Lady Dorrian Review Governance Group: Specialist Sexual Offences Court Working Group Report

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Scottish Government
Riaghaltas na h-Alba

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Purpose
This report provides the Governance Group with an overview of the considerations and the ultimate recommendations of the Specialist Court Working Group's work on Recommendation 2 of the Lord Justice Clerk's Review in to Improving the Management of Sexual Offence Cases (the Lady Dorrian Review), in so far as applicable.

Part 1: background

The Governance Group was established to bring partners from across the justice system together 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 a number of short life working groups to undertake detailed consideration of specific or aspects of specific recommendations contained within the Lady Dorrian Review were established. Among those was a Working Group specifically established to consider the creation of a national specialist court for serious sexual offences (the New Court) with the core features as recommended by the Lady Dorrian Review. The full terms of the recommendation made (Recommendation 2) are as follows:

> "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."

Remit and membership of the Working Group

The Specialist Court Working Group (the Group) comprised representatives from eight separate organisations drawn from the membership of the Governance Group, specifically chosen to provide the perspective of and insights from different parts of the justice system.

Terms of Reference setting out the parameters of its remit and proposed deliberations were ultimately agreed. The full terms of which, including details of the Membership of the Working Group are reproduced at Annex A.

It was agreed with the Governance Group that the Group's role would be to focus on, and critically examine the key component parts required of the national specialist sexual offences court as recommended and what the practical considerations and challenges to implementation were, and possible solutions to them. In doing so, certain elements of the recommendation (items 2(g) to (l)) were expressly removed from consideration because they were either being considered and explored by other Working Groups, Scottish Government led Implementation Groups, via consultation or were otherwise the responsibility of other organisations or a combination thereof; with updates on progress on these being provided to the Governance Group separately in any event. The aim of the Group was not to revisit the need for a Court given the extensive consideration over a period of two years by justice partners in the Lady Dorrian Review, but to provide criterial input and feedback on aspects associated with it and to help with its implementation, with a specific requirement to suggest next steps.

This paper accordingly sets out the key views expressed and insights provided by Members during meetings in which papers were circulated beforehand, and associated correspondence. The conclusions and recommendations on

implementation of the New Specialist court set out at page 29 reflect the broad consensus among Members on the issues discussed. Differing views or perspectives, and an inability to reach unanimous agreement or any agreement of course occurred and in so far as possible this has been documented. For example at the time of the paper being written, Rape Crisis Scotland (RCS) was not in a position to support the proposal that sheriffs, other than those appointed as temporary judges, preside over all cases before the New Court. Whether agreed unanimously or by majority the recommendations, commendations and suggestions made in this paper should be taken as final and are for further progression.

The Working Group's approach

Following its establishment on 28 February 2022 the Group met remotely on six occasions. At the outset and to facilitate delivery of its Terms of Reference the Group identified the key component parts of the national specialist sexual offences court which it required to critically examine from a practical and legal perspective (in so far as possible acknowledging that further detailed and legal analysis of any recommendations made was for others) to make recommendations to support implementation of the court in the future. Its work proceeded on the basis that the need for a new specialist sexual offences court should not be revisited, that a court was to be implemented and that the Group's observations and recommendations were to address the practicalities associated with implementation, and ultimately to assist those primarily responsible for that given that some form of legislative change would be needed to support its creation. The term 'the New Court' is used as an abbreviation throughout this paper to identify the national specialist sexual offences court discussed by the Group and to be introduced in Scotland.

The key elements for critical and practical consideration were as follows:

- the jurisdictional reach of the New Court. (This included the list of cases that would appear before it; how cases would come in to it; what exceptions, if any, might apply; and how cases could be transferred in to and from it, and the relevant legal test(s) for that)
- judicial appointments to the new court (i.e. the types of judges who could sit on the court)
- the sentencing powers of the new court
- the rights of audience for the new court
- the requirements and reach of trauma-informed training associated with participation in the new court
- other practical points with the establishment of the New Court or the recommendations made as they arose or were identified in the course of discussions
- the review of defence statements, as also recommended by the Lady Dorrian Review, this matter is addressed under a separate section in this report.

It was acknowledged at the outset that jurisdiction, the judiciary who would preside over the New Court and its sentencing powers were particularly inter-related, and that if for practical or legal reasons the Group was to recommend a change to one element it had the potential to address or aggravate concerns and practical challenges with another element. This was particularly the case for sentencing. It was acknowledged that there would likely be additional, and in some instances not insignificant costs associated with any proposals made by the Group. That taking

different options from those chosen by it, or indeed from the model recommended by the Lady Dorrian Review inevitably had the ability to either subtract from or add to those costs.

Part 2: the new specialist court structure and legislative requirements

At the commencement of discussions it was identified by members of the Group that the model recommended by the Lady Dorrian Review, namely of a new national sexual offences court with specific and bespoke national jurisdiction, sentencing powers, identifiable trauma-informed judges and compulsory training requirements for all those legal professionals who would appear before it or facilitate it had proceeded on the basis that primary legislation would be required to support and implement its core principles and operation.

Some members of the Group however queried the need for a specific new statutory court, and asked whether there was potential for its core elements, which they saw as training, to be replicated as envisaged but within the current court structure, perhaps via the creation of a division of the High Court, or even specialist courts in each sheriffdom. The suggestion of some was that change for change sake, should be avoided wherever possible and that options for establishing specialism that would deliver against the objectives set out in the Review but in a quicker and more cost effective way should be considered.

Mindful of this concern, resourcing generally and the requirement to critically consider implementation of the New Court, the Group therefore extended its remit and gave detailed consideration to two alternatives to establishing a new statutory court. With a focus being on using the current powers, court structure and practices with no or very limited legislative intervention or change in so far as possible. The view of many of the Group was that if it was identified that significant legislative change was required to facilitate fitting the court in to the current model without the ability or certainty to be able to gain all of the benefits of the recommended court, such effort and time would be best focused on creating the new statutory court as envisaged. The two alternative options considered were namely:

- establishing a specialist sexual offences court as a division or branch of the current High Court (option 1) using the current legislative processes and procedures in so far as possible.
- establishing a specialist sexual offences courts within the High Court and the sheriff and jury Court i.e. option 1 but with the addition of specialist courts within the 6 sheriffdoms (option 2).

In reviewing the options the Group looked at each of the key elements of the Lady Dorrian Review model in turn and gave consideration to the extent to which they could be replicated in so far as practicable within each model. One difficulty immediately identified by the Group in respect of both options was an apparent barrier within the current legislative provisions to the creation of a division or branch within the High Court. Furthermore both models would have to rely upon and use practice notes and directions to try and achieve the aims of the Review. These documents would not be permitted to change or recommend procedure contrary to the terms of primary legislation. Legislative reform would be required to effectively

deliver these alternative options and the question was, what would be gained or achieved by that approach to legislative reform as compared to the approach recommended by the Lady Dorrian Review; and conversely, what gaps would exist or what benefits would fail to materialise or be maximised. Ultimately the Group rejected both options for a variety of reasons, favouring the creation of a new bespoke statutory sexual offences court via primary legislation.

The reasons while lengthy, focused both in legal and practical terms on the impracticalities or inabilities to guarantee replication of the rationale and core elements and goals of the recommended court model, and ultimately the benefits it would bring. This was particularly so with regard to the requirement to create national jurisdiction, utilising all available judicial and estate resources, ensuring compulsory training of all legal individuals participating in the court (other than judges as current legislation was in place to assist) and ensuring the consistency of practice required to improve the experience of all users while not impacting the rights of the accused. All of these would require to be stipulated in statute to ensure their desired effect.

In respect of specifics, the Group's concern was that neither options 1 or 2 could compel or introduce a requirement for non-judicial participants to undertake trauma-informed training as a pre-requisite for appearing before the New Court. At most, parties and particularly legal professionals, could only be *encouraged* to take the training. Of greatest concern to some members of the Group was that each option, effectively involved an approach of tweaking current practice and procedure and using current structures and 'diffuse' aspects of training without the legislative backing, aspects which the Lady Dorrian Review had been at pains to discount. As the Lady Dorrian Review had stipulated (at 3.11) given the nature of the problems outlined in its report and the significant volume of cases the options of fast-tracking, clustering or using current procedures were clearly not sufficient, hence it favoured the creation of a dedicated specialist court for serious solemn sexual offences. Option 1 without the legislative ability to use other judicial resource had the potential to further aggravate the capacity issues the Review was seeking to address.

Over and above the aforementioned, some members advocated the position that implementing the recommendation, and advancing it on a statutory footing (subject perhaps to the innovations and commendations the Group makes) had a number of benefits over and above those detailed in the Review Report and discussed. These included:

- evidencing that the Scottish Criminal Justice System was taking positive and proactive steps to address such serious and life changing crimes, rather than as some jurisdictions were doing, attempting to do this by what might be seen by some as easier 'fixes' within current procedure and practice, something which the Lady Dorrian Review was opposed to, preferring a 'clean sheet approach'
- that the placing of the New Court on a statutory footing as intended allowed greater potential for future proofing of the court, evaluation, Parliamentary scrutiny and innovation. Avoiding the Lady Dorrian Review's concern that our successors will be examining the same issues forty years hence if a radical and new approach was not taken

- it should assist in restoring and increasing public confidence in the justice system generally; which may in turn increase volumes of reporting of crimes

The Group therefore recommended the progression of a national specialist sexual offences court as recommended by the Lady Dorrian Review, but subject to such further innovations or recommendations it or others might seek to make. Discussion on such matters and the ultimate recommendations made by the Group now follows.

Part 3: jurisdiction of the Specialist Sexual Offences Court, transfer of cases and appeals

National jurisdiction

The Group considered the proposed jurisdiction of the New Court as recommended by the Lady Dorrian Review i.e. the cases it would hear; as well as the practical and legal issues associated with implementing it in 'day to day' practice. This included who had responsibility for, and how cases would be brought to it, and how rights of remit would occur, and the associated tests for each. In doing so, it revisited the understood reasons and rationale for the recommendation, while taking cognisance of the time that had elapsed since the Review's publication, developments thereto and the practical experience of the Group's members.

