

Lady Dorrian Review Governance Group: Consideration of a Time- Limited Pilot of Single Judge Rape Trials Working Group Report

November 2022

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Purpose

This paper provides the Governance Group with an overview of the findings and recommendations arising from the Consideration of a Time-Limited Pilot of Single Judge Rape Trials Working Group's as proposed at Recommendation 5 of the [Lady Dorrian Review](#).

Part 1: background

The Governance Group was established to bring together partners from across the justice system to champion shared ownership of, and consider approaches to, implementing the recommendations of the Lady Dorrian Review on a cross-sector basis. In order to fulfil this remit, the Governance Group established a number of short life working groups to undertake detailed consideration of specific recommendations contained within the Review. Among these was a working group specifically established to consider Recommendation 5 of the Review:

“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.”

The nature of this recommendation recognised the differing views that exist among Justice Partners and in wider society regarding the merits and risks associated with introducing single judge trials for rape cases. It also acknowledged that, at the time the Lady Dorrian Review was published, there was limited evidence about the potential practical impact of moving to a single judge trial model for the prosecution of rape cases and that this was needed and could be achieved by a fully evaluated pilot to allow the merits and risks identified to be more fully assessed.

This paper set outs the views expressed and insights provided by members in meetings of and correspondence within the Working Group, in addition to the conclusions of a short term literature review commissioned by the Working Group. The findings and recommendations set out in this paper reflect areas of broad consensus among members on the issues discussed and also identify areas where differing views or perspectives were expressed in so far as practicable.

Remit and membership of the Working Group

The Working Group comprised 12 representatives from 8 separate organisations drawn from the membership of the Governance Group, who were specifically chosen to provide the perspective of, and insights from, different parts of the justice system.

The Working Group agreed Terms of Reference setting out the parameters of its deliberations. It is important to note that in establishing the Working Group to progress its consideration of this recommendation, the Governance Group did not require the Working Group to ask whether a pilot of single judge rape trials should go ahead. Members remain divided on that question which remains a matter for Scottish Ministers, who would require to introduce legislation to facilitate such a pilot which would ultimately be a decision for the Scottish Parliament. Rather, the Working Group's remit was to provide perspectives and insight into a broad set of issues related to the establishment of a pilot in order to inform the Governance Group's recommendation to Ministers as to the way in which a pilot could be structured.

The full Terms of Reference and Membership of the Working Group is included at Annex A.

Working Group approach

The Working Group met six times following its establishment by the Governance Group on the 28 February 2022. Remote meetings were held approximately once a month for which members received papers in advance to inform and frame discussions. Significant progress was also achieved outside formal meetings through ongoing dialogue among members as well as information and evidence-gathering exercises.

In identifying a Forward Work Programme for the Working Group, members identified two areas as the main focus of discussions to ensure that the Working Group delivered against its Terms of Reference, namely to:

- create a draft model for a Single Judge Trial Pilot to demonstrate how the Recommendation contained within the Lady Dorrian Review could work in practice
- consider what, if any, additional research on alternatives to jury trials had been released since publication of the Lady Dorrian Review in order to understand what further evidence exists on the merits and challenges single judge trial models might pose

Part 2: proposed pilot model

Given the potential challenges and complexities associated with designing a proposed model for a pilot of single judge rape trials, a significant proportion of the Working Group's time was dedicated to discussing this issue. This section provides an overview of the Working Group's key discussions on developing a draft model for a pilot and provides a series of recommendations based on those discussions. A full model of the pilot is attached at Annex B.

Methodology

A key principle of the Working Group's deliberations on developing a pilot model was that changes to existing rules and processes for rape cases should be kept to a minimum. Members felt that unnecessary changes to existing procedure would not only complicate the process, but would also introduce variables which would make it more challenging to evaluate a pilot. The Working Group agreed that the existing process for prosecuting cases in the High Court should remain the baseline model for any pilot, with changes only being introduced where it was necessary for the fair

and effective disposal of business. Cognisance being taken of experience and current practices and processes in place, which involve judge(s) as the sole decision maker as applicable.

