, Tribunals and Office of the Public Guardian (Jan 2021-)* Rhona McLean, *Supreme Courts (to April 2020)* Aileen Horner, *Criminal Justice Reform* Chris McGrane*, Criminal Justice Reform (May 2019 to Dec 2019)* Joy Moyes/Chris Fyffe, *High Court of Justiciary*
COPFS	David Harvie, *Crown Agent*
PSOS	Gillian Macdonald, *Assistant Chief Constable*
SCRA	Gordon Bell, *Scottish Children's Reporters Administration*
SLAB	Marie-Louise Fox, *Chief Operations Officer*
Scottish Government	Willie Cowan, *Deputy Director Justice* *(or nominee: Lesley Bagha)*
Legal Practitioners	Frances McMenamin QC, *Faculty of Advocates* Nicola Gilchrist*, Faculty of Advocates* Rosalyn McTaggart, *Beltrami & Co, Solicitors*
Third Sector	Sandy Brindley, *Rape Crisis Scotland* Kate Wallace, *Victim Support Scotland* Dr Marsha Scott, *Scottish Women's Aid*

ANNEX 3: Table 4 Proposed Vision for Taking the Evidence of Child and Vulnerable Adult Witnesses, extracted from Pre-recorded Further Evidence Work-stream Report, September 2017

Proposed vision					
In solemn proceedings only	**Level 1** Complete evidence collected through VRI conducted by expert forensic interviewer, with no direct questioning by lawyers	**Level 2** Visually recorded interview / witness statement used as evidence in chief, cross and further examination taken by commissioner	**Level 3** Written statement used as evidence in chief, cross and further examination taken by commissioner	**Level 4** VRI or written statement to be used as Statement of Uncontroversial Evidence or witness's complete evidence (Requires legislation)	**Level 5** Some or all of evidence to be given at trial – special measures must be applied
Complainer aged less than 16 years	Applied in the majority of cases				
Complainer aged 16 or 17 years		Applied in all cases where Level 1 would be applied if the complainer was aged less than 16 years			Applied in unusual circumstances such as where the witness requests to give evidence in person
Child witness aged less than 18 years	Applied occasionally where deemed appropriate by investigating officer	Applied in the majority of cases	Applied occasionally where VRI is deemed to be disproportionate	Applied occasionally where taking of evidence by commissioner is deemed to be disproportionate to materiality of evidence	Applied in unusual circumstances such as where the witness requests to give evidence in person
Vulnerable adult complainer	Applied very occasionally where adult complainer is vulnerable in multiple ways	Applied in the majority of cases	Applied occasionally where VRI is deemed to be disproportionate		Applied in unusual circumstances such as where the witness requests to give evidence in person
Vulnerable adult witness		Applied in the majority of cases	Applied occasionally where VRI is deemed to be disproportionate	Applied occasionally where taking of evidence by commissioner is deemed to be disproportionate to materiality of evidence	Applied in unusual circumstances such as where the witness requests to give evidence in person

ANNEX 4(a)– Sexual Offence Complainer's Journey Map (current procedures) prepared in course of Review



