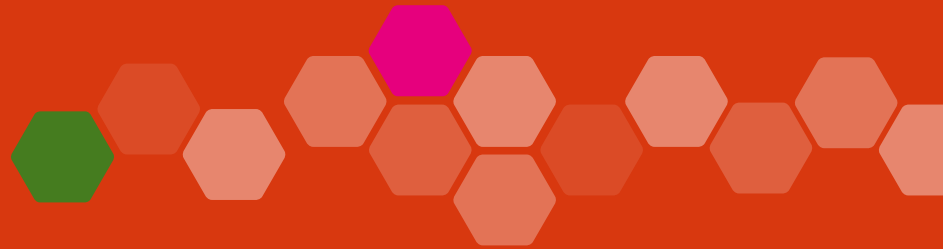




Scottish Government  
Riaghaltas na h-Alba

# Alternatives to Jury Trials: an evidence briefing for the Consideration of a Time-Limited Pilot of Single Judge Rape Trials Working Group



**CRIME AND JUSTICE**



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# Summary

- Research shows further evidence on the negative impact of rape myths and misconceptions on the complainant, but also raises concerns about perceived fairness by legal professionals when using single judge trials.
- Overall, there is a lack of empirical research comparing modes of trial for rape cases, which makes it difficult to draw any robust conclusions in relation to their impact on the complainant, rights of the accused, public confidence in the justice system and conviction rates.
- That said, there are some tentative indications that the complainant experience may be improved by a single judge trial model, but it might be more dependent on wider court procedures and approaches to (cross) examination than the mode of trial itself.
- Providing a written reason of verdict is seen as a clear advantage of single judge trials, both for the complainant and accused.
- Studies suggest that considering the rights of the accused should include agreeing on the justifications/criteria for single judge trials, establishing clear procedures to ensure consistency and transparency and addressing (implicit) bias and diversity in the judiciary.
- Significantly, where single judge trials for serious offences have been adopted, e.g. in countries such as New Zealand, Australia, Canada and the United States, it is by choice of the accused. There were no instances found of jurisdictions introducing alternatives to jury trials specifically for rape cases.
- There is no clear data on the effect of changing mode of trial on public confidence in justice system, although studies have shown a clear support of the public for the jury system. These studies however, did not ask directly about changing mode of trial in specific cases, such as for rape offences.
- The evidence is mixed on conviction rates, from lower, to no difference, to higher rates of conviction for cases tried by single judge, although, again, the evidence is limited and not specific to rape cases.
- Literature discussing mixed panels of professional and lay judges point to the possibility to mitigate concerns about the lack of community engagement and potential bias with one decision-maker, while preserving some of the advantages of a single judge trial such as clearer judicial direction and a reasoned written verdict.

- Overall, the literature suggest that to understand the impact of a change in mode of trial, it is important to take into account how a new mode of trial interacts with already established procedures in the criminal justice system. To improve the complainer experience additional reflection would be required on pre-trial and cross-examination procedures and training given to legal professionals.
- Taking into account that the evidence presented is limited and not always specific to sexual offences, it is difficult to make a clear translation to the context of a Scottish pilot for rape offences. A pilot can offer valuable and much needed empirical data and insight on the effects of a change in mode of trial.

# 1. Introduction

## Summary:

**The research available is limited, and the briefing draws on 24 studies, with most of them not specifically focusing on rape cases. The briefing therefore does not allow for robust conclusions to be drawn on the impact of single judge trials in rape cases.**

**Recent discussions, particular in the COVID-19 context, have shown that there is a more general ongoing discussion on the use of single judge trials.**

**In the context of rape offences, findings reiterate the arguments in the Lady Dorrian Review, with research finding further evidence on the use of rape myths and misconceptions in sexual offence trials, although they leave open questions about the effectiveness of jury education as well as a change of mode of trial.**

This section sets out the aim of this briefing and what research has been included.

This briefing was commissioned by the Consideration of a Time-Limited Pilot of Single Judge Rape Trials Working Group. The working group was established by the Lady Dorrian Review Governance Group to progress the recommendation by Lady Dorrian as part of her 'Improving the Management of Sexual Offences Review to consider a pilot introducing single judge trials for rape cases (Recommendation 5<sup>1</sup>).

The aim of this evidence briefing is to support and inform the Working Group's deliberations on the merits and challenges associated with alternatives to jury trials in cases of serious sexual assault. In response to the commission from the Working Group set out at Annex I, this paper reviews the academic literature published on the impact of single judge trials in rape/serious sexual offence cases covering the following themes

1. the experience of complainers during the trial process;
2. the rights of the accused;
3. public confidence in the justice system; and
4. conviction rates.

This evidence briefing is based on a desk-based literature search. An overview of the methodology and literature included in this briefing can be found in Annex II. The briefing initially considered empirical studies published since the publication of

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<sup>1</sup> The recommendation is part of the [Lady Dorrian Review](#). The report made six recommendations on the management of sexual offence cases, of which two referred to jury trials. Recommendation four suggests steps to enhance the quality of jury involvement. Recommendation five asks for consideration to be given to "developing a time-limited pilot of single judge rape trials to ascertain their effectiveness, how they are perceived by complainers, accused and lawyers, and to enable the issues to be assessed in a practical rather than a theoretical way" (p.118).

the Lady Dorrian Review, and focused on analysing single judge trials for rape cases. This however, resulted in only one study by Elisabeth McDonald (2022), comparing single judge trial and jury trial rape cases in New Zealand<sup>2</sup>. The search was therefore expanded to both research articles and review studies<sup>3</sup> in the last 25 years and not only focused on rape cases but single judge trials in general. This resulted in 24 studies that either came out after the Lady Dorrian review was published or studies that were published before but were not considered as part of the evidence base which informed the Lady Dorrian Review's consideration of Single Judge Rape Trials.

Five of these studies focus on a mode of trial different from either jury or single judge. These are included to reflect on the potential alternatives available. The evidence on these modes of trial included here is, however, not exhaustive and an extensive literature search on alternatives to single judge trials was not conducted, as the main focus of the working group is on single judge trials.

In summary, this briefing considers evidence on the impact of alternatives to jury trials in sexual offence cases. It finds that:

- The relatively small number of studies (24) available, with most of those not specifically focused on sexual offence cases, limits the conclusions that can be drawn.
- No examples have been found in other jurisdictions of a single judge trial model being used specifically for prosecuting rape cases. Caution should therefore be given to translating the outcome of the studies in this briefing to pilot single judge trials for rape cases in Scotland.

## 1.1 The Lady Dorrian Review

This section summarises the findings of the Lady Dorrian Review.

The Lady Dorrian review looked at ways in which the management of sexual offence cases could be improved, especially looking at its impact on the complainer. Chapter 5 discusses both the advantages and challenges of utilising a single judge trial model for rape cases opposed to jury trials.

Potential positive impacts discussed in the Lady Dorrian review include:

- Improved complainer experience through:
  - Avoiding juror bias and the impact of rape myths and stereotypes.
  - Examination more focused, courteous and less confrontational.
- Improved understanding in the process for accused and complainer, through a written verdict.
- Improved court procedure:
  - Less time consuming
  - Less expensive

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<sup>2</sup> Elisabeth McDonald. (2022). [\*In the Absence of a Jury\*](#). Canterbury University Press.

<sup>3</sup> Research articles include studies that discuss (novel) research projects performed by the authors of the study. Review studies analyse and summarize research articles on a specific topic.

- Less disruptive

Potential negative impacts include:

- Relying on only one decision-maker could increase impact of bias. Random selection of jury allows for diversity amongst decision-makers and marginalises extreme or unrepresentative views.
- Limited legitimacy:
  - Community involvement has the potential to enhance public understanding of and respect for fairness of system.
  - Single decision-maker could raise questions about prejudice.

The Review also identifies two other alternatives to single judge trials that can mitigate some of the concerns with jury trials:

- **Panel of judges** - This would mitigate some the challenges identified in relation to single judge trials regarding diversity in decision-making, but would be very expensive and would require an increase in the number of judges and sheriffs
- **A judge sitting with a lay panel** - This would retain a lay input into decision-making and retain some diversity. Moreover, a panel that features and is directed by a judge could eliminate rape myths and prejudice more easily. Trials in this format would probably take longer than single judge trials.

The Review also discusses other approaches specifically to mitigate the impact of rape myths on jury decision-making, namely increased use of plain language directions, instructing jurors on rape myths, and the inclusion of Routes to Verdicts for jurors. These are captured under recommendation 4 of the Lady Dorrian Review<sup>4</sup>.

## 1.2 The Current Context

This section considers how the context in respect of alternatives to jury trials has changed since the Lady Dorrian Review. It reflects on the impact and legacy of the COVID-19 pandemic on justice systems internationally and recent research highlighting the justice context of sexual offences.

The international picture on adopting alternatives to juries over the last decades is mixed. Several countries, such as Japan, South Korea, Spain and Argentina have introduced or increased citizen participation in court while other places, such as some Caribbean countries have introduced single judge, with Trinidad and Tobago commencing single judge trials in 2019 as an option for the accused, including in rape cases. Significantly, where single judge trials for serious offences have been adopted, also in countries such as New Zealand, Australia, Canada and the United States, it is by choice of the accused. It is important to note that there were no instances found of jurisdictions introducing alternatives to jury trials specifically for rape cases.