The Working Group also discussed other approaches to gathering evidence on the impact of single judge trials on rape cases, which included considering whether a pilot of ‘shadow verdicts’ could be a workable alternative. This would involve a trial being run in accordance with existing procedure with a verdict from a jury, but with a High Court judge, separate to the presiding judge, observing the trial and recording a shadow verdict, that is to say the way in which they would have decided the case had it been a single judge trial and the reasons for their decision. This was considered unworkable for a number of reasons, including:

- there were significant ethical, ECHR and other fairness concerns in recording shadow verdicts in live cases, no matter how well the cases were anonymised, this was considered too great a risk in terms of undermining verdicts and the fairness of proceedings
- in terms of resources, there is an insufficient number of Senators to be able to resource such a pilot, particularly in the current context of post pandemic recovery
- such a restricted exercise would only yield evidence in relation to the outcomes of trials and not any other aspect of the model such as the complainant’s experience, nor would it test the other proposed benefits of single judge trials (e.g. trial length)

Such an exercise was therefore considered not to be effective in ascertaining how the practical changes involved in running a single judge trial would be perceived by complainants, accused and lawyers per the recommendation.

The Working Group was further advised by Justice Analytical Services (JAS), that it was only through a live pilot of single judge trials that meaningful insights into the practical impact of the approach on rape cases comparative to jury trials could be extrapolated.

In developing a proposed model for any pilot, the Working Group first mapped out the key stages in the journey of a case through the justice system to identify those areas where amendments to existing rules and process may be required to facilitate single judge trials. In doing so the Working Group identified the following areas in which changes to existing legislation, procedures and process would or potentially could be required in order to accommodate single judge trials:

- case criteria for any pilot
- pre-trial and trial process
- verdicts
- appeals

The Working Group held a number of deep dive sessions designed to facilitate detailed consideration of each of the different areas of the pilot model identified above. The following issues provided the context for the consideration of the Working Group for each of these areas:

- ensuring the pilot does not adversely impact on participants’ rights and upholds the principles of the ECHR

- capacity of the justice system to resource the pilot
- ability to effectively evaluate the outcomes of the pilot

Pilot objectives and evaluation

The Working Group recognised early on in its deliberations the need to identify a clear set of objectives against which any pilot could be evaluated. In articulating the primary objectives for any pilot, the Working Group drew on the rationale set out in the Lady Dorrian Review in the context of its recommendation to consider a pilot of single judge rape trials. In doing so, the Working Group identified that the primary objectives of any pilot should be to:

- assess how the process of conducting a single judge trial for rape cases is perceived by those involved in the trial process;
- explore the impact of single judge trials on the effectiveness and efficiency of managing rape trials; and
- consider the impact of single judge trials on outcomes.

In identifying these objectives, the Working Group recognised that these should not be fixed and that it may be necessary for them to be adapted if proposals for running the pilot are developed and refined.

Following agreement on the pilot objectives, the Working Group turned its attention to considering how performance against those objectives should be evaluated during the pilot. To facilitate this, the Working Group conducted a deep dive session focused specifically on what areas and aspects of the pilot should be measured in order to undertake this assessment.

Representatives from JAS made several observations and suggestions for the Working Group to consider when discussing how to evaluate the pilot. In particular, Members were advised that it was vital to consider what could be evaluated and the particular mechanisms that should be used in order to gather this to ensure that the pilot was structured in such a way as to facilitate the collection of this data. The need to gather baseline data in order to provide a comparative assessment of single judge trials versus jury trials in rape cases was also identified as a key consideration. The Working Group recognised the need to gather baseline data in order to inform an accurate evaluation of the pilot and acknowledged that this process would have to begin well in advance of any pilot commencing.

JAS further highlighted the importance of implementing robust governance and decision-making structures in order to plan and execute the evaluation of the Pilot. Specifically, these would be necessary to consider and mitigate any ethical issues associated with the evaluation process, particularly in the collection of qualitative data, as well as ensuring both a robust and impartial assessment of the pilot outcomes given that different parties are likely have different interpretations of these.

The Working Group highlighted that the evaluation should be weighted towards Objective 1 given that the primary (measurable) motivation behind the piloting of single judge trials is to improve the experience of complainants in sexual offence cases. While Objectives 2 and 3 are important, these should be considered as being less significant in determining whether the pilot should be considered a success.

During this session, Working Group Members identified the need to use a mixture of qualitative and quantitative methods in order to collect the data and insights required to provide a rounded picture of how the pilot's performance against its stated objectives. The Working Group made the following observations in relation to each of the pilot objectives.