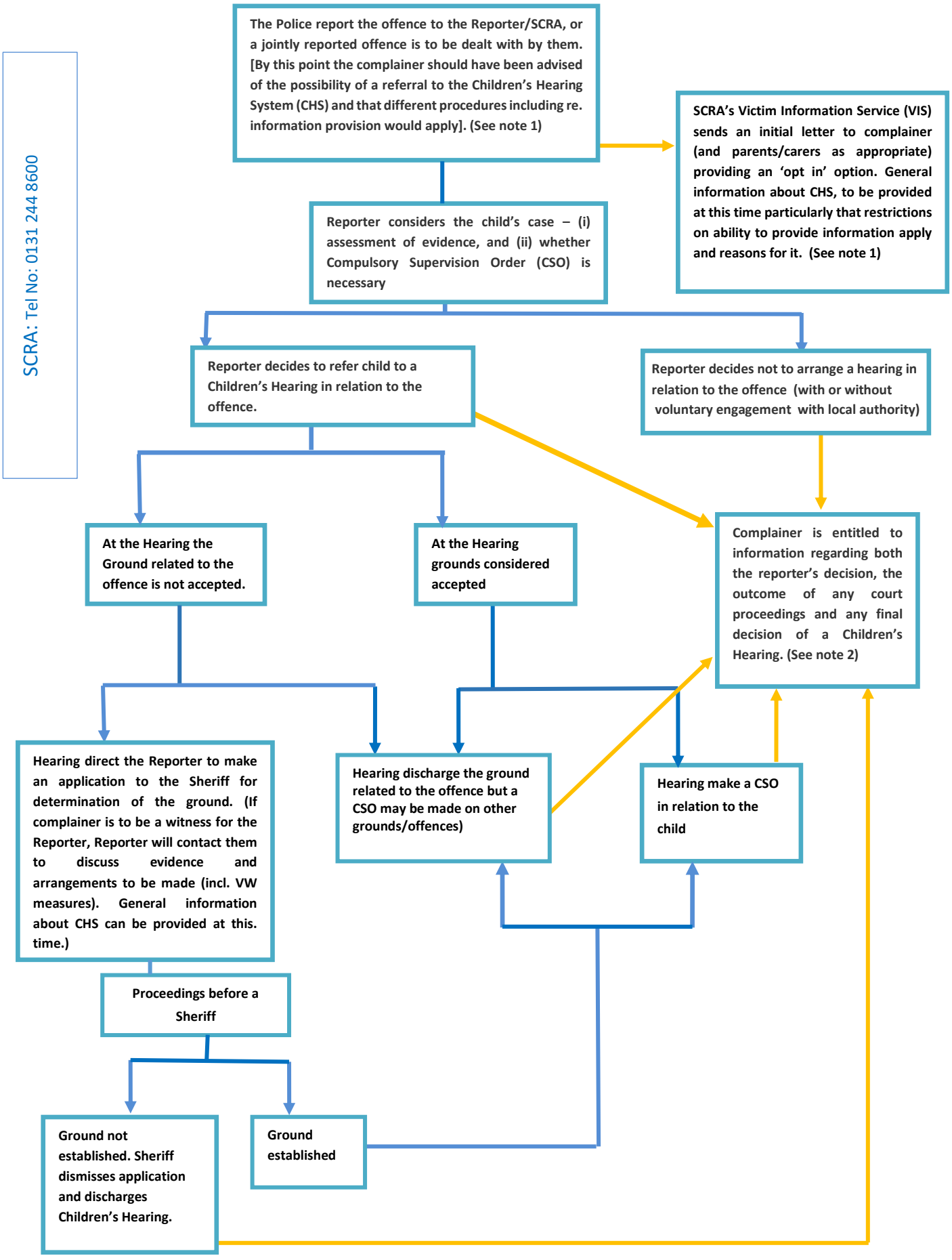


A 'victim' for the purposes of a Victim statement is classed as a person who is:

- the direct victim of a crime;
- the relatives of deceased victims; and
- parents/guardians of juvenile victims

You can find further support, advice and guidance here:
http://www.mygov.scot/victim-witness-support

ANNEX 4(b)-Sexual Offence Complainer's Journey Map –when allegations are reported to the Principal Report/ SCRA



PRE-SCRA CONTACT WITH COMPLAINER AND FAMILY

Note 1 –While a decision about which agency (COPFS and Reporter/SCRA) is to deal with an offence, should be made as quickly as possible, those affected by the alleged offence should be kept informed about what is happening during the decision making process and the possibility of the allegation being considered by, and any action to be taken in relation to the child said to have committed it, through the Children's Hearing System (CHS) and that in such instances the procedure and the availability of information will be different from that if it was being determined through the criminal justice system.

SCRA INITIAL CONTACT WITH COMPLAINER AND FAMILY

SCRA's Victim Information Service (VIS) reads every SPR2 police report and identifies complainers. Unless it's clear that any child would suffer significant detriment, they (if 12 or over) and the relevant person(s) (normally parents or carers) are sent an initial letter:

- Providing an information leaflet about the CHS and SCRA's website. Providing a VSS information leaflet for victims of children and young people.
- Advising of the right to opt-in to receive further information about the outcome of the offence and how to do this.