The Lady Dorrian Review recommended that the New Court should have a national jurisdiction in respect of all solemn cases on indictment where the primary charges were serious sexual offences including rape, alongside any ancillary offences triable on indictment. 'Serious sexual offences' were defined as 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 were unlikely to involve an individual complainer providing evidence or determination of whether there is a 'sexual element' to the offence would be a matter following trial. Paragraph 59A was similarly to be dis-applied in circumstances where there was no identifiable complainer who would give evidence. Indictments which featured serious sexual offences alongside or in combination with other serious offences such as murder, attempted murder, abduction, or where, it was anticipated that consideration of or the actual imposition of an Order for Lifelong Restriction (OLR), would be excluded but heard in the High Court presided over by a judge who was also trained to sit in the New Court, assisted with similarly trained SCTS personnel in so far as possible.

In the first instance, some members of the Group asked for consideration to be given to the potential revisal of the list of cases proposed to fall within the New Court's jurisdiction. In doing so, the Group gave consideration to the possible reasons for the approach taken by the Lady Dorrian Review, particularly the exclusion of certain crimes from the Court i.e. murder, attempted murder and abduction. It was acknowledged by the Group that allowing murder to be heard as standard in the New Court, and also at the High Court would raise notable constitutional issues and create an anomaly, given the High Court presently has privative jurisdiction for the crime.[1] Furthermore it carried with it an automatic life sentence with the punishment

[1] Currently in terms of section 3(6) of the Criminal Procedure (Scotland) Act 1995 (the 1995 Act) the High Court has privative jurisdiction for murder, treason, rape (whether at common law or under section 1(1) of the Sexual

part rarely set at less than 15 years (a level rarely applied to sex offence cases based on the data available to the Review at the time of its report). This would exceed the recommended sentencing limit of 10 years for the New Court. In a similar vein, an OLR was seen as a significant custodial order, only available to those presiding in the High Court presently. The view was taken that some commentators might perceive murder to be 'downgraded' if allowed to be heard as standard in the specialist court which had bespoke sentencing powers and judiciary.

The main driver for those members who ultimately proposed to revise the jurisdiction was to ensure that more complainers and users reaped the benefits associated with the New Court. A number of members were more cautious about increasing the list of cases given the undeniably finite resources within the criminal justice sector generally, and the need to use those wisely.

The experience of COPFS members of the Group was that as attempted murder and abduction were not within the privative jurisdiction of the High Court; they could and were on occasion prosecuted in the sheriff court with sexual offences. Furthermore rape with abduction often featured on the same indictment and from members' perspective there would be undeniable benefits in such cases calling before the New Court automatically. While acknowledging the benefits in principle of this some members of the Group continued to express caution about the automatic extension of the New Court's jurisdiction. It could unintentionally place strain on the New Court. The key aim of the recommended court was to use finite specialist resources for serious sexual offences, while allowing the High Court, and as applicable the sheriff courts, to continue to resource the remaining case load from its complement. Categories of charges libelling conduct such as serious violence including murder and attempted murder, drug trafficking or serious and organised crime remained a significant proportion of the work of the High Court and the professionals that support it. It would not be without its operational challenges if these cases were to be before the New Court automatically rather than by exception.

Notwithstanding such concerns a significant majority of the Group wished to recommend that the New Court's jurisdiction should be extended to hear indictments which featured at least one of the serious sexual offences designated by the Review alongside, or in combination with, all other types of solemn cases, with the exception of murder only (which would remain exclusively within the High Court). I.e. including abduction and attempted murder which had been excluded by the Lady Dorrian Review. Where murder appeared on the indictment alongside at least one other serious sexual offence charge the case should be indicted to the High Court, but parties would have the opportunity to seek a remit to the New Court (subject to the requirements for remit which are discussed further below.)

Introducing cases to the New Court

Consideration was given to who should have responsibility for identification of cases to be presented to the New Court, and how in practical terms that would be achieved. It was unanimously agreed by the Group that it should be COPFS, as masters of the instance who should determine in the first instance whether a case

Offences (Scotland) Act 2009 (2009 Act)), rape of a young child (under section 18 of the 2009 Act) and breach of duty by magistrates.

should be indicted to the New Court. This was for basic and practicable reasons if nothing else. Alternatives considered, such as requiring cases to be indicted to the High Court as standard and then an application being made for remit to the New Court with a determination being made at the Preliminary Hearing (PH) added an additional layer of complexity and administrative and resource burden. Identifying cases and indicting them to the New Court from the outset provided a degree of certainty for all concerned and ensured, in so far as possible, that cases benefited from the New Court's specialised practices, procedures and case management from the outset. It was acknowledged, as the Lady Dorrian Review itself did, that powers for remit to and from the New Court would also be needed for circumstances where a case had not been indicted directly to it.

Remit/transfer of cases between existing courts and the New Court
The Group, while initially struggling to envisage examples of when a case might require to be remitted out of the New Court agreed it was prudent to make provision for such eventualities. In doing so the Group recognised that the Lady Dorrian Review had not directly considered a remit from the New Court to the sheriff court. While it accepted that the possibility of such a remit being required was extremely small/rare, it concluded that it was nonetheless prudent for provision to be made for it. It accordingly gave consideration to the circumstances in which a remit could occur and what the legal tests for remit to be applied by the High Court should be.

As to the very rare circumstances a remit from the specialist court to the High Court might cover, it was suggested by a member that circumstances might arise where the sexual offence charges were removed from the indictment e.g. where a complainer had died or is no longer engaged since indictment and therefore the charges for consideration were no longer sexual ones. Another potential criteria for remit out was if it was envisaged that an OLR would be considered and/or to be imposed. That was presented on the basis that as per the Lady Dorrian Review recommendation the New Court was not to have the power to make an OLR. The Group (discussed further later on) now recommends that the New Court should have the ability to make such an order with an unlimited custodial sentencing power (discussed further below). Given all of the above-mentioned it was unclear to the Group as to why or in what additional circumstances a case could not be heard in the New Court, as it should be seen as being capable of dealing with the most serious sexual offence cases including those involving significant complexity, with the exception of murder. No other limited circumstances could be identified by the Group.

Timing of applications for remit
The unanimous view of the Group was that applications for remit should be made, and determinations should occur at the earliest possible opportunity, with a preference for this occurring no later than at the PH stage. This was to avoid unnecessary delay and ensure the efficient disposal of business; key underlying principles of the Lady Dorrian Review overall. The onus would be on the parties to identify the need for, and make the application as a matter of priority. The Group acknowledged that there might be exceptional circumstances in which an application may occur after the PH, and a decision as to whether to consider such an application and its determination, particularly that relative to remit out of the New Court, would be a matter for judicial discretion of the court/presiding judge as required.

Who can make applications and the test to be applied

Given the Lady Dorrian Review's reference to the statutory tests for remit that applied within the civil court sphere,[2] the Group gave consideration to its terms, how in practical terms the provisions might assist in its determination on the subject, in particular; and the experience and knowledge of its members. It was ultimately agreed by all that the aforementioned tests should be adopted and adapted and the High Court should have a final say on a 'cause shown' basis as to whether a remit to it should be ordered. The New Court would have the final say in respect of cases remitted to it. There was precedent for and awareness of the test across the justice sector, and introducing an alternative test had the potential to add further complexity or uncertainty. No higher or alternative test for remit out of the New Court, as suggested by some members to address concerns that parties might seek to frustrate the aims of the New Court, was felt warranted, particularly given the need to avoid over complexity, and the extremely limited circumstances in which the Group itself envisaged an application could be made in practice.

Akin to the civil provisions, it was agreed by members that a remit could be made by application of one or both the parties, or by the applicable court of its own volition having considered the facts and circumstances of the case before it. The consent of the parties, would not be needed, given concerns by some members that such a requirement could stall or otherwise frustrate a remit. Adopting the procedure used in civil matters, a decision of a single judge was all that was required. The Group acknowledged that further consideration as to e.g. the legal competency to legislate on such matters as it is identified in this section (and throughout this report) would require further consideration by appropriate officials and legal advisers as implementation of the New Court progressed further.

Jurisdiction of the Specialist Sexual Offences Court, transfer of cases and appeals recommendations

The Working Group recommends that:

- the Specialist Sexual Offences Court should, as the Lady Dorrian Review recommended, have national jurisdiction established by statute with authority to hear all serious sexual offences as listed at Paragraph 36 – 59ZL of Schedule 3 to the Sexual Offences Act 2003 as applicable and enforceable but with the exception of paragraphs 41A, 44, 44A, 45, and 46 (excluding 41A, 44, 44A, 45, 46, and 59A where there is no complainer) "Serious Sexual Offences"
- it should have authority to hear all types of solemn offences on indictment (but excluding murder) provided such charges are alongside or at least in combination with of one or more charges of Serious Sexual Offence, with such charges being the primary charges for consideration by the Court
- That as masters of the instance, it should be at the discretion of COPFS to determine in the first instance via indictment the most appropriate forum to prosecute cases including where both sexual and serious non-sexual offences

[2] It was of the view that the High Court should however have the final say on whether such a transfer should be effected, as the Court of Session has in respect of transfer of cases within the privative jurisdiction of the sheriff court under section 92 of the Courts Reform (Scotland) Act 2014.

feature on the same indictment. I.e. by indictment to the Specialist Sexual Offences Court, High Court, and sheriff and jury court as applicable

- as recommended by the Lady Dorrian Review there should be a power of remit of cases to and from the Specialist Sexual Offences Court. This will be achieved by application by one or both of the parties, or by the applicable court of its own accord.

The following constitutes appropriate criteria for determining whether cases should be transferred from the High Court (and, as applicable, solemn sheriff and jury court) to the specialist sexual offences court. Namely that:

- The charges libelled on the indictment (which must include at least one serious sexual offence as defined above) otherwise fall within the identified jurisdiction of the specialist sexual offences court and thus it has jurisdiction to hear the case; and
- In all the circumstances, the High Court, or sheriff and jury Court (as applicable), considers it appropriate to do so.
- The Specialist Sexual Offences court will have final say on cause shown on whether such a transfer should be effected, as the Court of Session has in respect of transfer of cases within the privative jurisdiction of the sheriff Court.[3]
- That in those very rare cases in which it may be merited the Sexual Offences Court should have the power to transfer cases to the High Court (and/or the sheriff and jury Court) on special cause shown, with the High Court having the final say on whether such a transfer should be effected in respect of cases being remitted to it.
- That to ensure efficiency and minimise delay and promote certainty in those rare cases in which a remit to or from the Specialist Sexual Offences Court requires to be made, it should be done at the earliest possible opportunity and preferably no later than the first Preliminary Hearing in the case (First diet in the sheriff and jury court as applicable), unless circumstances dictate otherwise.