Objective 1

Understanding performance against this objective would primarily be achieved through the use of qualitative research methods, specifically interviews or questionnaires with those involved in the trial process to gather information on their experience and, where possible, to determine how their experience compares to that of a jury trial and to understand what lessons might be learned. Views differed on whether to seek insights from complainers given that they may not have a benchmark against which to compare the trial process. There was however a majority consensus that insights should be sought from complainers given an important element of the pilot is to improve their experience of the trial process.

Objective 2

Measuring performance against objective 2 would be achieved through the collection and collation of data that provided insights into the efficiency and effectiveness of trial processes from a systemic perspective. The Group emphasised the need to ensure the need to take into account and, where possible, control for other factors which may influence the effectiveness or efficiency of rape trials to ensure the impact of a having a single judge as the decision-maker in these cases is fully understood.

Objective 3

This objective was identified as being particularly challenging to evaluate given that the different features and characteristics of rape cases will influence the outcome of cases and that it will not be possible to provide a control for. As with Objective 2, assessing how the pilot has performed against Objective 3 is also likely to be achieved primarily through the collection of quantitative data which will provide insights on trial outcomes.

Further detail on the potential data necessary to evaluate performance against each of the Objectives and the methods proposed to collect that data is set out at Annex C.

As with the suggested objectives of the pilot, the Working Group recognises that the potential research questions will require to be reviewed and refined should planning for any pilot progress. In particular, the Working Group recognises the challenges and sensitivities associated with seeking the views of those involved in the trial process, included judges and complainers, and offers these research questions as a set of initial ideas on how performance against the express objectives of the pilot might be evaluated.

Stage 1: case criteria for inclusion in the pilot

The first area addressed by the Working Group in developing the pilot model was how to determine which cases should be included within the pilot. In developing the criteria, the Working Group sought to answer the following questions:

- what offences should be within scope of the pilot?

- what other criteria should determine whether a case falls within the remit of the pilot?
- how are cases within the scope of the pilot to be identified?

What offences should be included within the scope of the pilot?

In recommending that further consideration be given to piloting single judge trials, the Lady Dorrian Review indicated that any pilot should be specifically focused on cases of rape. The recommendation was based on a number of factors and issues considered and documented in the Review report including evidence demonstrating the impact of rape myths on jury decision-making. Although members were broadly in agreement on the scope of the pilot, the majority of the Working Group was of the view that it should be expanded to incorporate cases of attempted rape indicted to the High Court on the basis that the impact of rape myths on jury decision-making was likely to be similar to that in rape cases. A further consideration was an acknowledgement that one indictment may contain charges of both rape and attempted rape and that should not cause the trial to be excluded from the pilot.

The Working Group also discussed whether the date on which the offence took place should be a criterion to be used to determine whether a case is included within the pilot. Members were ultimately of the view that it should be the date on which the accused was indicted rather than the date of the alleged offence which should be the determining factor in whether or not it is included in the pilot. It was however recognised by some members of the Group that at the point any pilot is further developed or implemented, it will be necessary when identifying a potential start date to consider the timescales involved in court scheduling, and also the times between Preliminary Hearing and scheduled trial diets noting the impact of COVID 19 on current journey times.

Accordingly, the majority of Group agreed that offences of rape or attempted rape under common law, or under Section 1 of the Sexual Offences (Scotland) Act 2009 indicted to the High Court, should be within scope of the pilot. Members further agreed that offences involving either child and adult complainers or both should be incorporated within the pilot.

The Working Group also considered whether cases which include other offences in addition to rape, or attempted rape, should be within scope of any pilot. It was recognised that doing so would require judges to deliver verdicts on all offences on the indictment. Members reflecting on their own practical knowledge and recent experience in the High Court were of the view that although cases do come to trial with a single charge of rape, or attempted rape, on the indictment, the norm is that in most cases this would be accompanied by evidential or ancillary charges related, or in addition to, the primary charge. This view was supported by initial unpublished data from SCTS discussed within the Working Group which suggested that in recent years registered indictments which featured at least one charge code of rape /attempted rape contained on average six charge codes. The Working Group recognised that restricting the criteria to indictments with single charges of rape or and/or attempted rape may not only significantly reduce the sample size arising from any pilot, it would also render the results of such a pilot of limited relevance given these indictments would not be representative of the majority of cases of rape, or attempted rape, limiting the value of the pilot. It was noted that further work

supported by analysts would be required to identify robust data to assist in planning a pilot, refining the case criteria and determining how long it ought to run for.