Norway has also shown a move away from jury trials, but has changed to using a mixed panel of professional judges and lay judges (see box 4). Although the main

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<sup>4</sup> Page 117-118 of the [Lady Dorrian Review](#).

reasons for moving away from the jury system were a general concern about transparency and to benefit from a collaborative decision making process between judge and lay assessors, some attention was also paid to rape cases specifically. In her study on the new Norwegian mixed panel system, Anna Offit (2021) mentioned politicians and judges in Norway had expressed concerns that lay persons would not be able to fairly assess the credibility of female victims<sup>5</sup>. Prosecutors also saw risks in juries in rape cases acquitting people for the wrong reasons, and with no written verdict this was difficult to assess. The mixed court system, where professional judges can give direction to lay judges, was therefore seen as better suited. However, Offit also mentioned that (especially older male) professional judges could just as likely harbour similar prejudices as lay persons.

During the COVID-19 pandemic, jurisdictions considered introducing single judge trials (for all serious offences) to tackle the backlog of court cases<sup>6</sup>, with some countries and regions adding single judge trials as an option for defendants<sup>7</sup>. In Scotland, an initial proposal to enable trials without a jury, was postponed and eventually not included in the Coronavirus Bill. The search of (emergency) alternatives during the pandemic resulted in increased scrutiny on single judge trials (see box 1 for an example from Australia). In these debates similar arguments were covered as those addressed by the Lady Dorrian Review.

Overall, the literature showed:

- a number of jurisdictions have introduced single judge trials in recent years, as option for the defendant.
- simultaneously, however, there are other jurisdictions which have increased citizen participation in their justice systems; and
- significantly, there were no examples identified of other jurisdictions introducing single judge trials specifically for rape cases

### **Box 1 – Debating Single Judge Trials in Australian Capital Territory**

Australian Capital Territory (ACT) introduced an emergency bill in April 2020 that included provisions allowing the court to order a trial by judge alone if it would ‘ensure expeditious discharge of the business of courts’ and ‘is otherwise in the interest of justice’. This differed from other State approaches in Australia where single judge trials were permitted even before COVID-19, but are chosen by the defendant. ACT government gave three main justifications for the change: to ensure the integrity of witness testimony; to prevent unnecessary prolonging of victim trauma and to avoid extended periods of indeterminate remand for those

<sup>5</sup> Offit, A. (2021) Dismissing the Jury: Mixed Courts and Lay Participation in Norway. In S. Ivković, S. Diamond, V. Hans, & N. Marder (Eds.), *Juries, Lay Judges, and Mixed Courts: A Global Perspective*. p. 197-217. Cambridge: Cambridge University Press. doi:10.1017/9781108669290.004

<sup>6</sup> See for example the BBC article: [Lord Advocate Dorothy Bain suggestion to consider single judge trials](#)

<sup>7</sup> An example is Victoria State in Australia, where single judge trials (consented by accused) were introduced through amendments to the Criminal Procedure Acts 2009 in April 2020. However, the legislation was repealed in April 2021.



awaiting trial. While these concerns were considered valid, doubts were raised as to whether this move was constitutional and whether better alternatives existed .

The new law in ACT was challenged by the Law Council of Australia on the basis that the right to a fair trial by jury must be observed unless the accused consents to a single judge trial. The Law Council stated that the jury is a fundamental part of the criminal justice system, allowing the community to play an important and direct role and providing a safeguard against arbitrary or oppressive enforcement of the criminal law by those in authority. Felicity Gerry, professor at Deakin University, reiterates this and suggests that even when a defendant consents to a single judge trial “there is a real risk we lose a sense of public accountability for decisions at the state level and the methods used to accuse people of serious crime”. She points out that jury service is an exercise in democracy and more analysis is needed of single judge trials to understand any differences, for example in acquittal rates. Lastly, Gerry draws attention to the lack of diversity in the Australian judiciary, which she argues raises the question whether it might lead to potential biased decisions against minority groups.

Source: Gerry, F. (2020) [Jury is out: why shifting to judge-alone trials is a flawed approach to criminal justice](#). Published in The Conversation

### **1.2.1 Sexual offence cases**

This sub-section gives an overview of recent publications on the prosecution of sexual offence cases in the criminal justice system, to assess whether the context has changed since the Lady Dorrian review was published which the Working Group may wish to take account of as part of its deliberations.

A key part of the Lady Dorrian Review’s rationale for proposing that further consideration is given to introducing single judge rape trials was concerns around how juries arrive at verdicts in these cases, an issue which publications have continued to highlight since publication of the Report. In 2021, for example, a cross-UK government end-to-end review into the Criminal Justice System was carried out to understand the response of the system to adult rape offences in England and Wales<sup>8</sup>. Research for this review included exploring the experiences and views of police, CPS, support services, lawyers and judges. Participants in all of these groups mentioned the complex role of juries. Specifically, they felt that juries lacked education to understand the unique complexities of rape cases, for example not understanding the impact of the offence on the victim and lacking knowledge of victim behaviour, rape trauma and forensic science. Some lawyers and CPS participants mentioned that juries were often swayed by personal views and biases. The participants identified several common rape myths and stereotypes in the criminal justice system, with some reporting they witnessed rape myths in courts and felt these were insufficiently challenged. While all judges said they would give judicial directions to the jury in rape cases, some lawyers raised concerns about the effectiveness of these.

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<sup>8</sup> George, R. and Ferguson, S. (2021) [Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales](#). Research Report, HM Government.

Other studies by Daly (2021)<sup>9</sup> and McDonald (2022)<sup>10</sup> also found that misconceptions about rape and rape myths are still part of the narratives presented in court, which can impact both the complainant experience and the potential outcome of the trial. Misconceptions that were drawn upon included those about consent and the defendants 'reasonable' belief in consent, complainant post-assault behaviour and expected consistency of the complainant's story. Moreover, Daly (2021) found that complainants were also framed as untrustworthy and unreliable by using cultural narratives reflecting structural inequalities, such as referring to (stereotypical) gender roles, social class and age. According to Daly this reinforces that some women are more to blame than others for their assault, and a lower bar was set for defendants' credibility compared to the much higher bar set for complainants.

Whether the reliance on rape myths might be addressed by single judge trials was considered by James Chalmers, Fiona Leverick and Vanessa Munro<sup>11</sup> in response to a study conducted by Cheryl Thomas<sup>12</sup>. In her research Thomas (2020) concluded that "hardly any" jurors believed widespread myths and stereotypes. Chalmers, Leverick and Munro (2021) point out that while Thomas study adds valuable information to earlier studies, outcomes of these earlier (mock) jury studies showed the importance of understanding the dynamic of deliberations in jury trials. It is important to know how abstract views translate in practice during deliberations. They point out that in Thomas' study there was still a significant proportion of jurors that agreed or were unsure about rape misconceptions. While this group represented a minority of the sample surveyed, the authors argued that during a discussion individuals holding these views can influence the tone and trajectory of the deliberation. Goodman-Delahunty et al (2021) also showed that even when jurors receive education and have an improved perception of a complainant's credibility, the deliberation process can impact on the final verdict<sup>13</sup>. It is important to note however, that these studies specifically focused on rape myths held by jurors, but doesn't tell us the prevalence of rape myths held by judges. One of the concerns that is raised about single judge trials is that a single decision-maker might be biased. This is discussed in more detail in [section 2.2.1](#).

In summary, research published since the release of the Lady Dorrian Review has:

- reinforced existing concerns on the role rape myths and misconceptions in sexual offence trials.

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<sup>9</sup> Daly, E. (2021) [Court Observations of English Rape and Sexual Assault Trials: An Intersectional Analysis](#). PhD Thesis, Anglia Ruskin University.

<sup>10</sup> Elisabeth McDonald. (2022). [In the Absence of a Jury](#). Canterbury University Press.

<sup>11</sup> Chalmers, J., Leverick, F. and Munro, Vanessa (2021) Why the jury is, and should still be, out on rape deliberation. *Criminal Law Review*, 9 . p. 753-771

<sup>12</sup> Thomas, C. (2020) The 21<sup>st</sup> Century Jury: Contempt, Bias and the Impact of Jury Service. *Criminal Law Review*, 11, p. 987-1012

<sup>13</sup> Goodman-Delahunty, J., Martschuk, N., Lee, E. and Cossins, A. (2021) Greater Knowledge Enhances Complainant Credibility and Increases Jury Convictions for Child Sexual Assault. *Frontiers in Psychology*, 12: 624331.

- introduced questions about the effectiveness of jury education.

## 2. Research on Alternatives to Jury Trials

This chapter discusses the research available on the use of different modes of trial in rape cases. The studies identified provide some interesting insights that the Working Group may wish to draw on as part of its deliberations. Nevertheless the empirical data is limited which means that questions about the benefits and suitability of both jury and single judge trials for rape cases remain unresolved.

The findings are oriented around the four main areas of interest identified by the working group: complainer experience, right of the accused, public confidence in the justice system and conviction rates.