General information about CHS, to be provided at this time particularly that restrictions on ability to provide information apply and reasons for it.

Note 2 – Information available to complainer and family

The following approach is based on legislative restrictions (sections 179A-C of the Children's Hearings (Scotland) Act 2011) on what SCRA is able to share with victims and their families concerning the outcome of the referred child's case. This information is quite limited and understandably there may be frustrations around what can be shared.

INFORMATION THAT CAN BE SHARED WITH COMPLAINER AND FAMILY GENERALLY REGARDING INDIVIDUAL CASE

If the victim (or relevant person) opts-in to VIS information and provided there is no detriment to any child, they are entitled to know the Reporter's decision for the referred child. Before making the decision the Reporter requires to assess whether there is sufficient evidence to prove that a ground exists (in offence cases, that an offence has been committed), AND whether a compulsory supervision order (CSO) is necessary for the protection, guidance, treatment or control of the child referred. Having done this the Reporter makes a decision. The complainer and their family are entitled to know if:

- ***The Reporter arranged a Hearing***
- ***The Reporter did not arrange a Hearing***
- ***The Reporter did not arrange a Hearing but arranged for "Voluntary Measures" – that is any issues to do with care and protection.***

If there is a Hearing and the offence is not accepted – or not understood – by the alleged offender and/or any relevant person, the following information will be given:

1) If the offence is remitted to the Sheriff Court, the outcome of the Court proceedings. That is:

- ***The offence was not proved at Court***
- ***Offence was proved at Court and that another CHS hearing will take place***

OR

If the offence relative to the complainer is accepted or established and is taken into account at a Children's Hearing, that the referred child:

- ***Is not on a CSO at the conclusion of the hearing***
- ***Is on a CSO at the conclusion of the Hearing.***

This means that a complainer might be told that the child is not on a CSO in relation to the offence which harmed them even though the child is on a CSO relative to other grounds (where the PMs discharged the denied offence involving that complainer and the child was already on a CSO or was placed on a CSO relative to other grounds).

Judicial Institute for Scotland

Written Directions for Jurors in the Scottish Courts

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Written Directions for Jurors in the Scottish Courts

Part A: Introduction

Towards the end of the trial I will give you the legal directions you will need when you begin deliberating on your verdict(s), but in the meantime it will be helpful if, before we start hearing evidence, you are aware of certain fundamental rules and principles which apply in almost every case.

Separate functions of Judge and Jury

You and I have completely different functions. I am responsible for all matters of the law which arise in the case.

Judge

The law tells us what the ingredients of an offence are and what must be proved to establish that an offence has been committed. I will tell you about that at the end of the trial when I direct you on the law. The law also regulates how trials must be conducted and what evidence may or not may be allowed. I will deal with that as the trial goes on and, if necessary, I will tell you what you may and may not do with particular pieces of evidence.

Jury

You on the other hand are responsible for all questions of fact. You and you alone will decide:

- What the evidence was;
- What is to be made of it;
- What reasonable inferences or conclusions should be drawn from it; and
- What verdict should be reached in light of it.

In other words, you will decide:

- Which evidence you accept and which you reject;
- Which witnesses you believe and which you disbelieve;
- Which witnesses you find reliable and which unreliable; and
- What reasonable inferences or conclusions you can draw from evidence which you accept.

When the time comes for you to deliberate on your verdict, you will decide what has been proved and what has not been proved.

Agreed facts

Sometimes facts are agreed. If that happens they will be set out in a document called a Joint Minute, which will be read to you. The facts set out in such a document must be accepted by you as conclusively proved and taken into account when you come to deliberate on your verdict.

Evidence

What is evidence?

- Evidence may come in the form of photographs, recordings such as CCTV footage and objects which are produced or shown in court.

- Most commonly, evidence comes from witnesses. Evidence from a witness is what the witness is able to tell you based on their direct observation.

What is not evidence?

- What the lawyers will say in their speeches and what I will say to you when I direct you on the law is not evidence.