Part 4: sentencing powers of the New Court

The Lady Dorrian Review recommended that the New Court should have a sentencing power of 10 years imprisonment with provision for remit of the issue of sentencing to the High Court to a bench of 2 or 3, in those rare cases in which a higher sentence might be appropriate. In reaching that conclusion it took cognisance of the constitutional and structural issues that would arise if the New Court was given sentencing powers equivalent to those of the High Court, particularly the potential uncertainty it could cause to the understanding of the High Court's status as Scotland's Supreme Criminal Court; while importantly considering sentencing figures for the four year period 2016 to 2019. Those figures suggested that a sentencing power of 10 years would capture more than 95% of sexual offences on indictment in the High Court; with 12 years capturing about 98% of cases; and those over 12 years were very rare save where there are other features of the case such as abduction, attempted murder or murder which were to be expressly excluded from the jurisdiction of the New Court as it recommended.

[3] Per section 92 of the Courts Reform (Scotland) Act 2014. Subsection 5 provides, that on receiving a request, the Court of Session may, on cause shown, allow the proceedings to be remitted to the Court.

At the outset of discussions some members of the Group, who had also been members of the Lady Dorrian Group, felt that on further examination and reflection they could no longer support the 10 year recommended limit. Reference was made to the fact that the Review had accepted when making its recommendation that sentencing powers for the New Court was a sensitive issue with legal, constitutional, structural and policy implications, and was something which may require further consideration and consultation before commencement of the New Court. The Group therefore had locus to give such further consideration to the topic in the circumstances.

Some favoured an unlimited sentencing power to prevent perceptions of a two-tiered system between the New Court and the High Court, and to give it the status and gravitas it was felt it deserved. Things had moved on since the Review Report was published and further data of pertinence was available and supported further review. The practical experience of some practitioner members of the Group was that serious violent domestic abuse cases often carried sentences above 10 years. It was important in their view that these cases were captured by the New Court too. Recent reported cases were also referenced. One example involved a multiple sexual charges indictment concerning more than 40 complainers, which had ultimately warranted a sentence of 12 years[4]. Members of the Group initially against the prospect of making a change to the limit highlighted that there was perhaps a misunderstanding or conflation between the sentence limit and the ability for the New Court to preside over serious sexual offences and how it applied. It was a limit per charge not collectively. The only thing the principle of remit impacted on was that the New Court would not determine the ultimate sentence, but remit that to the High Court. The case would still call before the New Court. It was also important to note that the Lady Dorrian Review had identified that the present unlimited sentencing power of the High Court had not prevented the need for the Review; and that sentencing should not be the sole determinative factor for establishing a court.

To help inform its discussions further the Group considered three alternative options to the recommended limit, namely:

- the option to extend the limit to 12 years to allow for the 98% of cases referenced by the Review to be captured by the New Court without the need for remit to the High Court. This in principle would also capture the cases referenced in the Group's discussions
- The option of unlimited custodial sentencing powers with the exception that in circumstances where consideration of, or an OLR was intended such matters would be remitted to the High Court for sentencing
- a general unlimited sentencing power covering OLRs

During discussions COPFS shared details of an unpublished internal analysis of rape only cases for the 2017 to 2021 and their related outcomes. It was acknowledged by the Group that while the scope, type of case and period of analysis likely differed from that before the Lady Dorrian Review Group preventing a direct comparison, it was nonetheless informative and of assistance to its considerations and discussions. The analysis showed that out of 353 convictions 63 or c18% had

[4] See HMA v Krishna Singh (judiciary.scot)

sentences of over 10 years. Meaning that if these cases had fallen within the jurisdiction of the New Court a remit for sentencing would have been needed. Such a figure was not negligible.

Ultimately the Group supported the extension of the sentencing powers to that of an unlimited custodial nature. The driving factors for that conclusion being the alternative data provided by COPFS, recent case examples, and the experience of practitioner members. While the constitutional issues and concerns raised by the Lady Dorrian Review report were not negligible the Group were of the view that they should not be preventative to progression. They would just have to be considered by the Justice Sector overall in future consultation on introduction of the legislation to support the New Court. One additional perceived advantage was that the need to create procedures and practices to support a remit fell away, allowing the focusing of resources on the conduct and other aspects of the New Court.

There was ultimately majority support for the New Court to also have authority to impose OLRs within that unlimited sentencing power. The concern of those who opposed its inclusion was that it was a significant order, only available to those presiding in the High Court presently; and national published statistics[5] indicated that they were used sparingly; thus a remit to the High Court may not therefore be too onerous to address.

Ultimately the Group was not of the view that giving the specialist court unlimited sentencing powers as well as the ability to impose OLRs undermined the primacy of the High Court. Many felt it did the opposite. It was important to note that the New Court was a court of first instance only and the power to hear appeals of its decisions would still sit with the High Court sitting as an appeal court; thus ensuring it retained its role as Scotland's superior criminal court. While it was acknowledged that its recommendation would require a notable extension to the existing sentencing powers of sheriffs when sitting in the New Court; it was felt by many in the Group that the critical matter of importance should in fact be the experience and training of the individual judge rather than whether they were a senator or a sheriff. The Group remained persuaded that, as the Lady Dorrian Review recommended, the Lord President (Lord Justice General) was best placed to set any training requirements and determine the ultimate appointment to the New Court. This being consistent with his responsibilities for making arrangements in respect of the training and education of Scotland's judiciary in accordance with section 2 of the Judiciary and Courts (Scotland) Act 2008. It was suggested that such training could perhaps include additional detailed training and discussion and reflection on the use of sentencing powers, particularly given some members of the court would receive a notable increase in powers.

Potential for increases in sentence length for accused

Some members raised significant concerns that the creation of the New Court with unlimited sentencing powers hearing cases, some of which, would previously have been heard in the sheriff court before sheriffs with limited sentencing powers of 5 years, created the potential for sentences to invariably increase. This is what is commonly known by the term 'sentence creep'. The requirement for a sheriff to remit

[5] See Criminal Proceedings in Scotland 2020-2021, Table 7 (b) accessible at Supporting documents - Criminal proceedings in Scotland: 2020-2021 - gov.scot (www.gov.scot)

to the High Court, if they felt their powers were insufficient would no longer apply in the model recommended. This concern required to be considered and addressed to ensure the rights of the accused were protected. The Group accordingly gave consideration from a practical and legal perspective to what could be done or what safeguards were or could be introduced to address such perceived concerns, irrespective of their potential eventuality. As noted above, it was felt that the additional training required of judges to appear before the New Court could include the use of sentencing powers to address such concerns. They also felt that it should not be forgotten that statutory limits for particular offences, many of which related to matters traditionally before the sheriff court would still remain for all judges. One important feature from the Group's perspective to address such concerns, anecdotal or otherwise, was an accused's right in law to appeal sentence under section 106 of the Criminal procedure (Scotland) Act 1995 (1995 Act). The proposed model had not sought to remove this, and it was essential that this remained the case. Furthermore the Group was of the view that the development of sentencing guidelines by the Scottish Sentencing Council, and their ultimate implementation by judges and subsequent review and evaluation would be of great assistance in sentencing of sexual offences generally, and addressing the concerns raised. It was understood that the development of guidelines covering the sexual offences of rape, indecent images of children, and sexual assault was already in train by the Council,[6] and their progression was therefore welcomed.

Sentencing powers of the new court recommendations

The Working Group recommends that the National Specialist Sexual Offences court to be implemented should subject to any derogations or otherwise exceptions in law have an unlimited sentencing power which includes the right to make orders for life long restriction.

Part 5: judicial appointments - judiciary to preside over the New Court

As recorded[7] by it, the Lady Dorrian 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 and particularly the High Court, which would become unsustainable as presently managed. To allow all available resources and available expertise to be used flexibly and to full capacity across the country, acknowledging that the volume of business was already such that serious sexual offence cases were presided over by sheriffs sitting as temporary judges, the Lady Dorrian Review recommended that the New Court should consist of both High Court judges and sheriffs. Appointment to the court was to be made by the Lord Justice General upon satisfaction that the level of experience and specialist training of candidates in question had been attained, irrespective of which branch of the judiciary they came from. Such criteria is yet to be considered or determined and will be a significant and important part in the implementation of the New Court. The Review's view was that the judicial officers sitting in the New Court were to have the same sentencing powers, otherwise there would be the potential for two tiers within

[6] Guidelines on sentencing for these offences are under development by the Scottish Sentencing Council which can be found at the following link https://www.scottishsentencingcouncil.org.uk/sentencing-guidelines/guidelines-in-development/

[7] See para iii, and chapter 1.

the same court to be created which might otherwise lead to potential perceptions that cases, or some at least, were being downgraded.

The Group carefully re-considered this recommendation and potential alternative options, given particular concerns made by some e.g. the Faculty of Advocates following publication of the Lady Dorrian Review Report that the appointment of sheriffs, not just those who currently serve as temporary judges to the Court, could be perceived as a downgrading of justice; and also given its own recommendation to increase the sentencing powers of those judges presiding in the Court from the 10 year limit recommended by the Review to that of an unlimited nature; and expand the jurisdiction of the Court and the impact on resourcing to support that. The Faculty of Advocates remained opposed to the appointment of sheriffs other than those serving as temporary judges to the New Court.

Options to extend the judicial complement

It was acknowledged that the current senator (36) and temporary judge complement (c24) would not be sufficient to meet the expected case load of the single national court model which the Lady Dorrian Review recommended, nor the further extended caseload which this Group now recommended, particularly when such a resource also required to service the civil justice system as a whole. The alternative models to a single national court which the Group also considered (discussed above at 10-17) also posed resourcing or practical difficulties. Options or alternative methods as to how a sufficient complement for the New Court could be supported were considered. One option considered was whether to extend or increase the number of temporary judges, which some members were initially in support of, while a number of others were opposed to. Consideration was also given to increasing the number of High Court judges (senators). Both were ultimately rejected as being impractical for a number of reasons.