While the focus of the briefing is on single judge trials, some initial research and reflections are included on two additional modes of trial: a panel of judges and mixed panels. However, due to time limitations and the focus of the working group on single judge trials the extent of the evaluation on these alternative modes of trials is limited.

### 2.1 Experience of the Complainer

#### Key findings:

**An exploratory study in New Zealand on 8 single judge trial rape cases shows that, compared to jury trial, single judge trials had a clearer focus on the primary issue, and there seemed to be less admission of irrelevant evidence.**

**However, the study showed no clear difference in the support given to and communication with the complainer. And although the judge intervened more during questioning, it was less than expected, and did not seem to reduce the stress complainers displayed during cross-examination.**

**An active rejection of rape myths during trial might improve the complainer experience, however research comparing English rape trials with Dutch rape trials suggests that the adversarial context shaping the cross-examination might restrict judges to actively intervene.**

**Overall, the evidence is limited to draw robust conclusions on the impact of changing mode of trial on the experience of the complainer.**

As the Lady Dorrian Review highlights, there are specific elements of the trial process that can be particularly stressful and re-traumatising for complainers, such as the use of irrelevant evidence, for example relating to sexual history or lifestyle of the complainer, the limited communication and care for well-being during the trial, and the use of rape myths and misconceptions during cross-examination.

Victims often report that they feel detached from the process, and that “everyone is talking about you but no one is talking or listening to you”<sup>14</sup>.

### **2.1.1 Single judge trials**

A key advantage of single judge rape trials compared to jury trials for rape cases highlighted by the Lady Dorrian Review is the potential to improve the experience of the complainer. The research published since the Lady Dorrian Review has, however, highlighted a mixed picture in this regard.

A comparative study of single judge and jury rape trials in New Zealand conducted by Elisabeth McDonald (2022) (see box 2) found that there was a clearer focus in single judge trials on the primary issue (in this case consent) and complainers did seem to be less negatively impacted by some aspects of questioning. In the single judge trials there also seemed to be less admission of clearly irrelevant evidence, although for some evidence there was no observable difference (e.g. including complainer’s occupation).

The experience of the complainer is also influenced by the time it takes for a case to go to court as well as the length of the trial. Single judge trials are suggested to shorten both. The study conducted in New Zealand showed that a single judge trial was indeed on average shorter, although the difference was not significant. The complainer spent on average 30 minutes less giving evidence which was mainly attributed to less time in cross-examination which may also be a sign that questions are more focused on the specifics of the trial. Time taken between reporting to the police and commencement of the trial was also shorter. However, the jury trials that were part of a specialist Sexual Violence Court Pilot were faster to trial than the single judge cases. The time waiting for a verdict was longer (on average two days, compared to 4.5 hours in the jury trials).

The New Zealand study, however, found no clear difference between single judge and jury trials in the support given to complainers by the judge or prosecuting counsel. Moreover, there was quite a large variation in the communication to the complainer (from minimal communication to active engagement and attention to well-being). This variation was most likely explained not because of the mode of trial, but by the fact that some judges had followed education and development programmes.

Research demonstrates that victims find giving evidence at trial extremely challenging. The fear of cross-examination and of aspects of their private lives being brought up has been cited as reasons for victims deciding not to report rape<sup>15</sup>. The New Zealand study showed that although the judge in the single judge

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<sup>14</sup> Dowds, E., McAlinden, A. and Killean, R. (2021) Putting sexual violence on trial – Challenges and future directions. In Killean, R., Dowds, E. and McAlinden, A (eds). *Sexual Violence on Trial – Local and Comparative Perspectives*. p. 258. London, Routledge.  
<https://doi.org/10.4324/9780429356087>

<sup>15</sup> Burman, M. and Brindley, S. (2021) Challenges in the investigation and prosecution of rape and serious sexual offences in Scotland. In Killean, R., Dowds, E. and McAlinden, A (eds). *Sexual*

model intervened in more cases, it was less than expected given the absence of a jury. There was no discernible difference in approach adopted by counsel to cross-examination, and while some aspects of complainer questioning that refer to misconceptions or myths were not present in single judge trials, overall the study did not find any significant differences.

Similar to New-Zealand, in Australia single judge trials for serious offences, including rape, are permitted by a large number of the states and territories, usually by choice of the accused (see box 3). In a review of the literature on single judge trials Fiona Hanlon (2014) points out that these trials might offer more space for judicial questioning during the trial, but there is little evidence that this actually happens<sup>16</sup>. Hanlon refers to a study surveying US and South Australian judges sitting in single judge trials, which showed that judges are reluctant to ask questions as they felt the general rules of the adversarial process restrict these<sup>17</sup>. Moreover, because single judge trials are an exception and not the rule, no distinct procedures have been developed for this.

In summary, research published since the Lady Dorrian Review indicates that the use of single judge rape trials can potentially improve some aspects of the complainer experience namely:

- Reducing the period of time that cases take to come to trial and the length of that trial;
- Greater focus on primary issues relevant to the trial;
- Less admission of irrelevant evidence

There is an indication that cross-examination could be shorter, however, there was no difference in the approach adopted to cross-examination by both prosecution and defence, and the judge intervened less than expected, not always actively rejecting rape myths and misconceptions during cross-examination.

This lead McDonald (2022) to conclude that “a change to the mode of trial within the same system appears not, of itself, to deliver demonstrably better experiences for adult rape complainants”<sup>18</sup>. The study highlights that both jury and single judge trials in New Zealand continue to be bound by the wider constraints of the adversarial trial process, specifically highlighting the need for greater judicial intervention and control pre-trial and during the trial as well as changes to the manner and content of cross-examination.

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*Violence on Trial – Local and Comparative Perspectives*. p. 254-255. London, Routledge.  
<https://doi.org/10.4324/9780429356087>

<sup>16</sup> Hanlon, F. (2014). Trying serious offences by judge alone: Towards an understanding of its impact on judicial administration in Australia. *Journal of judicial administration* 23, p. 137-157

<sup>17</sup> Hanlon references Vicki Waye (2003) Judicial Fact-Finding: Trial by Judge Alone in Serious Criminal Cases. *Melbourne University Law Review*, 27, p. 423 – 457. The study sent a survey to members of the Circuit Court in Eugene, Oregon and members of the District Court and Supreme Court of South Australia. It is however unclear how many judges participated.

<sup>18</sup> Elisabeth McDonald. (2022). *In the Absence of a Jury*, p. 313. Canterbury University Press.  
Available at: [In the absence of a jury \(online\)-G10.pdf \(canterbury.ac.nz\)](https://www.canterbury.ac.nz/~elizabeth.mcdonald/In%20the%20Absence%20of%20a%20Jury.pdf)

## **Box 2 – New Zealand: Comparative study of jury and single judge rape trials**

In New Zealand, depending on the level of the offence, the defendant can choose whether they want a trial by jury or single judge. Elisabeth McDonald conducted two studies, looking at complainer experience in rape cases. One study looked at thirty rape cases tried by jury<sup>1</sup>, while the other compared the findings of the jury study with rape cases that were heard by a single judge<sup>2</sup>.

The single judge trial study was exploratory as only eight rape cases were identified that fulfilled the research criteria. Both studies focused on cases with at least one sexual violation by rape charge involving an adult female complainant and an adult male defendant that knew each other but were not domestic partners. Consent or belief in consent was the issue in dispute in all cases. The study looked both at those that resulted in conviction and those resulting in acquittal, with balanced national spread.

McDonald considered six expectations associated with single judge trials in this study:

- increased conviction rates;
- a shortened pre-trial process and time for giving evidence by the complainer;
- interventions increase when questioning is improper or unfair;
- more irrelevant evidence would be offered;
- lack of deliberation might be countered by the judge asking questions or having a discussion with the counsel during the closing submissions; and
- providing a written verdict is an advantage.

The main outcomes were:

- the 8 single judge trial cases show a higher conviction rate. However, the sample is too small to draw any conclusions from this;
- the length of the trial was on average shorter, but the difference was small. The waiting time for a verdict was longer in single judge trials;
- single judge trials did not show a clear difference in interventions by the judge during (improper) questioning e.g. in cross-examination of the victim;
- single judge trials showed a clearer focus on the primary issue with less irrelevant evidence submitted in some cases;
- there was little questioning from the judge during the trial and closing submissions were very similar to jury trials; and
- the inclusion of a written verdict was seen as a clear advantage of single judge trials. The verdicts featured clear statements rebutting the assumptions and misconceptions about “real” rape.