While the Working Group did not identify any specific concerns in allowing judges to deliver verdicts on other offences where these were evidential or ancillary to a primary charge of rape or attempted rape, members were generally of the view that where there are charges of murder or attempted murder on the same indictment as rape or attempted rape, these cases should be excluded from a pilot.

What other criteria should determine whether a case falls within the remit of the pilot?

The annual publication, [Criminal Proceedings in Scotland](#), includes statistics on criminal proceedings concluded in Scottish courts refined by main crime or offence. In 2018/19, 313 people were proceeded against for rape and attempted rape and in 2019/20 this figure was 299. The impact of COVID-19 is demonstrated in the statistics for 20/21 which show 152 people proceeded against for rape and attempted rape. A majority of the Working Group's membership was of the view that the justice system would not be able to resource a pilot which included all cases of rape and attempted rape and that a mechanism for restricting the criteria for inclusion within the pilot to a specific subset of cases would be necessary. In discussing potential options for defining the case criteria for any pilot, members were aware of the need to ensure that there was clear justification and evidence for the resultant case criteria in so far as that was statistically and practically possible.

The Working Group discussed the possibility of establishing a procedure which would randomly assign cases to the pilot rather than limiting the case criteria to control the number of cases in the pilot. Analysts from JAS advised, however, that reducing the number of variables that can impact on trial outcomes would enable more effective evaluation of the impact of single judge trials. The majority of members were of the view that the pilot should be focused on rape and attempted rape cases in which there is a single complainant, on the basis that rape myths were likely to exert most influence where juries were asked to arrive at a verdict where there are potentially two conflicting factual accounts, namely that of the complainant and the accused (while recognising that the applicable procedural and evidential rules do not require the jury to select between two accounts). The Working Group concluded that any pilot should therefore include all cases of rape and attempted rape which are based on allegations from a single complainant.

How are cases within the scope of the pilot to be identified?

The Working Group considered that all cases should be automatically included in the pilot if they meet the criteria and that there should be no capacity for the accused to 'opt out' of the pilot other than by exception and application to the court (discussed further below). It should be for COPFS to indicate whether specific cases are within the scope of the pilot, although these decisions should be based on clear and consistent criteria in relation to the scope of the pilot, which should be made publicly available. When serving the indictment on the accused/their agent, it would be the responsibility of COPFS to indicate that the case falls under the pilot.

Stage 1 recommendations

In considering the case criteria for the pilot model, the Working Group agreed that the Pilot should incorporate all cases of rape or attempted rape, whether that is rape under common law or under section 1 or section 18 of the Sexual Offences Scotland Act 2009, indicted on or after the commencement date of the pilot, in which there is a single complainant and the charge of rape or attempted rape is the only or principal charge on the indictment, (allowing for minor or evidential charges or dockets in addition to the principal charge). The pilot will not include indictments which also include charges of murder or attempted murder.

Stage 2: pre-trial procedure

The Working Group did not identify any substantive changes which would require to be made to existing pre-trial procedure in order to accommodate single judge trials, beyond the effective removal of those stages, practices and processes which involve a jury, such as balloting, empanelment and the Judge's charge, or as otherwise outlined below.

While as discussed above, the Working Group was of the view that inclusion within the pilot was to be by default provided the case met, at the time of indictment, the case criteria; there was a consensus among members that parties should have the opportunity to request at their own instance, in what were envisaged to be exceptional circumstances/occasions, at the Preliminary Hearing that a case should be excluded from the pilot. The Working Group was of the view that the grounds for exclusion from the pilot should be specifically limited to whether or not the case meets the criteria identified for the pilot. A majority of members of the group considered other possible grounds upon which a party could seek exclusion including e.g. that a single judge trial would prejudice the fairness, or would give rise to a risk of prejudice or otherwise be unsuitable in individual cases; but believed such arguments were unsustainable. The test to be applied by the court in assessing requests from parties regarding exclusion from the pilot at the Preliminary Hearing should therefore be limited to whether or not the case meets the eligibility criteria. For example, an argument might be made that the charge of rape (or attempted rape) is not the principal charge on the indictment.