Option 1: increasing the senator complement

As to increasing the number of senators, irrespective of the financial costs and the statutory limit[8] on the number of judges who could sit in the Court of Session/High Court (currently 36 are available to serve all civil and supreme court work and including first instance and appeals), the latter of which could be changed by legislation, the greater challenge from the Group's perspective was the ability to actually recruit sufficient experience numbers if such a step was to be taken. Steps were being taken by the Judicial Appointments Board and senior judiciary to encourage practitioners to consider a judicial career. There was concerns that the pool from which senators (like all judicial posts) were drawn from was an increasingly small pool. Appointment from the pool, if achievable, would inevitably leave vacancies within the prosecution and defence profession to be filled, with a potential knock on impact on the ability to support the New Court and the criminal and civil justice system as a whole. This option's ability to facilitate the New Court also lacked certainty. It was dependent upon a number of factors outwith the justice sectors control. E.g. people with the relevant skills and attributes might not apply, or if they did they might not be successful in the recruitment process. Sufficient lead in time would also have to be considered. Some members also acknowledged that newly

[8] As specified in section 1(1) of the Court of Session Act 1988, as most recently amended by the Maximum Number of Judges (Scotland) Order 2022 (SSI 2022/96)

appointed judges who have come from the profession might not automatically have the full skill set or experience that the Review envisaged or as set down in the LJG's criteria. The reality being that skills obtained as a practitioner, while essential would need to be supplemented by experience as a judge. New senators might not automatically equate to experienced judges to complement the New Court.

Option 2: increasing temporary judge complement

The Group appreciated that to increase the number of temporary judges was not straightforward or an immediate solution either. The potential increase in temporary judges had the advantage over option 1 as candidates would already have gained judicial experience over and above that as a practitioner. Legislation stipulated that temporary judges required to be appointed by Scottish Ministers[9], thus potential sheriff candidates whose expertise to the New Court would be invaluable (and who otherwise would meet the criteria for appointment to the New Court) would require to go through a separate additional process before potentially being selected for the New Court. Posing an additional barrier. As with option 1, whether candidates with appropriate expertise would be appointed as temporary judges was also not a certainty. Furthermore, the appointment of additional temporary judges, as the Group understood it, would not equate to a fulltime judicial resource for the New Court as their sheriff court commitments would require to take precedence.

Overall the model proposed by the Lady Dorrian Review had one particular advantage as it increased automatically the potential pool from which the New Court could be resourced, without the arguably administrative burden and uncertainty which came from seeking to increase the number of judicial posts outright. Currently there were 116 fulltime sheriffs, senators and c24 temporary judges from which candidates with the essential expertise, and training could be drawn.

Concerns regarding perceived downgrading

It was acknowledged throughout Group discussions that irrespective of their veracity concerns regarding downgrading had to be addressed. For many members it was clear that the proposal that sheriffs may sit in other, perceived more superior or hierarchical courts with greater powers was not without precedent, even before the Review's recommendations. Sheriffs already sit as temporary judges in the High Court. They sit in the Sheriff Appeal Court as Appeal Sheriffs in both civil appeals and summary criminal conviction and sentence appeals.[10] Many of the Group felt strongly that the argument could not be sustained when all the features and the additional proposals the Group was making were taken, individually or collectively in to consideration, particularly the need for increased and additional training on the use of unlimited sentencing powers for those office holders to be appointed to the New Court. The focus of attention should be the expertise, experience and training of those judges who preside over the New Court not the title which they held currently or when not sitting in the New Court. It was acknowledged that the true challenge was addressing what could be described as perceptions, misguided or otherwise associated with the judicial title held by the judge in question, rather than their experience and expertise suited to preside over these important and life changing cases. Experience did not necessarily equate to nor was commensurate with judicial

[9] Section 20B of the Judiciary and Courts (Scotland) Act 2008
[10] See Courts Reform (Scotland) Act 2014 section 46 onwards.

title alone. The recommendation had not envisaged that every sheriff, temporary judge or High Court judge would preside over the New Court. There were many sheriffs with extensive expertise which would be lost if they did not have the potential to be appointed to the New Court merely due to status, provided they met all other appointment criteria.

The Group also acknowledged that there was also scope to provide greater public education on the roles of judges and specifically those in the New Court in the future to address what might be misunderstandings or perceptions. Greater knowledge and understanding of the criteria required for candidates and the process involved in becoming a judge to the New Court (discussed further below) would also assist.

Alternative approaches: separation of cases

Some members of the Group, RCS, suggested that to avoid perceived concerns about downgrading the most serious cases before the New Court- rape and attempted rape- should continue to be presided over by High Court judges and temporary judges only. Doing this, it was submitted, would provide a greater sense of parity between the rights of audience for the New Court as recommended by this Group (discussed further below). The underlying rationale behind it was that like solicitors no sheriffs would ordinarily preside over rape cases or cases of rape and attempted rape when they appeared on the same indictment, and that was a concept that would be retained. However unlike solicitors there was scope for sheriffs to preside over such cases without a change or requirement to take additional legal qualifications if appointed as a temporary judge. The greater concern for the Group about such an approach was that it created a two tier system leading to further concerns about and potentially providing further ammunition to the downgrading of cases argument. A two tiered system was something which the Lady Dorrian Review and this Group were at pains to avoid. There were also practical challenges to such an approach which could not be easily set aside. These included the programming of cases before the New Court; and resourcing of the Court more generally if the current complement was to continue to preside over rape and attempted cases, which were understood to be a significant proportion of the current High Court caseload.

Creation of new statutory judicial office holder

The Group did give some initial consideration to whether there was a need to create an entirely new type of judge in law by statute, separate from current posts to mark the separation and individuality of the New Court, and address concerns. Basically a statutory sexual offences judge in addition to the post of senator, temporary judge or sheriff. From its perspective there would be a number of legal and practical challenges in taking such an approach including the need for statutory criteria, a legislative appointment process and changes to the work of the Judicial Appointments Board for Scotland amongst others. Significant consideration would have to be given to such matters. The general issues associated with recruiting as identified in options 1 and 2 above would also apply. Alternative options using current practice and process in so far as possible were therefore favoured by some of the Group.

Alternative judicial title when sitting in the New Court

It was suggested within the Group that a possible solution to the perceived downgrading of justice associated with judicial title that had been mentioned in discussions was the creation of a new judicial title for use by all who sat in the New Court irrespective of their judicial status when sitting on non-sexual offence cases. This was separate from the creation of an entirely different judicial post by legislation. Careful consideration would require to be given to the title and the legal challenges and ability to do so. Some members of the Group understood that there was precedent, largely in civil law and most notably employment law for use of the same terminology to describe a variety of legally qualified and non- legal parties sitting in the same role as decision maker. This was notably seen in the employment tribunal field where it was understood that employment judges regularly consisted of senators and solicitors without a distinction of their title being drawn. Reference was also made to current provisions whereby sheriffs became appeal sheriffs[11] in both civil and summary criminal appeals, and senators were known as 'commercial' or 'intellectual property judges; when sitting in commercial or intellectual property courts, which evidenced to some extent the concept in practice.

Importance of the expertise, skills and training

The Group acknowledged that the Recommendation made by the Lady Dorrian Review was to make sure that serious sexual offence cases were given the proper attention their particular nature demands with the creation of specialist professionals to preside and appear before the New Court. The fact that the most serious cases were already presided over by High Court judges and temporary judges had not prevented the Review or its recommendations from being necessary. The reported appeal cases referenced in the Review concerned decisions and duties of presiding judges, and sheriffs alike. In the Group's view this reinforced the need for the focus and appointment to the Court to be on appropriate experience rather than a focus solely on current judicial title.

Ultimately of key importance to the Group therefore was to ensure those with the right experience, training and expertise in what were technical and sensitive cases were appointed to the New Court irrespective of their current title and the perceptions associated with their judicial title. It was accepted that the best candidates could and should be drawn from the High Court, sheriff and temporary judge complement. While criteria for appointment was to be a matter for the Lord Justice General and those who supported him in that process, the Group envisaged this would stipulate clear criteria and evidence of suitability for appointment which candidates would require to evidence before consideration and appointment. Appointment would require to be supported by essential and ongoing training on the requirements of the New Court, trauma-informed practice and sentencing in particular.

The Group acknowledged that while a matter for others, the issue of judicial salaries and other factors associated with the day to day running of the New Court would likely require further exploration and discussion once there was greater finality on the model to be introduced.

[11] See the Court Reforms (Scotland) Act 2014

Appointments to the New Court

During its considerations the Group identified that neither the original Recommendation nor the Review report had made specific comment or provision on the right of removal from such a post. It was stressed that this was aside from and distinct from the specific primary legislative provisions in place for the removal of judges from their judicial office.[12] All Members agreed that while by inference a right of appointment included a right of removal, for the avoidance of doubt the LJG should, in its view, have the right to both appoint and remove a member from the New Court, distinct from the removal from judicial office.

Presiding judge and governance of the court

The Group gave initial consideration to whether there was merit in recommending the appointment of a principal judicial officer who would be responsible for and oversee the day to day running of the new Court, with the individual perhaps reporting to the Lord President as applicable. Doing so would align the New Specialist Court with other courts specifically created by statute e.g. of the Sheriff Appeal Court.[13] In considering this question the Group was reminded that the Lord President, as head of the Judiciary, had general overriding responsibility and associated powers to secure the efficient disposal of business.[14] Supported and assisted by the Lord Justice Clerk, and Sheriffs Principal, as applicable. In the High Court in particular, the day to day management was further assisted by e.g. an appointed administrative judge. Some thus felt that the statutory appointment of a specific principal judicial officer for the New Court to oversee it might add unnecessary bureaucracy given the role of the LP/LJC, their undeniable interest in the New Court, and current practice. It was, however, acknowledged by members of the Group, that while perhaps not possible for this Group to determine at present, due consideration would need to be given to the governance structure of the New Court in the future. Given the volume of business before and the number of judicial officers presiding over the New Court had the potential to significantly exceed that of the High Court; combined with an expectation that it promulgate, develop and exemplify best practice and procedure in all sexual offence cases, while also supporting the efficient disposal of business; it would need some support and potential governance to perform and flourish in that role. The form and substance, if any, of the model would require further legal, constitutional, policy and practical consideration during the further development of the New Court.