<sup>1</sup>Elisabeth McDonald (2020). Rape Myths as Barriers to Fair Trial Process. Canterbury University Press. Available at: [Rape Myths as Barriers to Fair Trial Process \(online\).pdf \(canterbury.ac.nz\)](https://www.canterbury.ac.nz/~elizabeth.mcdonald/teaching/2020/rape-myths-as-barriers-to-fair-trial-process.pdf)

<sup>2</sup>Elisabeth McDonald. (2022). In the Absence of a Jury. Canterbury University Press. Available at: [In the absence of a jury \(online\)-G10.pdf \(canterbury.ac.nz\)](https://www.canterbury.ac.nz/~elizabeth.mcdonald/teaching/2022/in-the-absence-of-a-jury.pdf)

### 2.1.2 Panel of judges

In some countries serious offences, including rape, are tried in front of a panel of judges (see Annex III for an overview of different modes of trials used internationally). While the literature search for this evidence briefing did not focus specifically on countries that try cases using a panel of judges, some initial reflections were found in a study by Ellison (1997) comparing the English adversarial system with the Dutch inquisitorial system in rape cases<sup>19</sup>. The study looked at the Dutch system as an alternative way of structuring the rape trial process. The Dutch system is based on an inquisitorial process. In this system rape cases are tried by professional judges, usually in a panel of three. Ellison's study does not reflect specifically on the benefit of three judges over a jury but reflects more generally on the differences in process between an adversarial jury trial and an inquisitorial trial by judge. Similar to the New Zealand study, this study raises the question whether, for the experience of the complainant, it is the mode of trial, or more generally the wider (adversarial) process that requires consideration. In the study, Ellison underlines that while individual criminal justice professionals play a role in how complainants experience the process, it is the court procedure and in particular the use of cross-examination that must be reviewed.

The study draws on secondary monitoring data of English rape trials, to compare the experiences in the English court system with those of the Dutch system. Data on Dutch rape cases were gathered through interviews with legal professionals. The data should be seen as exploratory, drawing on insights from professionals, which, while offering the opportunity to highlight important aspects of the process, limits the ability to draw robust conclusions. In the Dutch system there is a strong emphasis on pre-trial investigation by the judge, prosecutor and defence to establish what evidence will be evaluated by the trial judge(s) in court. The complainant rarely has to give evidence in court, preventing re-traumatization as a result of the cross-examination process.

Ellison does point out that even though the Dutch system is organised differently, questioning of complainants by the defence lawyers in the pre-trial stage did still draw upon misconceptions and could cause distress, leaving it up to the judgement of the examining pre-trial judge when/if to intervene. Whether these interventions were consistently made could not be concluded from her study. The study does suggest that certain types of questions, such as those relating to sexual history and lifestyle, were not common in the Netherlands. Ellison suggests this may be due to trials being in front of three judges (and not a jury), who are less likely to be swayed by such evidence.

Evidence from the Dutch justice system, which uses a panel of three judges, reinforces the point that it is not just changing the mode of trial that can improve the complainant's experience, but changes to the trial process should also be considered.

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<sup>19</sup> Ellison (1997) A Comparative Study of Rape Trials in Adversarial and Inquisitorial Criminal Justice Systems. PhD thesis, University of Leeds.



## 2.2 Rights of the Accused

### Key Findings

Currently, single judge trials for serious offences are offered in several countries such as Australia, New Zealand and the United States, as an option for the defendant, often subject to approval by the court.

Whilst giving the accused the option does not impact their rights negatively, studies show it is important to be transparent and consistent on the reasons for conducting a single judge trials.

There is a need to consider procedural questions, such as will the pre-trial judge be the same as the trial judge, knowing the pre-trial judge might see inadmissible evidence. Studies suggest a clear procedure and guidelines should be developed.

Other research has focused on the implicit bias judges might hold. Training that actively challenges potential biases is suggested to help tackle potential prejudice and misconceptions. Studies also mention the lack of diversity in the judiciary and that increasing this diversity might increase legitimacy, trust and fairness perceived by both defendant and complainer.

The provision of a written verdict is seen as potentially improving both the complainer and the defendant's experience of the system, offering transparency and consistency. The written verdict is part of both a single judge, a panel of judges and a mixed panel model. In Norway one of the main arguments to move from jury to mixed panel of judges was the perceived opaqueness and unpredictability of jury decisions.

Overall, there is limited research on the impact of different modes of trial on the rights of the accused, and most studies included in this briefing are either reviews or critical reflections, limiting the empirical evidence there is available.

This section will discuss literature that reflects on the influence of different modes of trial on the rights of the accused. Eithne Dowds et al. (2021) observed in their book on sexual offences in the criminal justice system, that the common law criminal justice system can be seen as "*one where, due to the adversarial nature of our justice system, the treatment of the complainant and the accused are often viewed in opposition to one another*"<sup>20</sup>. They point out the challenge of balancing the dignity of complainer and right to a fair trial for the defendant in the context of the adversarial process. Unfortunately not many additional studies or new arguments to the Lady Dorrian Review were found. Moreover, the literature that is included considers single judge trials more generally and not necessarily in the context of

<sup>20</sup> Dowds, E., McAlinden, A. and Killeen, R. (2021) Putting sexual violence on trial – Challenges and future directions. In Killeen, R., Dowds, E. and McAlinden, A (eds). *Sexual Violence on Trial – Local and Comparative Perspectives*. p. 254-255. London, Routledge.  
<https://doi.org/10.4324/9780429356087>



rape cases. With these limitation in mind, the following subsections point out some elements of different modes of trials that are important to take into account when considering the rights of the accused.

### **Box 3 – Different models of single judge trials in Australia**

Several states and territories in Australia allow single judge trials for serious offences, including sexual offences, under specific circumstances.

#### *Australian Capital Territory*

Offers the option as a choice for the accused, but excludes some crimes, including those involving death and sexual offences (including rape). This provision was put in place after a review showing that single judge trials were used more than expected. The expectation was that only cases with lengthy legal issues or extensive pre-trial publicity were eligible to be conducted through a single judge trial. Concerns were raised especially about the large number of single judge trials that involved allegations of a sexual nature and murder or manslaughter. However, a supreme court judge critiqued the exclusion provision, noting that the categories that were excluded seemed random and some of those would actually fit the initial consideration of adverse pre-trial publicity and community prejudice (influencing an impartial and fair trial).

#### *Western Australia and Queensland*

Either the accused or prosecution (but with the accused's consent) can apply to court for a single judge trial. The Court then considers if it is in the interest of justice to grant a single judge trial. This is at the Court's discretion but the law states that the Court may refuse if a trial will involve factual issues requiring the application of objective community standards such as reasonableness, negligence, indecency, obscenity or dangerousness.

#### *New South Wales*

The law initially allowed the accused to elect for a single judge trial, but only with the consent of the prosecution, making the prosecutor the de facto decision-maker. This was changed to either accused or prosecutor applying to court. If both the accused and prosecution agrees, the Court must grant it with the exception of trials that will involve a factual issue requiring the application of objective community standards (as per Western Australia and Queensland). If the prosecution does not agree with a single judge trial, the Court will decide and can grant it if it is in the interests of justice. If the accused disagrees the court can only order a single judge trial if it is of the opinion that there is a substantial risk of interference with the jury that cannot otherwise be mitigated.

Source: Hanlon, F. (2014). Trying serious offences by judge alone: Towards an understanding of its impact on judicial administration in Australia. *Journal of judicial administration* 23, p. 137-157

### 2.2.1 Single judge trials

A key concern regarding the introduction of single judge rape trials is the impact that it may have on the right of the accused to a fair trial. While Article 6 of the ECHR does state that a trial does not have to take place in front of a jury in order to be considered fair, the literature raises concerns about handling implicit bias as well as ensuring procedural consistency.

The examples of single judge trials for serious offences (which includes some rape cases) are all from countries in which the accused has the right to decide whether they are tried by a single judge. It is the defence that can opt for a single judge trial instead of a jury trial, although in some cases the Court can overrule an application (see box 3 for examples from Australia). Whilst giving the accused the option does not impact their rights negatively, a study by Jodie O'Leary (2011) identified inconsistencies in granting single judge trials in Australia<sup>21</sup>.

There are also some procedural issues that could impact on the rights of the accused (as well as potential bias towards the complainant). In Australia, states and territories differ on whether they permit the judge that grants the request for a single judge trial can also be the (pre)trial judge, as they might be influenced by prior knowledge of the case<sup>22</sup>. Similarly, when a decision in favour of a single judge trial is made, and the case comes in front of a pre-trial judge, there is the question whether this pre-trial judge should be different from the trial judge as a pre-trial judge is likely to see inadmissible evidence. There is however, the expectation that a judge is trained to be neutral and can set aside prior knowledge. Whatever direction is chosen, the literature proposes a clear procedure is needed to ensure consistency.

Melissa Breger (2019) suggests that it should be assumed that judges will have implicit bias about both the accused and the complainant<sup>23</sup>. She argues that these biases are particularly important to address in single judge trials as the verdict is dependent on a single decision-maker. She refers to a review of studies in the United States showing racial bias in judges presiding over single judge trials resulted in stricter sentences for African American defendants. One of these studies also showed that judges under-estimated their inherent biases, with 97% reporting they believed themselves to be in the top 25% of judges who avoid racial prejudice.