Stage 2 recommendations

In considering the pre-trial procedure for the pilot model, the Working Group agreed that:

- the pilot should take place in the High Court
- all procedural steps, questions and applications for determination shall proceed as normal, and within the timeframes currently prescribed by legislation and law
- parties should be given the opportunity to make a request at the Preliminary Hearing for the case to be excluded from the pilot with grounds for exclusion from the pilot to be specifically limited to whether or not the case meets the specified criteria identified for the pilot

Stage 3: the trial

The Working Group did not identify any substantive changes that would require to be made to the existing process for conducting trials in the High Court to accommodate single judge trials other than the procedural aspects associated with the actual jury abovementioned. On the impact of piloting single judge trials on Legal Aid, the Working Group noted its intention that the pilot should not have implications on the

payment of Legal Aid. In particular the Working Group felt that a single judge trial should be considered to commence at the same point as a rape trial heard in front of a jury for the purposes of triggering Legal Aid payments.

Attention was drawn by some Members to the demographic from which some judges come and the way in which this might result in unconscious biases and prejudices which may influence or impact on their decision-making when arriving at a verdict in rape or attempted rape cases. Some members therefore suggested, which was opposed by others citing in particular the independence, selection process judicial training, legal knowledge and oaths sworn by judges in Scotland, that there was a need to consider how any such unconscious biases could be mitigated. There was no consensus among Working Group members about whether to include such a requirement given the diverse views and lack of consensus on the existence and need to address the perceived issue in the first instance.

The Working Group also discussed whether or not the proposed pilot model should include a requirement that the Preliminary Hearing judge is different from the trial judge. This has been adopted as a requirement in other jurisdictions, such as some Australian states, in which the procedural measure was introduced to avoid exposing the trial judge to specific issues or considerations that may not emerge at trial. Some members expressed concern that a judge making determinations on applications made under Section 275 of the Criminal Procedure (Scotland) Act 1995 , and other pre-trial matters may have the potential to result in unconscious bias in a case, a view strongly opposed by others with the Working Group. To the contrary there was also a view expressed in support of retaining the same judge for both stages on the basis this might support stronger judicial case management. There was no consensus among Working Group members about whether to include a requirement for the trial judge to differ from the judge who presided over the Preliminary Hearing.

Stage 3 recommendations

In considering the trial procedure for the pilot model, the Working Group agreed that the Court should possess all the powers, authorities and jurisdiction which it would have had if it had been sitting with a jury, including the power to determine any question and to make any finding which would otherwise be required to be determined or made by a jury. References in any enactment or other rule of law to a jury or the verdict or finding of a jury shall be construed accordingly.

Stage 4: delivering the verdict and sentencing

The Working Group considered whether judges should be required to provide written reasons to accompany their verdicts. There already being precedent for this at summary level offending, and in the civil legal process. Members learned that this was common in other jurisdictions where single judge trials had been introduced and that evidence suggested that this could result in an improvement in the complainant experience. There was broad agreement among members that, in line with ECHR requirements, there should be a requirement on judges to provide written reasons for verdicts and that specific guidance should be provided to judges on the issues and considerations that they should be required to consider in producing reasons for verdict, recognising the importance of judicial discretion, that each case will have its own individual facts and circumstances and that development of this guidance is typically a matter for the judiciary and its training provider.

While, based on the knowledge and practical experience of some members of the Working Group it was understood that there was likely to be a strong desire among complainers for an explanation about why a particular verdict had been reached in sexual offence cases, the Working Group acknowledged that requiring judges to provide written reasons for verdicts also had the potential to impact negatively on some complainers, particularly in cases where there is an acquittal. Recognising that written reasons for verdicts were likely to include discussion on complex legal matters and assessments of the credibility and reliability of the complainant as a witness, members suggested that additional support should be made available to complainants to support them in understanding and digesting written reasons for verdicts.

With reference to research on single judge rape trials in New Zealand conducted by Elisabeth McDonald¹ which suggested that delivery of verdicts typically took longer in single judge trials, Members considered whether, as part of the pilot model, judges should be required to deliver their verdict within a specific timeframe. Given the need to ensure that there was sufficient opportunity for judges to give robust consideration to the evidence and submissions in the trial, the majority of the Working Group did not feel that it would be appropriate to include a requirement for judges to deliver their verdict within a specific timeframe. A majority of the Working Group was, however, of the view that a requirement should be placed on judges to publish written reasons within two weeks of having delivered their verdict or another identified reasonable period and that a style format should be developed by the judiciary and its training provider.