Judicial appointments recommendations:

The Working Group recommends that:

- as stipulated by the Lady Dorrian Review the New Court should be presided over by members of the judiciary who have relevant experience and 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. Candidates may therefore be drawn from the High Court and shrieval complement. The criteria for consideration and appointment to the New Court is to be determined by the Lord Justice General. Such eligibility criteria for the post should, in so far as possible seek, to ensure that candidates have and can evidence the required range of skills, knowledge and experience to preside

[12] Chapter 5, The Courts Reform (Scotland) Act 2008.
[13] See the Court Reforms (Scotland) Act 2014, sections 54-56 which introduced the role of President and Deputy President of the Sheriff Appeal Court.
[14] See the Judiciary and Courts (Scotland) Act 2008.

over the New Court, including the completion of designated courses. Office holders should for the avoidance of doubt be supported by additional training including on sentencing as required (and as separately recommended by this Group)
- for the avoidance of doubt the Lord Justice General shall have authority to both appoint and also remove appointees

Part 6: the required rights of audience to appear before the New Court

The Group noted that consistent with the serious nature of the cases involved, many of which are currently prosecuted in the High Court, the Lady Dorrian Review had recommended that rights of audience for the New Court should reflect those applicable in the High Court, as the training received by such officers was not readily accessible to the legal profession at large. Diffuse efforts to train judges and practitioners had not prevented situations such as those which arose in both the High Court and sheriff and jury court in the cases of *McDonald*, *Donegan*, *Dreghorn* and others[15]. In addition to that, advocates or solicitor advocates appearing before the New Court would be required to receive specialist trauma-informed training in dealing with vulnerable witnesses including enhanced training on questioning and cross examination techniques in courses accredited by the Lord Justice General (LJG) before they would be permitted to appear.

A majority of the Group continued to support the Recommendation itself and felt that steps could be taken to support implementation of it. Some members felt strongly that solicitors should be able to appear before the New Court if they wished to do so and were appropriately trained, the training and scope of expertise required could be considered further. It was acknowledged, that an essential part of the Group's terms of reference and remit was to consider such issues and any challenges to practical delivery and, as applicable, make suggestions on how they might be addressed. In this regard some members identified concerns regarding the capacity of the defence profession generally, and the current Faculty of Advocates, 74 Advocate Depute and solicitor advocate complement in Scotland to support the New Court, particularly if its proposed jurisdiction resulted in the effective transfer to it of some solemn offences which would otherwise have been indicted to the sheriff court. Such cases would have been conducted in all likelihood by solicitors without extended rights of audience. Another concern raised was the potential reduction in the opportunities for solicitors who might otherwise have conducted certain sexual offences before a solemn sheriff and jury court to maintain and develop their skills. Further consideration was therefore given to such concerns given its significant importance to the potential operation of the New Court.

It was importantly acknowledged that the New Court itself was not seeking to create additional courts over and above those already in the High Court complement as extended by the current recovery programme. Rather it would be an effective transfer of those sexual offences cases which fell within the proposed jurisdiction of

[15] *McDonald* v *HM Advocate* [2020] HCJAC 21, *Donegan* v *HM Advocate* 2019 JC 81, *Dreghorn* v *HM Advocate* 2015 SCCR 349 and e.g. *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.

the New Court which would otherwise be heard in the High Court or the sheriff and jury court going to the New Court. The remaining cases outwith the New Court's jurisdiction would continue to be heard and indicted to their respective court forums.

The exact impact the change of jurisdiction on case numbers being effectively transferred from the sheriff court and the associated requirement for extended rights of audience if the Lady Dorrian Review recommendation remained, was not readily ascertainable due to a number of variables and the lack of data currently collated and published by Justice Partners. Consideration by the Group was therefore limited to what data was available, with relevant caveats, the hope being further information would become available and would inevitably be considered further at that point. Unpublished data shared by COPFS within the Group, indicated that as at December 2021 70% of live indictments (584) in the High Court were sexual offence cases, thus requiring agents with extended right of audience; while this figure was 10% (349) in the sheriff court. At the time of writing it has not been possible to ascertain the extent to which that 10% falls strictly within the New Court's strict jurisdiction. One particular caveat was that from the recent experience and recollection of some members of the Group there had been a steep rise in the number of online sexual offences within the sheriff court which, while likely to be included within that 10%, would potentially fall outwith the New Court's jurisdiction if no 'identified complainer' was involved. Notwithstanding this, some members of the Group preferred a broad brush or 'worse case' scenario to be considered. That provision should be made on the basis that the 10% volume in its entirety would effectively be transferred over to the New Court. Similarly, the specific impact on solicitors without extended rights of audience *vis a vis* a possible reduction in skills or workload was hard to assess. The Group considered different indicators to assess the potential number of solicitors impacted. However, as there was no data easily available without further analysis, the Group used general data available from SLAB's website on the number of firms who received a payment from criminal legal aid assistance to facilitate general discussion only.[16] It was acknowledged that this number did not equate to the number of solicitors potentially impacted as most firms can have multiple solicitors and multiple solicitors in a firm can be working on a solemn case at any one time. It also did not take account of those solicitors with applicable expertise in COPFS and the PDSO.

During discussions, the Group acknowledged that resource implications had already been considered by the Lady Dorrian Review. It had acknowledged that it could not[17] 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 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." One Group member indicated those initial start up costs could include the 'training up', as required, of solicitors to obtain extended rights of audience.

[16] The latest SLAB accounts suggest that the number of firms actually receiving payment for provision of criminal legal services in 2020-2021 was 402, a drop from 438 the previous year.
[17] At para 3.32

The majority of members of the Group who provided a view favoured the exploration of steps to encourage and facilitate the 'up take' in those obtaining extended rights of audience in so far as possible and to join the legal profession generally, irrespective of the model of rights of audience adopted, not only to support the New Court but to support the justice sector more generally. Some spoke of, or suggested steps to encourage wholescale careers in criminal practice given challenges faced by the profession at large in people entering the field and/or leaving it. The upward trend in both new entrants to the Faculty and solicitors advocates as reported in recent years was promising.[18] Some members suggested that steps could be taken by the professional organisations, and the justice sector employers to address what were seen as the key barriers to increasing/having current practitioners obtain rights of audience- namely costs and time commitment for undertaking specialist training. Some members felt the transformative nature of the New Court justified the investment in this regard. Given the limited time and resources available to the Group the likely costs and resource implications could not be explored further.

The Group gave consideration to two alternative solutions to the model proposed by the Lady Dorrian Review, with a majority ultimately preferring one for further exploration. Namely: (i) varying the jurisdiction of the court to allow retention of some cases within the sheriff and jury court setting outright; and (ii) extending the rights of audience for the court to include solicitors.

Option (i) Varying the jurisdiction - Given the earlier detailed discussion on the topic, discussed above, and the intention and wish of the Review and this Group for as many complainers, accused and the justice sector more generally to reap the benefits of the New Court, there was no appetite for restricting the jurisdiction of the New Court further. This alternative was rejected by the Group.

Option (ii) Extending the rights of audience for the New Court to solicitors - It was acknowledged by some members at the outset, that this option would be a significant divergence from the recommendation made by Lady Dorrian and her Review which had been supported by a clear and rationale justification. Other alternatives like encouraging training and the up take in rights of audience to improve and assist solicitor practitioner development and experience generally were viable, and of much benefit to practitioners and the justice sector generally. This would require commitment and resourcing, but should be explored. The Review had envisaged a small pool of expert/specialist professionals trained in obligatory trauma-informed practice, who had undertaken detailed training and had proven experience of questioning and interacting with complainers, training which it said was not readily accessible to the legal profession at large. A dedicated team of PH judges in the High Court had already proven the concept. There was a notable bigger pool of practising solicitors available in contrast to the number of advocates and solicitors advocates, while some would have notable experience many may not. A key aim of the recommendation was to ensure all practitioners before the New Court had

[18] The Law Society in July (New solicitor advocates introduced | Law Society of Scotland (lawscot.org.uk)) there has been a significant increase in the number of new solicitor advocates this year following a lull during the pandemic, with more than 20 solicitor advocates introduced to the Court so far. In 2019 the Faculty of Advocates saw the largest number of devils (26) for at least ten years start training; followed by the second largest ever group in Faculty's history in 2021 (28)- see Devils settle into training | Faculty of Advocates

undertaken and were experienced practitioners, thus a key focus on any extension of the rights of audience would require to be on unifying training.

A majority of the Group ultimately agreed that as an alternative to the Lady Dorrian model, rights of audience for the New Court should be extended to include Scottish qualified solicitors. An essential and minimum stipulation however to help in achieving the goal of experience and specialism was that those solicitors would complete the accredited trauma-informed training required of advocates and solicitor advocates, the details of which and accreditation therefore were for the Lord Justice General. Consideration may also require to be given to what additional training might be needed to support practitioners joining the New Court. The ultimate conclusion of the Group was that cases of rape and attempted rape, and those which featured charges on the indictment which remained within the privative jurisdiction of the High Court but had the potential to be remitted to the New Specialist court would still require to be prosecuted/defended by those with extended rights of audience. The reason being that such crimes, and specifically rape (and attempted rape when on the same indictment) would always have required extended rights of audience, and there was no reason to depart from that given the very serious nature of them. The Group noted that assigning rights of audience via crime rather than by court forum would be a novel approach in law, but was ultimately one for legislators to address if the proposal was to be taken forward. Consideration was given by members to whether there was a need for, and if so, what measures could be used to address any concerns or perceived concerns regarding the deviation from the Lady Dorrian recommendation; and to ensure the best and most experienced practitioners could practice before the New Court. Introducing an experience requirement or number of Post Qualified Experience years' (PQE) stipulation was suggested by some members and considered but rejected. It was acknowledged that enforcement of this had practical challenges, in addition to a general appreciation that PQE did not necessarily equate to actual experience in the conduct of the types of cases under discussion. There were a number of experienced solicitor practitioners out there doing exceptional work and whose expertise would be an asset to the New Court.