The literature points out, that while bias does exist, there are ways of addressing and/or mitigating these to limit their impact on decision-making. To prevent bias, Breger recommends that training should be considered, including exposing judges to situations that challenge their biases; continuous testing of judge's own prejudices and decisions; stating biases explicitly before trial; journaling; and

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<sup>21</sup> O'Leary, J. (2011). Twelve angry peers or one angry judge. An analysis of judge alone trials in Australia. *Criminal Law Journal*, 35, p. 154 - 169

<sup>22</sup> Hanlon, F. (2014). Trying serious offences by judge alone: Towards an understanding of its impact on judicial administration in Australia. *Journal of judicial administration* 23, p. 137-157

<sup>23</sup> Breger, M.L. (2019). Making the invisible visible: exploring implicit bias, judicial diversity, and the bench trial. *University of Richmond Law Review*, 53, p. 1039 - 1083

providing information and (statistical) data on biases in the justice system. She also points out that a more diverse judiciary could decrease biases as it introduces a range of perspectives to the judiciary. An additional benefit would be that a more diverse judiciary might increase the legitimacy, trust and fairness perceived by defendants (as well as complainers) as they might feel a judge with similar lived experiences can identify with them.

One aspect of single judge trials that can be seen as positive for both complainer and accused is the introduction of a written verdict setting out the rationale for the judge's decision, contributing to a thorough and transparent decision-making process. McDonald (2022)<sup>24</sup> points out in the New Zealand study that judges in their reasoned verdict will clearly state what definitions they applied and give rebuttals to assumptions and misconceptions about behaviour of "real" rape victims. One of the definitions that was clearly discussed was that of consent. The way consent was explained by judges was more extensive than the directions usually given to the juries. The judges used the written verdict to actively reject rape myths. Overall it increases the transparency in the decision-making process and given verdict. The reasoned verdict will also allow for a clearer evaluation of the case in appeal courts.

While data on the impact of single judge trials on the rights of the accused is limited, particularly in the context of rape cases, the literature highlights the following:

- most jurisdictions that have introduced single judge trials give the accused the right to decide whether they wish to be accused by a jury or a single judge;
- judges have inherent biases which could impact on their decision-making both for or against the accused although there are mechanisms for mitigating or challenging these prejudices; and
- the use of written verdicts require judges to provide clear justification of why they have arrived at a determination of guilt or innocence based on the facts of the case, offering transparency for both defendant and complainer

### **2.2.2 Panel of judges and mixed panels**

A further alternative to jury trials and one which was specifically mentioned by the Lady Dorrian Review is using a panel comprising a professional accompanied by lay jurors. The arrangement of these mixed panels – how many professional judges and lay jurors are included, how lay people are selected, and the role they play in the process – can differ from country to country (see Annex III for examples).

Including a panel of judges or a mixed panel of professional judges and lay assessors instead of a single judge offers the opportunity for the panel to deliberate, which could limit bias. Moreover, there is the potential to have a more diverse group of decision-makers. A literature search of specific studies on bias in these alternative modes of trials was beyond the scope of this evidence briefing and therefore there is no more detail provided here.

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<sup>24</sup> Elisabeth McDonald. (2022). [\*In the Absence of a Jury\*](#). Canterbury University Press.

Another potential advantage of mixed panels is that while maintaining community involvement, the shared decision making does offer the advantage of providing a reasoned verdicts. In fact, a key reason for changing mode of trial in Norway, from jury to a mixed panel of professional and lay judges, was the introduction of written reasons for verdict that a mixed panel is required to provide. In a qualitative, ethnographic research study of the perception of prosecutors, judges and lay judges on both the old jury and the new mixed court system, Anna Offit (2021) found that lawyers, prosecutors and judges in Norway shared concerns about juries not providing a rationale for their verdict<sup>25</sup>. Participants in the study felt it made jury decisions opaque and unpredictable and some argued it made the justice system more uncertain and inconsistent.

In Offit's study some prosecutors and judges mentioned the great variety in instructions given to jurors and the difficulty of knowing how these instructions land or are taken into account by the jurors. A mistaken understanding of the law or a failure to take different perspectives into account would be avoided by a shared deliberation. This collaboration, together with having to write down the reasons for verdict, meant that prosecutors and judges felt it facilitated getting a clear complete picture of a case, while preserving the value of lay participation that brings different perspectives to the decision-making process. Concerns that lay persons would be unwilling to (directly) challenge professional jurors or speak up did not seem to play out in Norway. A survey in 2011 asked hundreds of Norwegian lay judges on their experiences, around 90% of whom responding by stating they felt their perspectives were considered by professional judges and they did not feel pressured to change their minds. Offit offers the explanation that Norway is a country with a high level of social equality which allows this system to function.

In Japan there has been a move away from trials by single judge to the inclusion of lay participation. In 2009 the *Saiban-in* system was introduced, with serious offences (including rape) now tried by a mixed panel of 3 professional judges and 6 lay people (see box 4). A change to a mixed court sparked similar concerns as in Norway, with questions being raised whether lay judges would feel comfortable to speak up to professional judges. Cultural difference with Norway, such as more deference to authority, a tendency to follow opinion of those of higher status and a desire to maintain harmony, might influence the dynamics in a mixed court<sup>26</sup>. In surveys by the Japanese supreme court a large majority of lay judges mentioned that they experienced their participation as positive, however, with little change in conviction rate some people are unsure what influence lay judges have on the process.

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<sup>25</sup> Offit, A. (2021) Dismissing the Jury: Mixed Courts and Lay Participation in Norway. In S. Ivković, S. Diamond, V. Hans, & N. Marder (Eds.), *Juries, Lay Judges, and Mixed Courts: A Global Perspective*. p. 197-217. Cambridge: Cambridge University Press. doi:10.1017/9781108669290.004.

The study ran from July 2014 to July 2017 and included interviews with 20 prosecutors, 12 professional judges, 5 defence attorneys and 6 former lay decision-makers. It also included conversations with journalists, politicians and legal academics who contributed to the jury reform.

<sup>26</sup> Mika Obara-Minnitt (2018) The Sacrifices behind the "Success" of Saiban-in Seido (Quasi-Jury System), available at [ACS44\\_02Obara.indd \(core.ac.uk\)](#)

To summarize, a panel of judges or mixed panel of lay and professional judges may limit the impact of bias on decision-making through increased diversity, while retaining increased transparency by allowing a written verdict. Some limitations have been identified in respect of mixed panels due to the potential perceived inequity between lay and professional judges.

#### **Box 4 – Changing mode of trial in Norway and Japan**

##### **Norway**

Norway introduced a jury system in 1887 based on the English model, on the understanding that jurors' practical knowledge and life experience would counterbalance and complement the narrow experience of professional judges. However, over the years it has changed to a hybrid system, where in criminal court cases a panel of 2 lay judges and 1 professional judge (or in complex cases 3 lay and 2 professional judges) hear a case. A jury system was still used to determine appeals, where a ten lay-person jury would reach a verdict. In 2017 Norway changed this jury system in the appellate court, to a mixed court system where 5 lay and 2 professional judges hear appeal cases. In this system of mixed courts, lay judges are chosen by the municipality for a 4 year term, and are mainly nominated by political parties.

##### **Japan**

Japan has had varied forms of a jury system, including a 12 member jury for criminal cases from 1928 to 1943 and a grand jury in which a panel of 11 citizens was asked to make indictment decisions (1948 until the present). Criminal cases were tried by judge from 1943 (1972 in Okinawa) onwards. In 2009 a change was made to the mode of trial, and serious offences (including rape) are now tried by a mixed court called Saiban-in, comprising 3 professional judges and 6 lay people. The lay judges are drawn from a list of Japanese citizens aged twenty or over who are eligible to vote. Similar to the Norwegian system, the lay judges will deliberate with the judges. Together the panel will decide on both verdict and sentence.

##### **Sources:**

Offit, A. (2021) Dismissing the Jury: Mixed Courts and Lay Participation in Norway. In S. Ivković, S. Diamond, V. Hans, & N. Marder (Eds.), *Juries, Lay Judges, and Mixed Courts: A Global Perspective*. p. 197-217. Cambridge: Cambridge University Press. doi:10.1017/9781108669290.004

Vanoverbeke, D. and Fukurai, H. (2021) Lay Participation in the Criminal Trial in Japan A Decade of Activity and Its Sociopolitical Consequences. In S. Ivković, S. Diamond, V. Hans, & N. Marder (Eds.), *Juries, Lay Judges, and Mixed Courts: A Global Perspective*. p. 69-87. Cambridge: Cambridge University Press. doi:10.1017/9781108669290.004

## 2.3 Public Confidence in the Justice System

### Key findings:

**There is very limited research available addressing public confidence in specific modes of trial.**

**Wider research on public confidence of the justice system in Scotland shows about three-quarter of people agreeing that the system is fair.**

**A study conducted in England and Wales in 2002 showed respondents had more confidence in the jury than judges, although both were fairly high (80% compared to 71%). Asked to react to a hypothetical proposal to change jury to single judge trials for “middle ranking” offences, two-thirds of respondents rejected this proposal.**

**This survey, however, is already twenty years old, and does not address the question how the public would react to changes in mode of trial for specific cases (such as rape), or when more background and information on justification are given.**

**Apart from public confidence in the system, a 2021 review of the response of the UK criminal justice system to rape cases found that both police and support services suggested several changes to juries, including replacing the jury with either a panel of expert witnesses or specially trained judges. Crown prosecution service participants however, did not reference removing juries from rape trials.**

This section considers the data available on the public confidence in the justice system and in particular in different modes of trial. Arguments in favour of jury trials often cite that this mode of trial ensures community confidence in verdicts. The literature search, however, showed there is very limited research that directly asked about public confidence in specific modes of trial.