The Working Group was of the view that, in line with existing process, verdict and sentencing should be conducted in open court but that written reasons could be produced thereafter.

Stage 4 recommendations

In considering the delivery of verdicts and sentencing as part of the pilot model the Working Group agreed that:

- once the judge has arrived at their verdict, the court shall reconvene to allow the judge to provide their verdict in open court, in line with existing practice
- the court shall either pass sentence on the day, or as more commonly occurs, the court may continue the case for sentence in open court to an assigned date, to allow the collation of reports.
- the judge shall publish written reasons for their verdict, in accordance with specific guidance, within a specified time of the verdict being delivered. The majority of the Group supported a 2 week period.

Stage 5: the appeals process

The Working Group did not identify any required changes to the procedural requirements of, or grounds for, appeal, as currently set out in the Criminal Procedure (Scotland) Act 1995, subject to what is noted below. It was observed by some members however that the timescales for appeals in cases that are heard in

¹ Elisabeth McDonald (2022) In the Absence of a Jury, Canterbury University Press. Available at [In the absence of a jury: examining judge-alone rape trials \(canterbury.ac.nz\)](http://intheabsenceofajury.com)

front of a single judge may need to be adapted to take account of the additional time associated with producing written reasons for verdicts.

Concerns were highlighted by some members regarding perceived low number of applications seeking leave to appeal that are currently granted based on Section 106(3)(b) of the Criminal Procedure (Scotland) Act 1995, namely where a jury delivers a verdict that no reasonable and properly directed jury could have returned. Some members highlighted the potential for this to be exacerbated by the pilot of single judge trials and the introduction of written reasons for verdicts, by increasing reluctance to grant appeals on this or a similar ground. The Group took the view that consideration of the propensity or otherwise of this issue and in particular the success or otherwise of applications for leave to appeal or ultimately decision of appeal were issues outwith its scope and terms of reference.

Stage 5 recommendations

In considering the process for appeals the Working Group agreed that:

- The existing procedural requirements for appeals from the decision of a jury trial shall remain
- Should specific requirements be introduced placing a requirement on judges to return written reasons for verdicts within a specific timeframe, the timescale for appeals may need to be reviewed to consider this.

Part 4: matters not covered within the Working Group's recommendations

While the Working Group's discussions encompassed a wide range of issues associated with the development of a model for piloting single judge rape trials, the limited period of time that the Working Group had to conclude its deliberations meant that there were some areas that it was unable to fully consider. This relates in particular to the logistical aspects of piloting single judge rape trials including considerations about how long a pilot should last in order to ensure it encompasses sufficient trials to facilitate a meaningful evaluation against the key objectives of the pilot. As noted above, it was recognised that further work supported by analysts would be required to identify robust data to assist in planning a pilot, refining the case criteria and determining how long it ought to run for.

Nor did the Working Group discuss in detail how implementation of Lady Dorrian's other recommendations might interact or influence the timing or design of any pilot. While the High Court has exclusive jurisdiction over cases of rape (and as such the Working Group's recommendations include that the pilots take place in the High Court), the recommendation made by the Lady Dorrian Review to establish a specialist sexual offences court, if implemented, introduces the possibility that a pilot could be located within that court.

Despite not having had the opportunity to consider these issues in depth, the Working Group recognises that detailed consideration must be given to the logistics that will underpin how any pilot might operate including how long the pilot should run for and in which court it should take place. With reference to the significant benefits that close collaboration between justice partners has brought in progressing the

discussion around piloting single judge rape trials, the Working Group considers that should a pilot be implemented, further consideration of the logistics and other outstanding aspects of the pilot should be the subject of further cross-sector collaboration.

Part 5: evidence briefing

In order to consider what, if any, additional research had been published on alternatives to jury trials for rape cases since publication of the Lady Dorrian Review in March 2021, the Working Group commissioned an evidence briefing from the Scottish Government's Justice Analytical Services (JAS), to consider whether there were any new developments or evidence potentially relevant to discussions around single judge trials that the Working Group could take into account. In doing so the Working Group acknowledged the challenges associated with transposing and adopting experiences in other jurisdictions to Scotland given the unique jurisdictional practices and procedures applicable in Scotland. Specifically JAS was commissioned to review the academic literature published on the impact of single judge trials in rape/serious sexual offence cases in relation to the following themes:

- the experience of complainers during the trial process
- the rights of the accused
- public confidence in the justice system
- conviction rates

The international evidence briefing on alternatives to jury trials, including single judge trials, will be published in accordance with Scottish Government social research protocols early next year.