Some reservations and/or practical considerations were still noted about this alternative too. In particular, that the solicitor profession may not be engaged nor have the time or capacity to undertake the specified training to appear in the New Court, thus the objective of increasing capacity and not de-skilling or limiting the opportunities for a tranche of the solicitors' profession might not be achieved in full or in reality. Members flagged that it was important to allow and encourage access given the wealth of experience that some sheriff court practitioners could have and would bring to the New Court. We return to assisting with training later on in this paper.

A further and relevant consideration to such an alternative approach, and its potential success that some members indicated required further consideration was also the cost, time and overall benefit in training up solicitors in this way. If, as some members suggested, the cost in time or resource of a solicitor completing the trauma-informed training was potentially similar or commensurate to that of becoming a solicitor advocate or similar, then there might be greater benefit in training people up. Both for the profession and justice sector as a whole, and individuals development. The Group ultimately acknowledged that as the scope and

training for the New Court and its procedure and process was yet to be determined, alongside the fact that accreditation of courses was currently envisaged to be for determination by the Lord Justice General, it was difficult for it to make an assessment on this at this juncture, rather it was a matter that required to be taken in to consideration in the future.

Removal of right to appear before the New Court

RCS representatives in the Group questioned whether there was a need to introduce a specific method by which a legal professional who had attained the relevant training and experience to appear before the New Court could, however, have that 'right' removed in circumstances in which e.g. their professional conduct was perceived as being contrary to the principles and rationale of the court and/or trauma-informed principles generally. It was acknowledged by members that generally a 'ticketing system' in most instances includes a process for removing such a ticket. However it was also acknowledged by members that the removal of a right to appear before a court once all relevant entry criteria had been met would be a significant step. Particularly as conduct is generally a matter for a professional's regulating body. Further detailed consideration would require to be given to the issue generally, and to a number of legal, practical and matters of principle if such steps were to be further considered. These included consideration as to who would have the power to remove- if it was to be the court at all; what circumstances/criteria would have to apply; how the professional would be removed; how the professional might be permitted back in to the court; and whether this should ever be an issue for the court. Given the time limited nature of the Group and its extensive remit it was not possible to consider the issue further.

Required rights of audience to appear before the New Court recommendations

The Working Group Recommends that:

- as an alternative to the approach recommended by the Lady Dorrian Review to address concerns discussed in this section, that rights of audience for the Specialist Sexual Offences Court should be extended to include solicitors practising in Scotland who have undertaken the specialist trauma-informed training in dealing with vulnerable witnesses, including examination techniques, in accredited courses approved by the Lord Justice General required for appearance, but with the exception that no solicitor shall prosecute or defend cases before the New Court in which there is a charge(s) of rape, attempted rape (both statutory and at common law)
- irrespective of the rights of audience model adopted in the New Court, to support its implementation in principle it is recommended that there requires to be further consideration and exploration by justice partners in the criminal justice sector regarding the potential to support, encourage and facilitate the 'up take' of training including extended rights of audience in so far as possible to support the New Court and the criminal justice sector. This could include consideration and discussion of costs and time associated with training and perceived barriers to obtain extended rights of audience.

Part 7: implementation of trauma-informed training – other professionals

The Group considered the terms and the proposed reach of the training proposed by the Lady Dorrian Review.[19] In doing so some members queried the specific reach of the training required for legal professionals e.g. did it include instructing solicitors who would not appear before the New Court. The Group accordingly looked at this further.

It was acknowledged that no express mention of this had been made in the Review Report. A majority of members of the Group ultimately supported some form of mandatory requirement for solicitors to be trained in trauma-informed practices when instructed in cases falling within the New Court's jurisdiction. This was on the basis that they were more often than not the parties taking precognitions from complainers and vulnerable witnesses and engaging with vulnerable people involved in a case on a daily basis. A majority agreed that while it should not necessarily be the detailed training required of those appearing before the New Court it should cover the key themes and requirements of the course, finessed as required. Further discussion would be needed on the content and form of such training, as the New Court and the concept of trauma-informed practice evolved. A key aim nonetheless should be to try and maintain consistency in so far as possible in the training, and allow practitioners to easily evidence their uptake of training. It was accepted that there was no readily identifiable party to monitor compliance, and such monitoring may be onerous given the volume of parties its reach would cover. One suggestion was that mandatory CPD for criminal legal professionals, akin to the mandatory requirement for risk management introduced by the Law Society, could be introduced provided this was supported with the provision of sufficient free resources.

Supporting training

Throughout discussions some members of the Group raised concerns about the ability, capacity and cost associated with legal professionals undertaking the requisite trauma-informed training to support the New Court; be it the training as recommended in the Review or by this Group; and what solutions or support for this might be available or could be introduced. While attendance and uptake would be a decision for practitioners wishing to practice in the area, additional support for this was welcomed by many of the Group.

This was a particular concern for solicitors, who while not appearing before the court would, based on the majority views of the Group, be required to undertake some form of training. Consideration was given to a number of options. It was acknowledged in the first instance that there were a number of free online courses, CPD and resources from a variety of organisations which could be accessed by

[19] Namely that the judiciary presiding over the court should receive trauma-informed training in best practice in the presentation of evidence of vulnerable witnesses and appointed to the court by the Lord Justice General; that members of the Faculty of Advocates, solicitor advocates, and prosecutors appearing before the court would also have received specialist trauma-informed training in dealing with vulnerable witnesses including examination techniques, in accredited courses approved by the Lord Justice General; that it was believed essential to the success of the court that administrative and support staff were experienced and well trained, with an understanding of trauma commensurate with the roles they are fulfilling, given they are usually the first contact which a complainer has when attending court, and the nature of the interaction which follows is important. It was envisaged that third sector parties and agencies supporting complainers at court will have undertaken comparable trauma-informed training as well. It was known to the Group that many of the third sector organisations represented on it had advanced this already.

instructing solicitors. The national justice sector trauma-informed framework, once available and introduced, would invariably assist too. Other suggestions received from members were focused on supporting all legal professionals and not just instructing solicitors. Some suggestions included the need for additional public funding/subsidy. Others suggested perhaps introducing courses as part of the entrant syllabus to the Faculty, and the equivalent for solicitors and solicitor advocates.[20] No unified response on a specific recommendation could be reached, but there was broad consensus within the Group that further discussion on the options required to be considered and progressed further, as the concept and creation of the New Court evolved. Some members were particularly conscious that further consideration and discussion may be better focused to take place and align with the development of the justice sector wide national trauma-informed framework and resources which would be provided to support that.

Implementation of trauma-informed training recommendations:
The Working Group recommends that:

- solicitors instructed in the prosecution or defence of cases proceeding before the New Court should be required to undertake trauma-informed training. The scope and detail of which, and the extent to which a solicitor may require to evidence compliance requires to be considered further. It is not envisaged by members of this Working Group that it should emulate the content and terms of the accredited courses required for those appearing before the New Court, but its key themes and issues should be included
- further consideration requires to be given as to the methods and ways in which legal professionals, particularly those solicitors not appearing before the New Specialist Sexual Offences court could potentially be assisted in complying with their obligations to undertake trauma-informed training, and how that could be evidenced and monitored
- further consideration and possible options, while not exhaustive, could consist of the availability of public funding, the exploration and expansion of free or reduced fees for courses, and review of current training requirements on entry to branches of the profession.

Part 8: practice and procedure in the New Court

Some members of the Group suggested that one of the new practices or methods of management that the New Court could adopt could be a move from a floating trial model to a fixed trial model. RCS and Victim Support Scotland (VSS) in particular wished fixed trials to be introduced. Such a model was perceived as adding greater certainty for complainers and witnesses; while a floating trial model was seen as not being truly compliant with trauma-informed practice for vulnerable witnesses. In addition, COPFS indicated that from their perspective, floating trials caused an administrative burden as consideration had to be given to the allocation of c74 prosecution counsel (Advocates Deputes “ADs”) to undefined dates. In contrast, while accepting the need and rationale for improving the experience of all court users, some members expressed concerns about the introduction of fixed trials in

[20] See section 120 Legal Services (Scotland) Act 2010 and Act of Sederunt (Regulation of Advocates) 2011, para 1 and 2 which identify who is responsible for admitting persons to the public office of Advocate and the criteria and procedure for admission. See section 25A of the Solicitors (Scotland) Act 1980 in respect of solicitors seeking extended rights of audience.

the New Court without addressing issues and challenges with the current approach which would equally apply to a fixed trial model. The concern was that without addressing the challenges prevalent in the current system; rather than improving the experience for complainers, witnesses, accused and the justice system generally, there was significant potential for greater delay with the time between PHs and trials increasing significantly, with less efficiency and flexibility, potential empty courts and the Covid-19 backlog growing. Their preference was for the issues identified as causing challenges for court programming in the floating trial model to be managed and improved in so far as possible first. It was acknowledged in the first instance that this was not a matter for legislation and that the overall efficient progression of business of the New Court would remain a matter for the Lord Justice General or such other officials identified in the New Court's ultimate governance structure, the need for which is discussed above.

To inform discussions and considerations of the introduction of fixed trials in full or in part, the SCTS provided unpublished data and information to the Group to help illustrate the challenges the current practice of estimates, late pleas and adjournments posed, and the flexibility the floating model provided in contrast to a fixed model. It was explained that currently floating trials were used in the High Court for all but exceptional solemn business. High Court programming for all 20 trial courts was proactively managed via meetings with the Crown. Loading (i.e. the number of cases assigned to each trial court) reflected the estimates of length given, and the cases identified, by the Crown and defence as ready for trial.

Importantly, contrary to initial perception of some members of the Group, it was submitted that the floating model provided flexibility and a degree of certainty for all court users. For the period April to end July 2022 data indicated that the vast majority (94%) of all High Court trials that proceeded, called within 4 days of the identified start date of the float, with 26% on the identified date, followed by 19% on the first day of the float.