- Questions or suggestions put to witnesses by the lawyers are not evidence.
- Assertions of fact put to a witness who cannot remember them, or who does not know about them, or who does not agree with them are not evidence. The evidence consists in the witness' answer. If all a witness did was to agree with

a suggestion you would need to take care in deciding what weight to give to that.

- Hearsay evidence, namely what a witness tells you was said by someone else, is generally not allowed.

Possible exceptions to the rule against hearsay

There are exceptions to that rule which I will tell you about in my directions at the end of the trial in more detail if they arise. They may include:

- Evidence of what a witness says they heard someone say may be allowed to explain the witness' state of knowledge or why they did something;
- Evidence of what was heard to be said or shouted whilst an alleged crime was actually being committed is usually allowed;
- Evidence of what an accused person was heard to say is evidence in the case. I will direct you about this if it arises;
- Witnesses may be asked about earlier statements made by them to other people. There are three main reasons for this:

    i) To jog the memory of the witness, who may then be able to give evidence from recollection.
    ii) To enable the witness to adopt an earlier statement, which then becomes evidence. Statements are adopted if they are proved to have been made by a witness and the witness accepts that they were telling the truth at that time.
    iii) To undermine a witness's credibility or reliability. A statement may be used to contradict what the witness has said in court by demonstrating that the witness has said something different on an earlier occasion. The earlier statement, unless adopted, is not evidence of the truth of what is in it but it is available to help you in your assessment of the witness's evidence.

In certain other situations, where a witness is unavailable, hearsay evidence of a previous statement by that witness may be available as evidence of what is in the statement. You will be directed on that should it arise.

Assessing witnesses and their evidence

You will have to judge the quality of the evidence of witnesses. You should judge the evidence of all witnesses in the same way.

In doing so, you can look at their demeanour, or body language, as they gave evidence. You may want to be careful how much you can draw from the way a person presents. You do not know the witnesses and you do not know how they normally present. It can be hard to decide if a person is truthful or not just by their presentation.

What you can do is compare and contrast their evidence with other evidence in the case which you accept.
There are two aspects to the evidence of witnesses; credibility and reliability.

Credibility

You will find witnesses to be credible when you are satisfied that they are doing their best to tell the truth.

Reliability

Even the most honest witness doing their level best to tell the truth as they see it may simply get it wrong. Their evidence may not be reliable. There may be various reasons for that, such as:

- the passage of time,
- poor hearing or eyesight,
- the consumption of drink or drugs.

However even with such factors present you may still be prepared to accept the evidence as being reliable. It is very much a matter for your judgement as a jury, applying your collective experience and common sense.

You can only convict the accused on the basis of evidence which you find to be credible and reliable.

It is not all or nothing with the evidence of a witness

You are free to accept the evidence of a witness in whole or in part. You may accept bits of what a witness has had to say and reject other bits. You may pick and choose as you see fit in light of what you make of the evidence. If you reject what a witness has said, either in whole or in part, that does not establish that the opposite is true. If you reject evidence for whatever reason just put it out of your minds as if it had never been given.

It may be that some evidence will be inconsistent in itself or when compared with other evidence. Quite often witnesses give differing accounts of the same event, especially if things happened quickly or unexpectedly. If there are discrepancies or differences you will have to decide whether you think they are important and undermine the evidence of a witness or witnesses. Can any discrepancies be explained?

For example:

- by the impact of traumatic events;
- by the passage of time;
- by differing powers of recall ;
- by different viewpoints which witnesses might have had.

Ultimately, it is for you to decide if there are any differences and if so, whether they undermine the evidence of a witness or witnesses in whole or in part.

Inferences

If you accept a piece of evidence or a body of evidence then you may be able to draw an inference or conclusion from it, but any inference must be a reasonable one and there must be evidence to support it. You cannot indulge in speculation or guesswork.

You decide the case only on the evidence

It is important that your verdict should be based only on the evidence. When you come to deliberate you must not be swayed by any emotional considerations or any prejudices or any revulsion which you might have for the type of conduct alleged. You will put aside any feelings of sympathy you might have for anyone involved in the case. Your verdict may have consequences, whatever it is, but these will be for others to deal with and you should put them out of your minds.