The full commission from the Working Group is provided at Annex D.

Discussion following a presentation of the evidence

An oral presentation summarising the international evidence was given to the members. The presentation pointed out that the amount of new research released since publication of the Lady Dorrian Review was limited, and consisted primarily of one study from New Zealand which compared 8 single judge trials with c30 jury trials in rape cases^[1]. Additionally, while a number of jurisdictions allow single judge trials as a choice to the accused, there were no specific examples of single judge trials being introduced specifically for rape and/or attempted rape cases, therefore impacting on the relevance of international comparators. The Working Group noted that while of assistance to its consideration the findings related to jurisdictions which do not have the same practices, procedures and legislative provision as those which govern Scottish courts including e.g. the ability to use pre-recorded evidence, thus some caution was required in drawing conclusions on the impact of any pilot model in Scotland.

^[1] Elisabeth McDonald (2022) In the Absence of a Jury, Canterbury University Press. Available at [In the absence of a jury: examining judge-alone rape trials \(canterbury.ac.nz\)](http://intheabsenceofajury.canterbury.ac.nz)

Nonetheless, the presentation highlighted some features which have reinforced existing findings or generated new considerations in the debate around the perceived merits and challenges associated with single judge trials, namely:

- **Complainant Experience** – there are indications that the use of single judge rape trials can improve some aspects of the complainant experience by ensuring a greater focus on relevant issues and admitting less irrelevant evidence. However, the presentation indicated that the New Zealand study showed that some elements such as communication to the complainant and cross-examination process did not change. Other interventions may be required in order to achieve this.
- **Rights of the Accused** – The use of written verdicts requires judges to provide clear reasons for their conviction or acquittal of the accused, based on the facts of the case, which offers transparency for both accused and complainant, as well as the general public.
- **Conviction Rates** - There is limited empirical evidence about the impact of single judge trials on conviction rates, and most evidence that was found did not relate specifically to rape cases.

Part 6: conclusions and recommendations

In discussing a proposed model for piloting single judge trials in line with the recommendation of the Lady Dorrian Review, the Working Group identified the following considerations and features that it recommends should underpin the model:

- changes to existing rules and processes for rape cases should be kept to a minimum
- there should be a clear set of objectives against which the pilot should be evaluated, recognising that these may need to change as proposals for the pilot develop
- the pilot should incorporate all cases of rape and attempted rape, whether that is rape under common law or under section 1 or section 18 of the Sexual Offences Scotland Act 2009, indicted on or after the commencement date of the pilot, in which there is a single complainant and the charge of rape or attempted rape is the only or principal charge on the indictment, (allowing for minor or evidential charges or dockets to also appear in addition to the principal charge). The pilot will not include indictments which also include charges of murder or attempted murder
- the pilot should take place in the High Court
- all procedural steps, questions and applications for determination shall proceed as normal, and within the timeframes currently prescribed by legislation and law
- parties should be given the opportunity to request at the Preliminary Hearing that a case should be excluded from the pilot although grounds for exclusion from the pilot should be specifically limited to whether or not the case meets the specified criteria
- the trial should commence on the assigned diet with the leading of evidence. Any reference in any enactment or other rule of law to commencement of the trial or the swearing in of the jury shall mean this
- the Court should possess all the powers, authorities and jurisdiction which it would have had if it had been sitting with a jury, including the power to

determine any question and to make any finding which would otherwise be required to be determined or made by a jury. References in any enactment or other rule of law to a jury or the verdict or finding of a jury will require to be construed accordingly.

- once the judge has arrived at their verdict, the Court shall reconvene to allow the judge to provide their verdict in open court in line with established practice
- the trial court shall either pass sentence on the day, or as more commonly occurs, the court may continue the cause for sentence in open court to an assigned date to allow the collation of reports
- the judge shall publish written reasons for their verdict in accordance with specific guidance within a designated period, the majority of the Group support it being two weeks of the verdict being delivered
- The procedural requirements for appeals from the decision of a jury trial shall remain and apply as they do currently
- Should specific requirements be introduced placing a requirement on judges to return written reasons for verdicts within a specific timeframe, the timescale for appeals may need to be updated to reflect this



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