The Scottish Crime and Justice Survey shows that the majority of people are either very or fairly confident about the delivery of the criminal justice system, with 77% agreeing that all those accused of crimes get a fair trial<sup>27</sup>. 72% agreed that the system makes fair, impartial decisions based on the evidence available, although there were some differences between groups, with only 63% being confident of adults living in the 15% most deprived areas. Women were in general less likely to be confident in the justice system than men. However, as the justice system in Scotland operates both single judge and jury trials these figures do not show specific confidence in different modes of trial.

A review by Julian Roberts and Mike Hough (2011) points out there is limited research on perceptions of the jury trial in England and Wales, but they do highlight

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<sup>27</sup> Scottish Crime and Justice Survey 2019/20, available at: [Scottish Crime and Justice Survey 2019/20: main findings - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/scottish-crime-and-justice-survey-2019-20-main-findings/pages/22.aspx)



some research done in the early 2000s<sup>28</sup>. In the 2005 British Social Attitudes Survey respondents were asked to rate the importance of specific rights, including the right to jury trial for defendants. The importance was ranked on a scale from one (not important) to 7 (very important), and 77% of respondents ranked a jury trial as 7, with 15% ranking it as a 6.

### **2.3.1 Single judge trials**

In their review of public attitude to the jury, Roberts and Hough (2011) refer to a 2002 survey conducted by the Bar Council and Law Society in England and Wales, which asked around 900 respondents about jury trials in a series of questions<sup>29</sup>. Respondents were asked to rank the level of confidence of different elements of the criminal justice system. 80% had a “great deal” or “some” confidence in jury system, compared to 71% for judges. In the same survey 82% of respondents agreed or somewhat agreed to the statement “I think I would be more likely to get a fairer trial if I was tried by a jury rather than a judge”. Respondents were also asked to react to a proposal that would change jury trials to single judge trials for “middle ranking” offences. Two-thirds of the respondents rejected this proposal. While this survey suggest a strong level of public support and confidence in the jury system, it is already (almost) 20 years old. Moreover, these studies do not address the question of how the public would react to changes in mode of trial for specific cases such as rape, or when more background information and justifications are given.

One aspect that could potentially positively influence confidence in the justice system, and has already been described in the previous sections, is increased transparency provided by a clear written reasoned verdict that is offered in a single judge trial.

Apart from public confidence in the system, the perceptions of legal professionals can also be considered. In a study conducted by Shari Diamond and Jessica Salerno (2020), judges, prosecutors and defence attorneys in the United States were asked their views on using single judge trials and jury trials in the criminal justice system<sup>30</sup>. 1460 legal professionals participated in a survey where they were asked to rank both modes of trial on four characteristics: predictability, speed, cost effectiveness and fairness<sup>31</sup>. For judges and lawyers working in the criminal justice system, single judge trials were seen as more predictable, faster and more cost effective. However, 67% of judges, 56% of prosecutors and 84% of defence attorneys felt that in general a jury trial was fairer, and they would prefer this mode

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<sup>28</sup> Roberts, J.V. and Hough, M. (2011). Public Attitudes to the Criminal Jury: a Review of Recent Findings. *The Howard Journal*, 50, p. 247-261

<sup>29</sup> It is unclear from the information provided by Roberts and Hough what the sampling method of this survey was.

<sup>30</sup> Diamond, S.S. and Salerno, J.M. (2020) Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges. *Louisiana Law Review*, 81, p. 119-163

<sup>31</sup> The sample included both professionals working in the civil justice and criminal justice system and included 173 judges, 70% state and 30% federal, and 1,282 attorneys, 63% who handle primarily civil cases, 33% who handle primarily criminal cases, and 4% who did not indicate whether they primarily handle civil or criminal cases.

of trial over a single judge trial. The study did not consider whether different considerations would be made for different type of cases, such as sexual offences.

A 2021 cross-UK government end-to-end review into the response of the Criminal Justice System to adult rape offences included conducting surveys and focus groups with CJS agencies and stakeholders<sup>32</sup>. The study found that police and support service participants suggested several changes to juries, including allowing the use of expert witnesses, the use of specialist juries, or to replace juries with a panel of expert witnesses or specially trained judges. Crown prosecution service participants did not reference removing juries from rape trials.

In summary, there is no specific data for Scotland measuring the public confidence in different modes of trial. Data from England suggest that the confidence in the jury system is high. However, these studies did not distinguish between different types of cases and it leaves open the question what the reception would be when informed of the specifics of rape offences. Overall, there is insufficient evidence to gauge the level of support that the public may have for single judge trials for serious sexual offences in Scotland. Public confidence can also be impacted by conviction and acquittal rates. These will be discussed in the next section, but similarly to public confidence data, there is limited evidence to draw on.

### **2.3.2 Panel of judges and mixed panels**

The literature search has not looked at specific data on public confidence in a panel of judges or mixed panels.

## **2.4 Conviction Rates**

### **Key findings:**

**There is limited empirical evidence on the impact of single judge trials on conviction rates, and most evidence that was found was not specific for rape cases. This limits the conclusions that can be drawn.**

**For rape cases specifically, a comparison between eight single judge trials and 30 jury trials showed a higher conviction rate in single judge trials (88%, compared to 44% in jury trials)**

**More general comparisons between conviction rates of jury and single judge trials has shown lower rates in single judge trials, or no difference in conviction rates.**

**The difficulty with comparing conviction rates lies in the potential differences between cases that go through the different mode of trials. In rape offences,**

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<sup>32</sup> George, R. and Ferguson, S. (2021) *Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales*. Research Report, HM Government. Available at: [Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/964447/Review-into-the-Criminal-Justice-System-response-to-adult-rape-and-serious-sexual-offences-across-England-and-Wales.pdf)



**conviction rates have for example been influenced by the age of the defendant and whether complainer and defendant were acquainted.**

**The literature search did not include specific data on conviction rates in a panel of judges or mixed panels**

This section looks at the data on conviction rates, comparing single judge trials and jury trials. There is limited data available to compare conviction rates of different modes of trials. Apart from the study in New Zealand, which only included eight single judge rape trials, no other study was found that gave specific data for conviction rates of sexual offences. The literature search was therefore expanded to included comparison of conviction rates between jury and single judge cases more general. Again, this data was limited, and moreover is difficult to extrapolate to expectations for rape cases specifically. The literature search has not looked at specific data on conviction rates in a panel of judges or mixed panels.

### **2.4.1 Single judge trials**

With very few empirical and comparative studies available, there are no clear conclusions to be drawn about the impact of single judge trials on conviction rates. The New Zealand study suggests that conviction rates could be higher in single judge trials. In the eight single judge trial cases the study evaluated the conviction rate was much higher (88%) than in the 30 jury trials the study looked at (40%). However, as McDonald point out, the conviction rate could be attributed to other factors than just the different mode of trial (e.g. the type of cases that proceed to a single judge trial). The sample is too small to arrive at clear conclusions.

Previous research has shown that the type of case can influence the conviction rate. Looking at rape convictions between 2017-2018 in England and Wales, on average 46% of accused were convicted, however, young defendants (18-24 years old) were less likely to be convicted, only 32%<sup>33</sup>. A lower conviction rate has also been found in rape cases where the defendant and complainer were acquainted, as opposed to cases where the accused was a stranger to the victim. In a study in England and Wales, only 36% of cases with acquaintances resulted in conviction, compared to 73% in case of rape by a stranger. Rape that involved acquaintances is however much more common than rape by a stranger<sup>34</sup>.

Fiona Hanlon has looked at overall conviction rates of jury trials and single judge trials in Australia<sup>35</sup>. However, court statistics in Australian States and Territories do not tend to differentiate between single judge and jury trials, which makes any comparison difficult. She cites a study on a small sample of South Australian

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<sup>33</sup> Willmott, D, Boduszek, D., Debouska, A. and Hudspith, L. (2021). Jury decision-making in rape trials: an attitude problem? In: Crighton, D.A. and Towl, G.J. (eds), *Forensic Psychology*, Chapter 5. West-Sussex, Wiley, 3<sup>rd</sup> edition

<sup>34</sup> Waterhouse, G.F., Reynolds, A. and Egan, V. (2016). Myths and legends: The reality of rape offences reported to a UK police force. *The European Journal of Psychology Applied to Legal Context*, 8, p 1-10

<sup>35</sup> Hanlon, F. (2014). Trying serious offences by judge alone: Towards an understanding of its impact on judicial administration in Australia. *Journal of judicial administration* 23, p. 137-157

Supreme Court cases between 1989 and 1993, which suggest that single judge trials had lower conviction rates. Figures from New South Wales published in 2011 suggest a similar trend. However, this data is out-of-date and does not specify the type of offences that were included or whether there might be a difference in the cases dealt with in the different modes of trial. It is usually a particular type of cases that proceed to a single judge trial, such as more (legally) complex cases or cases with a high level of pre-trial publicity. It is therefore difficult to conclude whether differences in conviction rate are due to mode of trial or other factors involved.