At the end of the day you will require, as the oath which you took said, to return a true verdict according to the evidence.

Direct and circumstantial evidence

The sorts of evidence which can be relied on will vary from case to case but in general terms there are two types of evidence – direct evidence and indirect or circumstantial evidence. A case may be proved:

- entirely on the basis of direct evidence;
- entirely on the basis of circumstantial evidence; or
- on the basis of a combination of direct and circumstantial evidence.

Direct evidence

The classic example of direct evidence is evidence from an eye witness describing an event they observed.

Circumstantial evidence

Circumstantial evidence is simply evidence about various facts and circumstances relating to the crime alleged or to the accused, which, when they are taken together, may connect the accused with its commission. On the other hand, it may point the other way.

In considering circumstantial evidence, please bear in mind that:

- Each piece of circumstantial evidence may be spoken to by a single witness.
- A piece of circumstantial evidence need not be obviously incriminating in itself and it may be open to more than one interpretation.
- You can choose an interpretation which supports the Crown case or one which undermines it, so long as it is a reasonable interpretation.

Where circumstantial evidence is based on accurate observation, it can be powerful in its effect. Individually each fact may establish very little but in combination they may justify the conclusion that the accused committed the crime charged. When you come to decide on your verdict, though, you should consider all of the evidence.

It is for you to decide what weight - what importance - should be given to a piece of evidence. Ultimately, you will have to consider what conclusions you can draw from the evidence and, in particular, whether you are satisfied beyond reasonable doubt that the crime you are considering was committed and that the accused committed it.

Part B: Certain fundamental principles

Some rules of law apply in every criminal trial in Scotland.

1. The presumption of innocence

The first rule is this. Every accused is presumed innocent until proved guilty. Accused persons are not required to prove their innocence.

2. The burden of proof is only on the Crown

Secondly, it is for the Crown, the prosecution, to prove the guilt of the accused on the charge or charges which the accused faces. If that is not done an acquittal must result. The Crown has the burden of proving guilt.

3. The standard of proof – proof beyond reasonable doubt

Thirdly, the Crown must establish guilt beyond reasonable doubt. A reasonable doubt is a doubt arising from the evidence and based on reason, not on sympathy or prejudice. It is not some fanciful doubt or theoretical speculation. A reasonable doubt is the sort of doubt that would make you pause or hesitate before taking an important decision in the practical conduct of your own lives. Proof beyond reasonable doubt is less than certainty but it is more than a suspicion of guilt and more than a probability of guilt. This does not mean that every fact has to be proved beyond reasonable doubt. What it means is that, looking at the evidence as a whole, you have to be satisfied of the guilt of the accused beyond reasonable doubt before you return a verdict of guilty on a charge.

4. Corroboration

Fourthly, the law is that nobody can be convicted on the evidence of one witness alone, no matter how credible or reliable their evidence may be. The law requires a cross-check, corroboration.
There must be evidence you accept as credible and reliable coming from at least two separate sources, which, when taken together, implicate the accused in the commission of the crime. Evidence from one witness is not enough.

Be clear about this:
Every incidental detail of a charge, such as the narrative of how the crime is alleged to have been committed, does not need evidence from two sources. But there are two essential matters that must be proved by corroborated evidence.

These are:

- that the crime charged was committed and
- that the accused committed it.

Please note that in a case where there is a main source of evidence, such as a witness describing the event in which a crime was committed, corroborative evidence does not need to be more consistent with guilt than with innocence.

All that is required for corroboration is evidence which provides support for, or confirmation of, or fits with, the main source of evidence about an essential fact.

What is the position of the defence in relation to the four rules?

The burden of proof lies only on the Crown. The accused is presumed to be innocent. There is no burden of proof on accused persons.

The requirements of standard of proof and corroboration apply only to the Crown case. They do not apply to the defence.

Accused persons are not required to prove their innocence. They are presumed to be innocent. They are not required to give evidence or call witnesses and if they choose not to do so, nothing can be taken from that.