It was explained by SCTS that estimated and actual trial length figures provided by Crown and defence played a significant role in court scheduling and impacted the running of trials. An automatic move to a system of fixed trials for cases without seeking to make improvements to estimates and minimising adjournments and pleas at the start of, and during the trial, in so far as possible had the potential to significantly impact on trial programming, courtroom utilisation and churn; resulting in more uncertainty and further delays working contrary to the hoped intentions of members. For example in quarter 1 of 2022/2023 the Group was advised that the High Court was provided with accurate estimates in only 32 out of 150 occasions (21%), with 56% of trials exceeding the trial estimate. It was highlighted by some practitioner members that this data indicated the difficulties professionals faced in estimating trials generally, which was not a science. A number of variables were at play at any given time, with some not foreseeable at the time of the estimate given to the court. Covid-19 and general illness impacted witness, staffing and professional availability and the ability to proceed with cases and trial duration. Duration of the trial could also be influenced by the trial judge to some extent. The point of note for particular consideration, it was submitted by SCTS, was that a floating model provided a flexibility which a fixed model could not. If a trial finished early other cases in the float could be moved in to the court. If a case spilled over its estimated length

there would be an impact on when the next scheduled trial can start, potentially delaying its start significantly or leading to its adjournment; impacting counsel and solicitors' ability to accept instructions. A floating trial model allowed the potential for other cases to be moved to other courts, a fixed model would not.

It was acknowledged by all that more could potentially be done by practitioners to improve the interim floating model situation, while also acknowledging that some aspects, particularly regarding witnesses and illness remained outwith their control. There was a real impetus within the Group to improve the scheduling model and to work collaboratively to achieve that. The inevitable lead in time before the introduction of the New Court provided justice partners the opportunity to explore and potentially further address these challenges and concerns raised. That progress in this regard should continue to be reviewed.

Members agreed that the use of fixed trials should be an aspiration for the New Court. That there might still need to be for some flexibility in the model ultimately used by the New Court to ensure efficiency and avoid unnecessary court downtime and negative impact on the recovery programme however.

Progressing matters
The Group considered how progress could be made to help reach its recommended aspiration of an improved court programming model with fixed trials including potential alternatives to the immediate introduction of a wholescale fixed diet system. It felt that ongoing consideration and review would have to be given to the landscape and data available going forward by those responsible for the programming of the New Court, particularly when the commencement date for the New Court was known.

Use for selected cases
It was suggested by some members of the Group that if fixed trials could not be introduced automatically or wholescale into the New Court then as a minimum they should be used for selected cases. It was suggested that it could be used in those perceived rare situations, where a complainer was giving live evidence. This suggestion and perceived 'rarity' proceeded on the assumption that the Lady Dorrian Review recommendation (recommendation 1) that all complainer evidence could be pre-recorded would apply. It was acknowledged that there would be practical, albeit not insurmountable challenges to such an approach. E.g. identifying such cases would require detailed and considered preparation prior to and at the Preliminary Hearing by the parties supported by case management- which the Group recommended in any event. There were, or might be, situations where a change to live evidence might not be foreseeable at such a procedural stage. Rather it may be dictated by the facts and circumstances close to or at trial, which might be hard to address/be captured for such an approach. Further detailed consideration would be needed on the circumstances it would apply and how it would work in practice. There was some support for this suggestion within the Group, and progression of it is accordingly recommended subject to the challenges and practicalities referenced and the individual circumstances of cases.

More engagement and collaboration between justice partners
The Group acknowledged that concerns about complainer and witness certainty were not solely or strictly connected to, or are a consequence of, the actual floating trial process itself necessarily, but rather they related to a number of factors or inputs in to it, which had the potential for improvement now and also as part of the case management within the New Court too. In addition to taking steps now, it was submitted and agreed that the New Court, provided a unique opportunity to improve the causes of current challenges, and on the face of it inadequacies, and that should be a particular focus of the practice and procedures it introduced in so far as possible. A recommendation has been made to that effect.

Communication with complainers
Practitioner members of the Group themselves acknowledged that the floating trial concept was challenging to understand and follow for them. Members therefore felt that in line with improving communication and complainers understanding as per recommendation 3 of the Lady Dorrian Review there was merit in continuing to improve communication and complainer understanding of the concept, covering in particular the factors that might impact when their trial might in fact start. The single point of contact, as recommended by the Lady Dorrian Review, could, if implemented, support that further.

Practice and procedure in the New Court recommendations:
The Working Group Recommends that:

- the introduction of fixed trials in the New Court should be a key aspiration, with the introduction and potential use of such a model kept under constant review prior to, at commencement of, and throughout the operation of the New Court by those responsible for the New Court and, or its programming. The model used by the New Court should ultimately seek to achieve an optimum balance between efficiency and flexibility
- fixed trial diets for those cases in which a complainer's evidence has not been pre-recorded and therefore they require to attend the New Court to give 'live' evidence should be used in so far as possible and practicable, taking cognisance of the individual circumstances of the case
- in the interim there should be concerted efforts by justice partners involved in the High Court trial process to review the respective roles they play and collaborate and engage further in the identification of cases for trial, provision of estimates, and trial duration with a view to improving efficient use of current trial diets and trial scheduling in so far as possible and practicable
- with a view to improving programming and efficiency of the use of the trial model to be adopted, in so far as possible and practicable, the New Court should aim to encourage, via the use of judicial oversight and case management in particular, improved engagement and communication between prosecutors and defence to facilitate the identification of cases ready for trial, improved estimated duration of trials and efficiency during trials. Progression in this regard may be assisted with the ultimate conclusions of the review in to defence statements recommended by the Lady Dorrian Review
- meantime and in line with the recommendation made by the Lady Dorrian Review for improved communication to complainers, there should continue to be steps taken to improve communication with complainers regarding how the

floating trial model operates, and their general understanding of the concept in so far as possible and practicable

Part 9: legal aid provision for the New Court

The Lady Dorrian Review recommended that there should be "(l) Legal aid provision for the court including a dedicated table of legal aid fees."

There was almost unanimous support within the Group that how legal aid provision could support the New Court remained a pertinent issue, with further consideration of the issue requiring to be taken forward.

It was agreed, by majority, that as a minimum a refreshed look at the structuring of legal aid to support the New Court might be needed and progressed. Members noted that existing Legal Aid provision was based on offence type and level of representation, resulting in differences in the fees paid for parties and counsel appearing in the sheriff court and those appearing in the High Court. Given the New Court would remove at least in part such distinction, there was a requirement for the matter to be revisited. While, as noted earlier in this paper, concerns were raised about how trauma-informed training could be resourced it was acknowledged by the Group following discussion that the legal aid fund, in its current form at least, was not an appropriate source to support this for the avoidance of doubt.

Due to limits on its time and the extensive scope of work to be considered the Group was not able to fully explore and consider the approaches that could be taken to support the Court, be it via a new table or using more holistic changes. It was also mindful of ongoing dialogue and discussion regarding legal aid provision for the future more generally, and that more detail would be needed about the final proposed court structure and procedure. The Group recommended that further consideration of the recommendation should be progressed through further consideration and discussion with justice sector partners including the Scottish Legal Aid Board. Should it assist, some members of the Group were willing to regroup or to otherwise support progression of this action in so far as that would be of assistance.

Legal aid provision in the New Court recommendations*:*
The Working Group recommends that further consideration of the original recommendation should be progressed, initially through further consideration and discussion with justice sector partners including the Scottish Legal Aid Board.

Part 10: defence statements – consideration and discussion of implementation of a review as recommended by the Lady Dorrian Review

The Group, as part of its Terms of Reference had been tasked with considering what, from its perspective, the key components and substance a review of defence statements under section 70A of the 1995 Act might take, noting the benefits and practical challenges associated with implementing such a review, possible solutions to those and making recommendations for progression in so far as possible. To facilitate that consideration the Group revisited the background to the introduction of

the current provisions, and identified and explored a number of options. The Group was mindful that the need and form of a review was the subject of consultation.[21]

From the outset all members supported the progression of a review and this is accordingly recommended.

Remit
It was accepted at the outset by members of the Group, that a review would primarily need to be a legislative one, which would require to take cognisance of practice and procedure and the views of the principal justice partner participants in the process. It was also accepted that there would be a need to consider the potential impact on and the need to ensure that any changes that a Review might recommend, were ECHR compliant, maintaining the accused's right to a fair trial.

Who
To facilitate focused discussion and collation of views by the Group four options, with their associated benefits and challenges were considered. The options being:

- A judicially led review by appointment in consultation with the head of the judiciary (Lord President).
- An independent review by a non-judicial member of the legal profession, by Government request/appointment.
- A designated time limited justice sector Review Group with membership drawn from key stakeholders, akin to the present group; and
- Other- an alternative or combination of aspects of the options.

It was agreed from the outset by members that recent and practical experience of and qualifications in law and in the use of defence statements were seen as essential requirements of the ultimate reviewer to be appointed. There was unanimous support amongst those who expressed a view within the Group for options a) or b) to be explored, with a majority ultimately supporting a) notwithstanding judicial capacity and resourcing concerns raised by members. Reviews led by judicial members were common, as evidenced by the appointment of Lord Coulsfield to the review which had been the pre-starter to the discussion and the ultimate legislative provisions put in place for defence statements. Such benefits were seen to have the benefits of independence and impartiality. Concerns were raised by some members of the use of members of the judiciary, given the limited pool from which the candidate could be drawn and their current utilisation in the extensive recovery programme, which had the potential to include recently retired senators. Members suggested that a potential solution could be to put arrangements in to allow a current senator to perhaps work 'part time' rather than fulltime on the Review, acknowledging that that would have knock on impact on the length of the review.

Scope
The Group considered the potential scope of the Review. It recognised that the Recommendation had made it clear that as a minimum consideration should be

[21] See Improving Victims' Experiences of the Justice System, May 2022

given to the current utility of defence provisions. For its discussion there were a number of areas for potential consideration that should also be included:

- The timing/deadlines for submission of defence statements/updated defence statements and the impact these have on preparation for trial and communication and experience of complainers.
- The importance of early case management by the judge.
- The terms of the equivalent legislative provisions in England and Wales.