Data from New South Wales in 2014, showed that about a quarter of all trials were conducted by a single judge. The acquittal rate for these single judge trials was 33.3%, very similar to the jury trial acquittal rates of 35.2%.

A study by Sager, Wentzlof and Stinson<sup>36</sup> comparing conviction rates between single judge and jury trials for offences by police officers in the United States also showed no difference in conviction rates.

Daniel Givelber and Amy Farrell (2008) looked at the differences in conviction rates between judges and juries in more detail<sup>37</sup>. Their study does not compare convictions from jury trials and single judge trials, but instead asked judges presiding over jury trials in the United States whether they would have made the same decision as the jury. It showed that juries and judges react differently to the defence case, with juries more likely to acquit than judges when the defendant and an additional witness for the defence would testify. The difference in acquittal would become even starker if the defendant claimed innocence. The authors suggest an explanation could be that judges might be more inclined to pay attention to the prosecutors case as their professional experience puts them mostly in situations where they have to scrutinize the crown's evidence. Judges might retain this focus in the trial and view the case through the lens of the prosecution. Another explanation the authors provide is that a jury might be more likely to be influenced by sentiment. There are limitations on what conclusions can be drawn from this study, as the setting and type of cases might be different and it is difficult to say whether the judge's evaluation in a live single judge trial would be the same as their hypothetical ruling of one.

To address the impact of rape myths on conviction rates, Jane Goodman-Delahunty et al. (2021) looked at potential ways to decrease jury bias<sup>38</sup>. The study

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<sup>36</sup> Sager, B.R., Wentzlof, C.A. and Stinson, P.M. 2021. Bench vs Jury Trials: Sentencing and Conviction Outcomes for Criminally Charged Police Officers. *Criminal Justice Faculty Publications* 121. Available at: ["Bench vs. Jury Trials: Sentencing and Conviction Outcomes for Criminal" by Bethany R. Sager, Chloe Wentzlof et al. \(bgsu.edu\)](#)

<sup>37</sup> Givelber, D. and Farrell, A. (2008). Judges and Juries: The Defense Case and Differences in Acquittal Rates. *Law and Social Inquiry*, 33, p. 31 - 52

<sup>38</sup> Goodman-Delahunty, J., Martschuk, N., Lee, E. and Cossins, A. (2021) Greater Knowledge Enhances Complainant Credibility and Increases Jury Convictions for Child Sexual Assault. *Frontiers in Psychology*, 12: 624331.

used mock jurors to examine the effectiveness of interventions by expert witnesses and educative judicial direction, as well as the effect that jury deliberation can have. Judicial direction lead to greater knowledge, leading to an increased perception of credibility of the complainant and higher likelihood to convict the accused in jurors that were asked to make an individual decision. However, when jurors were asked to deliberate, this process still appeared to enhance the perception of credibility of the complainant, yet the conviction rate dropped. A potential explanation Goodman-Delahunty et al. provide is that other considerations raised in deliberation, such as the meaning of standard of proof, could increase jurors doubt or willingness to convict raising questions about the effectiveness of jury education.

Overall, the literature does not offer a clear answer on how single judge trials will impact conviction rates. Taking into account that most of the studies did not focus on rape cases specifically, one showed a higher conviction rate, some lower rates and others showed no difference with jury trials. Other studies have looked at what could cause different conviction rates between jury and single judge trials, with jury deliberation and the evaluation of the defendants story as two potential influences.

#### **2.4.2 Panel of judges and mixed panels**

The literature search has not looked at specific data on conviction rates in a panel of judges or mixed panels.

### **3. Conclusion**

The literature reviewed in this evidence briefing raises similar advantages of and challenges to single judge trials that were included in the Lady Dorrian Review: rape myths could be easier to tackle by a single judge; the trial could have some positive impacts on the complainant experience; written verdict allows for clarity and transparency; but concerns are raised about diversity and bias and public confidence in the justice system. Overall, however, there is a lack of empirical research comparing modes of trial for rape cases, which makes it difficult to draw any robust conclusions.

An important reason to consider single judge trials to replace jury trials is the existence of rape myths. Recent evidence underlines that these myths still exist in the court room. Initial evidence from New Zealand showed that judges in single judge trials tend to actively reject rape myths in their written verdict. However, potential bias of a single judge could have a large impact when they are the sole decision-maker. Training and education, as well as a more diverse judiciary might help tackling bias. Increasing diversity could also raise confidence in the justice system, including by those accused. To increase diversity, there is also the possibility to opt for a mode of trial in which lay persons and judge(s) sit together.

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While the study looked at child sexual assault cases specifically, these cases encounter similar problems as adult rape cases, with misconceptions on delay in reporting, ability to resist assault and perceived credibility of the victim.

When it comes to the experience of the complainer and reducing re-traumatization through single judge trials, the evidence is mixed. There is some indication that single judge trials might be more focused on the primary issues, that less irrelevant evidence may be introduced in court, and that single judge trials result in shorter cross-examination and a shorter overall time from reporting to commencement of trial. However, there is no evidence that improper or unfair questioning is reduced, that cross-examination is less confrontational or that more support is given to the complainer. Both a lack of (specific) procedures and training for judges and prosecutors as well as the general principles of the adversarial process are given as reasons for this.

The written verdict is seen as one of the main advantages of a single judge trial, both in improving the experience of the complainer and improving the rights of the accused. It offers more transparency in the decision-making process and would allow for a clearer evaluation in appeal courts. Taking the rights of the accused into consideration, the studies discussed in this evidence briefing also suggest consistent and clear procedures should be developed, as well as implicit bias of judges should be addressed. Training that actively challenges potential biases can help tackle prejudice and misconceptions. Increasing the diversity in the judiciary might also help to increase legitimacy, trust and fairness perceived by both defendant and complainer.

Research on the impact of single judge trials on public confidence in the justice system, as well as clear evidence on the impact on conviction rates, is lacking. Studies looking at public confidence in the system rarely refer to specific modes of trial or specific offences. Studies on conviction rates in other jurisdictions have shown an increase, no change or even a decrease of convictions when single judge trials are compared to jury trials. Overall, data is limited and most studies did not look at rape cases specifically.

The evidence briefing shows that it is difficult with the current available research to give any clear expectations of how single judge trials for rape offences will impact complainers, the rights of the accused, public confidence or conviction rates in Scotland. In general, there seems to be a consensus that there is a need to change how rape cases are handled. However, data on how best to tackle this is limited. Together with other recommendations from the Lady Dorrian review, such as a piloting a specialist court, a single judge trial pilot in Scotland can offer valuable and much needed empirical data and insight on the effects a change in mode of trial can have on the decision-making process and complainer experience.

### **3.1 Reflections on a Scottish Pilot**

Developing a Scottish pilot for single judge trials for rape cases will be important to increase our understanding of the impact changing the mode of trial will have. Although the current evidence is limited, this briefing does suggest that when developing the pilot, some additional element, apart from the mode of trial, would be valuable to consider. The exploratory studies discussed in this briefing indicate that to improve the complainer's experience, changes to the way a trial is conducted might also be needed. A single judge trial can make it easier to adopt

these changes, but might not necessarily make them happen on its own. The limited research that is available points to the importance of considering the system holistically, ensuring wider processes support the intended improvements for the complainer. Complainer experiences are multi-faceted, but overall, to improve it, different elements are important to consider:

- **Written reasoned verdict.** A reasoned verdict can offer transparency in the decision-making process for both complainer and accused. The exploratory study in New Zealand also showed that judges actively reject misconceptions and rape myths in their written verdict. The written verdict is something that is difficult to include in a jury trial, but would be supported by a single judge model (as well as a panel of judges or mixed panel model).
- **Trial conducted.** An important influence on the complainer's experience is the way the trial is conducted and specifically the process of cross-examination. Single judge trials offer possibilities to address this, however, tentative evidence presented in this briefing shows that only changing the mode of trial might not be enough. The studies suggest to consider more trauma-informed approaches to cross-examination as well as establishing clear procedures for judges (e.g. on interventions in questioning) and training for judges, prosecutors and defence attorneys.
- **Communication and active (emphatic) engagement with the complainer.** This is another important aspect that impact the complainer's experience. The exploratory study conducted in New Zealand suggests that it might not be the mode of trial, but offering training for judges and counsel that can play an important role in encouraging a more active communication with and support for the complainer.
- **Bias.** Studies included in this briefing point out that while there is evidence that rape myths and misconceptions play a role in jury trials, it is important to acknowledge that a judge is also not without (implicit) bias. There are, however, indications that offering training to judges to ensure they can actively question their own ideas and prejudices can help mitigate the influence of bias. A more diverse judiciary might also be important when switching to a single judge trial mode. A panel of judges or mixed panel model could help to mitigate some of the impact of (implicit) bias.

All of this asks for a clear evaluation of the pilot, including the experience of the complainer. Moreover, it might be good to consider how the different recommendations of the Lady Dorrian review, including the establishing of a specialist court and of jury education, could inform each other.

# Annex I - Rapid Evidence Review

## Commission

**Who:** Single Judge Trial Pilot Working Group

**Timeframe:** 30 May - 31 July 2022

**Commission:** Rapid Evidence Review exploring alternatives to Jury Trials for serious sexual offences, with a particular focus on single judge only trials.