If evidence is led for the defence, any witnesses they choose to call, which may include the accused, should be treated like any other witnesses in the case. However, there is no particular standard of proof which defence evidence has to meet and defence evidence does not require corroboration. It follows that:

- If you accept any piece of evidence, from wherever it comes, that shows that the accused is not guilty then you will acquit.
- If you do not fully accept that evidence but it raises a reasonable doubt then again you will acquit.
- Even if you completely reject any defence evidence, that does not assist the Crown case. Just put that evidence out of your minds as if it had never been given and consider what, if anything, the Crown has proved beyond reasonable doubt.

In summary:

- **The law is for the Judge**
- **The facts are for the Jury**
- **The verdict must be based only on the evidence and in accordance with the law as explained by the Judge**
- **The accused is presumed to be innocent**
- **The burden of proving guilt is on the Crown**
- **The standard of proof which the Crown must reach is proof beyond reasonable doubt**
- **The benefit of any reasonable doubt, from wherever it comes, must be given to the accused**

Part C: Other directions to be used as appropriate

These directions will not apply in all cases and therefore are formatted on separate pages which can be handed out if required.

Where there is a docket

Please note that you will only be returning a verdict on the charges. The clerk also read a notice which is attached to the indictment. The purpose of this notice is to inform the defence that evidence of the kind described in the notice may be led by the Crown during the trial. What is in the notice is not another charge or charges and you will not be asked to consider convicting the accused of those matters. If evidence of the sort mentioned in the notice is led, it may be of relevance to a charge which does appear on the indictment (charges which do appear on the indictment). I will tell you more about that at a later stage, if it should be necessary.

Where there is a notice of special-defence

You have had read to you a notice of special defence and you may hear more about that later. However, the only thing special about a special defence is that notice of it has to be given to the Crown before the trial starts so that they may investigate it if they wish and are not taken by surprise by any evidence which may be led in support of it.

A notice does not constitute evidence. A notice of special defence does not in any way alter the burden of proof. If it arises on the evidence it is not for the accused to prove it but for the Crown to disprove it.

Where there is more than one charge

You will see that there is more than one charge on the indictment. When you come to deliberate, each charge must be considered separately. A separate verdict must be returned on each charge. It may be that certain evidence will have a bearing on more than one charge. Nonetheless, when you come to deliberate, it will have to be considered separately in relation to each charge.

Where there is more than one accused

You will see that there is more than one accused. You must give separate consideration to the cases for and against each accused. It may be that some evidence will have a bearing on the position of more than one accused. Nonetheless, when you come to deliberate on your verdicts, that evidence must be considered separately in the context of the case against each of the accused. You must return a separate verdict in respect of each accused.

Concert

The issue of joint criminal responsibility may arise for consideration. If it does I will give you full directions at the end of the trial, but let me give you some understanding of this at the outset.

Normally a person is only responsible for his or her own actions, and not for what somebody else does.

However, if people act together in committing a crime, each participant can be responsible not only for what that participant does but also for what everyone else does while committing that crime. This happens where the crime is committed in furtherance of a common criminal purpose, regardless of the part which the individual played, provided that the crime is within the scope of that common criminal purpose.

The principle applies both where there is a crime committed in pursuit of a plan agreed beforehand and also where people spontaneously commit a crime as a group in circumstances where you can infer that they were all in it together.

Joint criminal responsibility is referred to as concert and someone who is acting in concert with another is said to be acting art and part with that person. These are merely different terms used to describe circumstances where joint criminal responsibility arises.

So if you have to consider this issue you will be deciding whether it has been established that:

1) people knowingly engaged together in committing a crime
2) what happened was done in furtherance of that purpose
3) what happened did not go beyond what was planned by, ***or*** reasonably to be anticipated by, those involved.

Mutual corroboration

In some cases, in certain circumstances, evidence of one complainer speaking to one charge can be corroborated by the evidence of another complainer speaking to another charge. This is known as mutual corroboration.

If this becomes an issue in this case, I will give you full directions at the end of the trial on how you deal with any question of mutual corroboration.