All members of the Group who expressed a view agreed that a prescriptive list of issues should not restrict the Reviewee, rather the Reviewer who should have a broadly unlimited discretion to consider the issues believed pertinent to the Review as, it was anticipated, issues would become apparent as the Review progressed. The points raised above may be a useful starting point. Clearly defined Terms of Reference for the legislative review at the outset would assist in managing this and expectations and resourcing generally. Some members suggested that its terms could perhaps be agreed in consultation with interested parties.

Timescales for the Review

The Group discussed what time period, if any, should be set for the Review and if the Reviewer would have authority to seek an extension.

It was acknowledged that there was undoubtedly a fine balance to be reached between ensuring that a sufficiently wide scope and remit of work was available, against the practical ability to undertake the Review within a reasonable time. In its discussions the Group took cognisance of the fact that the Lady Dorrian Review had made clear that the review of defence statements should proceed irrespective of the implementation of any of the other recommendations made in the report. There was an impetus for it given its outcome was not solely intended to improve the case management powers of the new specialised court, but the current High Court both in the interim while other elements of the Review were progressed and in the future. An impetus which many members supported.

It was acknowledged that discussing and agreeing defined timescales may be challenging when the personnel, scope and workload of the Review have yet to be defined. There was also no ‘typical’ period of time within which a Review was completed, for a variety of reasons. It was acknowledged that providing a defined time limit or some other form of steer would, however, have the benefit in principle of providing certainty and progression of the matter. While some submitted that a defined period would potentially limit discretion and/or the extent of the exploration and investigation that can be undertaken, safeguards like providing the appointed reviewer the option to seek additional time if further investigations or an avenue required to be explored; or a requirement to provide an interim report within a specified period, with a further period of review to report on any/such outstanding matters were sufficient safeguards. An opposite position suggested was that the Reviewer have an unlimited discretion on the timescales to report.

It was agreed by the majority that a timescale for the Review to allow focus would be preferable, but that would require to be set with reference to the ultimate appointee

and their commitments. Some members suggested that a period of between 9-12 months might be adequate for completion, with no requirement for extension.

Defence statements recommendations
The Working Group recommends:

- That progression of a review in to defence statements should remain a priority in accordance with the preference and stipulation of the Lady Dorrian Review.
- That the Reviewer should be derived from the legal profession, with a preference that they be drawn from the current or recently retired judiciary. The Reviewee should for the avoidance of doubt have extensive and recent experience of the High Court and defence statements.
- That the Reviewee should have unlimited/unfettered discretion on its terms of remit and reference which would require to be refined further.
- That there was a preference for the review of defence statements to be undertaken and completed as soon as practicable, taking cognisance of the need for appropriate time for consultation, exploration and discussion and the commitments of the ultimate reviewer. The Group's preference was for an outline time period to be agreed taking cognisance of the aforementioned. A 9-12 month period.

Part 11: conclusions and recommendations of the Working Group and next steps

After detailed discussion and deliberation over a wide ranging number of practical and legal issues the Working Group makes the following recommendations, acknowledging in particular the requirement placed upon it in the Terms of Reference to make recommendations on next steps:

Next steps

That steps should be taken to progress implementation by means of legislation the creation of a national Specialist Sexual Offences Court with the core features and elements recommended by the Lady Dorrian, as further updated and innovated on below.

The Working Group recommends that:

- the Specialist Sexual Offences Court should, as the Lady Dorrian Review recommended, have national jurisdiction established by statute with authority to hear all serious sexual offences as listed at Paragraph 36 – 59ZL of Schedule 3 to the Sexual Offences Act 2003 as applicable and enforceable but with the exception of paragraphs 41A, 44, 44A, 45, and 46 (excluding 41A, 44, 44A, 45, 46, and 59A where there is no complainer) "Serious Sexual Offences"
- it should have authority to hear all types of solemn offences on indictment (**but excluding murder**) provided such charges are alongside or at least in combination with of one or more charges of Serious Sexual Offence, with such charges being the primary charges for consideration by the Court
- as masters of the instance, it should be at the discretion of COPFS to determine in the first instance via indictment the most appropriate forum to prosecute cases including where both sexual and serious non-sexual offences

feature on the same indictment. I.e. by indictment to the Specialist Sexual Offences Court, High Court, and sheriff and jury court as applicable

- as recommended by the Lady Dorrian Review there should be a power of remit of cases to and from the Specialist Sexual Offences Court. This will be achieved by application by one or both of the parties, or by the applicable court of its own accord. The following constitutes appropriate criteria for determining whether cases should be transferred from the High Court (and, as applicable, solemn sheriff and jury court) to the Specialist Sexual Offences Court, namely that:
  - the charges libelled on the indictment (which must include at least one serious sexual offence as defined above) otherwise fall within the identified jurisdiction of the Specialist Sexual Offences Court and thus it has jurisdiction to hear the case; and
  - In all the circumstances, the High Court, or Sheriff and Jury Court (as applicable), considers it appropriate to do so
  - the Specialist Sexual Offences Court will have final say on cause shown on whether such a transfer should be effected, as the Court of Session has in respect of transfer of cases within the privative jurisdiction of the sheriff court[22]
- in those very rare cases in which it may be merited the Sexual Offences Court should have the power to transfer cases to the High Court (and/or the sheriff and jury Court) on special cause shown, with the High Court having the final say on whether such a transfer should be effected in respect of cases being remitted to
- to ensure efficiency and minimise delay and promote certainty in those rare cases in which a remit to or from the Specialist Sexual Offences Court requires to be made, it should be done at the earliest possible opportunity and preferably no later than the first Preliminary Hearing in the case (First diet in the sheriff and jury court as applicable), unless circumstances dictate otherwise
- the National Specialist Sexual Offences Court to be implemented should subject to any derogations or otherwise exceptions in law have an unlimited sentencing power which includes the right to make orders for life long restriction
- as stipulated by the Lady Dorrian Review the New Court should be presided over by members of the judiciary who have relevant experience and 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. Candidates may therefore be drawn from the High Court and shrieval complement. The criteria for consideration and appointment to the New Court is to be determination by the Lord Justice General. Such eligibility criteria for the post should, in so far as possible seek, to ensure that candidates have and can evidence the required range of skills, knowledge and experience to preside over the New Court, including the completion of designated courses. Office holders should for the avoidance of doubt be supported by additional training including on sentencing as required (and as separately recommended by this Group)

[22] Per section 92 of the Courts Reform (Scotland) Act 2014. Subsection 5 provides, that on receiving a request, the Court of Session may, on cause shown, allow the proceedings to be remitted to the Court.

- for the avoidance of doubt the Lord Justice General shall have authority to both appoint and also remove appointees from the New Court in such circumstances as are deemed appropriate by him
- as an alternative to the approach recommended by the Lady Dorrian Review to address concerns discussed in this section, that rights of audience for the Specialist Sexual Offences Court should be extended to include solicitors practising in Scotland who have undertaken the specialist trauma-informed training in dealing with vulnerable witnesses, including examination techniques, in accredited courses approved by the Lord Justice General required for appearance, but with the exception that no solicitor shall prosecute or defend cases before the New Court in which there is a charge(s) of rape, attempted rape (both statutory and at common law) or murder.
- irrespective of the rights of audience model adopted in the New Court, to support its implementation in principle it is recommended that there requires to be further consideration and exploration by justice partners in the criminal justice sector regarding the potential to support, encourage and facilitate the 'up take' of training including extended rights of audience in so far as possible to support the New Court and the criminal justice sector. This could include consideration and discussion of costs and time associated with training and perceived barriers to obtain extended rights of audience
- solicitors instructed in the prosecution or defence of cases proceeding before the New Court should be required to undertake trauma-informed training. The scope and detail of which, and the extent to which a solicitor may require to evidence compliance requires to be considered further. It is not envisaged by members of this Working Group that it should emulate the content and terms of the accredited courses required for those appearing before the New Court, but its key themes and issues should be included
- further consideration requires to be given as to the methods and ways in which legal professionals, particularly those solicitors not appearing before the New Specialist Sexual Offences Court could potentially be assisted in complying with their obligations to undertake trauma-informed training, and how that could be evidenced and monitored
- further consideration and possible options, while not exhaustive, could consist of the availability of public funding, the exploration and expansion of free or reduced fees for courses, and review of current training requirements on entry to branches of the profession
- the introduction of fixed trials in the New Court should be a key aspiration, with the introduction and potential use of such a model kept under constant review prior to, at commencement of, and throughout the operation of the New Court by those responsible for the New Court and, or its programming. The model used by the New Court should ultimately seek to achieve an optimum balance between efficiency and flexibility
- fixed trial diets for those cases in which a complainer's evidence has not been pre-recorded and therefore they require to attend the New Court to give 'live' evidence should be used in so far as possible and practicable, taking cognisance of the individual circumstances of the case
- in the interim there should be concerted efforts by justice partners involved in the High Court trial process to review the respective roles they play and collaborate and engage further in the identification of cases for trial, provision

of estimates, and trial duration with a view to improving efficient use of current trial diets and trial scheduling in so far as possible and practicable

- with a view to improving programming and efficiency of the use of the trial model to be adopted, in so far as possible and practicable, the New Court should aim to encourage, via the use of judicial oversight and case management in particular, improved engagement and communication between prosecutors and defence to facilitate the identification of cases ready for trial, improved estimated duration of trials and efficiency during trials. Progression in this regard may be assisted with the ultimate conclusions of the review in to defence statements recommended by the Lady Dorrian Review
- progression of a review in to defence statements should remain a priority in accordance with the preference and stipulation of the Lady Dorrian Review.
- the Reviewer should be derived from the legal profession, with a preference that they be drawn from the current or recently retired judiciary. The Reviewee should for the avoidance of doubt have extensive and recent experience of the High Court and defence statements
- the Reviewee should have unlimited/unfettered discretion on its terms of remit and reference which would require to be refined further
- there was a preference for the review of defence statements to be undertaken and completed as soon as practicable taking cognisance of the need for appropriate time for consultation, exploration and discussion and the commitments of the ultimate reviewer. The Group's preference was for an outline time period to be agreed taking cognisance of the aforementioned 9-12 month period

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