**Purpose of Commission:** To support and inform deliberations and the wider debate on the merits and challenges associated with alternatives to jury trials in cases of serious sexual assault.

### Scope of Commission:

The commission seeks commentary on the questions set out below, with a particular focus on identifying any developments (including legal, commentary or proposed further reform) in the legal jurisdictions considered by the Lady Dorrian Review (e.g. New Zealand referenced at paragraphs 5.45-5.50 of the Review Report) since the Review Report was published in March 2021, including any jurisdictions not identified which have introduced or are considering the introduction of alternatives to juries, and any further literature or evidence published on the evaluation of the alternatives to jury trials considered by Lady Dorrian's Review (single judge; panel of judges; judge with lay person(s); professional jurors). The Working Group is particularly interested in information in jurisdictions where such alternatives have been introduced as a change/reform to an existing regime of jury trials and how the additional information available adds to or impacts the existing body of evidence regarding the criminal justice system's response to serious sexual offence cases.

- How has any academic literature/evidence published since the Lady Dorrian Review was released in March 2021 progressed discussions about the impact of alternatives to Jury trials (single judge trials, a panel of judges and combined judge and lay panel) on rape and serious sexual offences with specific regard to:
  - the experience of complainers during the trial process;
  - the rights of the accused;
  - public confidence in the justice system; and
  - Conviction Rates.
- With a view to informing consideration and discussion on the implement of a single judge pilot, what are the key themes, challenges (both legal and practical) and lessons learnt (as applicable) that have emerged from those jurisdictions in which alternatives to jury trials (particularly single judge trials) for serious sexual offences have been introduced, or are proposed to be introduced. We are interested in particular on
  - the experience of complainers during the trial process;

- the rights of the accused;
- public confidence in the justice system; and
- conviction rates.

Focus should be on those countries in which a jury system has been in place. Identification of the type of criminal legal system (i.e. inquisitorial or adversarial), its constitutional position.

### **Bibliography:**

#### **Consideration could be given to**

1. MacDonald. E, [In the Absence of A Jury: Examining Judge-Alone Rape Trials Canterbury](https://ir.canterbury.ac.nz/handle/10092/102735) University Press, 2022, accessible at: <https://ir.canterbury.ac.nz/handle/10092/102735>
2. Research conducted and collated for the Lady Dorrian Review, accessible at [Single Judge Trial Pilot - Working Group - Rapid Evidence Review Material details - Objective ECM \(scotland.gov.uk\)](https://www.scotland.gov.uk/topics/justice-reform/lady-dorrian-review)

## Annex II – Methods

An initial search on both Google Scholar and the Scottish Government Library Service, KandE, was conducted. KandE has access to an extensive range of online search engines and databases.

In order to supplement the Lady Dorrian Review, the initial search was limited to literature published since 2020. However this only gave limited relevant results and the period was extended to 2010. It included the following terms:

“rape”, “sexual offence”, “sexual offences” and “single judge”, “judge alone”, “judge only”, “professional juror”, “lay panel” OR “lay assessor”, “judge panel”, “panel of judges”, “jury-less trial”, “trial by judge”.

The search was also complemented by a Scottish government library search. This search similarly revealed that there currently is very little research comparing jury trials and their alternatives. The most promising publication from this search was Elisabeth McDonald’s “In the Absence of a Jury”. This publication was read, and relevant references mentioned in this study were also added to the list.

Recommendations were asked from Professors James Chalmers, Fiona Leverick and Vanessa Munro. They were specifically asked for recommendations on pilots or cases where a switch was made from jury trials to an alternative mode of trial. In their reply they mentioned the limited amount of research available on this topic, but suggested the book *Juries, Lay Judges, and Mixed Courts – a Global Perspective*, by Sanja Kutnjak Ivković and others.

An overview of the relevant literature included in this briefing can be found in the tables below. Initial relevance was determined by the study involving empirical analysis or practical examples of establishing alternatives to jury trials. However, this resulted in a very limited number of studies. In consultation with policy colleagues the scope was broadened to include literature that reflects on the challenges of different modes of trial and suggestions of criteria for changes to modes of trial. Specific searches were conducted looking at conviction rates and public confidence in the justice system. Attention was also given to countries that have a similar (adversarial) system to Scotland, and have used single judge trials. These include Australia, New Zealand, Canada and United States. Examples were also included of serious (sexual) offence proceedings in countries with different modes of trial, and studies were found focusing on Japan, Norway and The Netherlands. In total 24 studies were included in this briefing:

### Literature on rape trials

Dowds et al (2021) Putting Sexual violence on trial In: *Sexual Violence on Trial: Local and Comparative Perspectives*

- **Scope:** Summary of recent developments in social and legal responses to sexual violence, comparing Northern Ireland context to other countries
- **Relevance:** Overview of challenges in system, but not specifically on mode of trial



Michele Burman and Sandy Brindley (2021) Challenges in the investigation and prosecution of rape and serious sexual offences in Scotland

- **Scope:** Overview of important themes in and research on prosecution of rape offences in Scotland
- **Relevance:** Overview of challenges, Scotland specific, but not specifically on mode of trial

Rachel George and Sophie Ferguson (2021) Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales

- **Scope:** Research report for HM Government exploring experiences and views of the police, CPS, support services, solicitors, barristers, defence practitioners and judges on criminal justice system related to sexual offences
- **Relevance:** Overview of challenges in the system, but only briefly discusses views expressed on juries

Ellen Daly (2021) Court Observations of English Rape and Sexual Assault Trials: an Intersectional Analysis

- **Scope:** Study exploring the role of rape myths and cultural narratives in serious sexual offence trials in England
- **Relevance:** Reflection on rape myths and jury trial

James Chalmers et al (2021) Why the Jury Is, and Should Still be, Out on Rape Deliberation

- **Scope:** Discussion of arguments in favour of judge alone trials
- **Relevance:** Reflection on use of jury in sexual offence trials

Waterhouse et al (2016) Myths and legends: The reality of rape offences reported to a UK police force

- **Scope:** Looking at rape statistics and misconceptions
- **Relevance:** Rape statistics

Jane Goodman-Delahunty et al (2021) Greater Knowledge Enhances Complainant Credibility and Increases Jury Convictions for Child Sexual Assault

- **Scope:** Study in Australia where jury interventions (including expert witness or giving educative judicial direction) were tested in child sexual assault cases
- **Relevance:** Reflections on use of interventions to help jury overcome bias

## Literature on justifications for jury/single judge trial

J Boersig et al. (2021) Accused Stripped of the power to elect to have trials before a jury of their peers

- **Scope:** Critique on the emergency COVID-19 response act in Australian Capital Territory that allowed judge-alone trials on election of the judge
- **Relevance:** Reflection on legitimacy of single judge trials

Felicity Gerry (2020) Jury is out: why shifting to judge-alone trials is a flawed approach to criminal justice

- **Scope:** Critique on judge alone trials
- **Relevance:** Reflections on jury and judge alone trial system (opinion piece)

Dominic Willmott et al (2018) The English Jury on Trial

- **Scope:** Discussing (early) results from mock jury rape trials and bias. Calls for reform but no abolishment of jury system
- **Relevance:** Reflections on jury system in rape trials

Julian Roberts and Mike Hough (2011) Public Attitudes to the Criminal Jury: a Review of Recent Findings

- **Scope:** Presenting overview of surveys in England and Wales that record public attitudes to the jury
- **Relevance:** Public attitudes statistics, with focus on jury trial

## Literature assessing single judge trials

Elisabeth McDonald (2022) In the Absence of a Jury

- **Scope:** Comparative study between jury trial and single judge trials in New Zealand, with a focus on the complainers experience of the Justice process
- **Relevance:** Direct comparison between jury and single judge trials

Fiona Hanlon (2014) Trying serious offences by judge alone: Towards an understanding of its impact on judicial administration in Australia

- **Scope:** Study of judge-alone trials in serious offences in Australia, looking at role and pressures on judge, impact of trial and trial procedure
- **Relevance:** Review of single judge trials, but not specific for sexual offences

Jodie O'Leary (2011) Twelve Angry Peers or One Angry Judge: An Analysis of Judge Alone Trials in Australia

- **Scope:** Examines reasons given for granting a single judge trial in Australia (and the difficulties with competing justifications)
- **Relevance:** Gives information on judge alone trials, but not specific for sexual offences

Don Read et al. (2006) An Archival Analysis of Actual Cases of Historic Child Sexual Abuse: A Comparison of Jury and Bench Trials

- **Scope:** Comparison between jury and single judge trial in Canada, with an analysis of different predictors of verdicts
- **Relevance:** Compares jury and single judge trials, focuses on variables that can predict verdict

Shari Seidman Diamond and Jessica Salerno (2020) Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges

- **Scope:** Reflections on use of jury trials, including a survey of judges and attorneys in the United States
- **Relevance:** Reflection on use of jury trial, but not specific for sexual offences

Daniel Givelber and Amy Farrell (2008) Judges and Juries: The Defense Case and Differences in Acquittal Rates

- **Scope:** Study on the differences in giving a guilty verdict between jury and judge (presiding over jury trial) in the United States
- **Relevance:** Empirical data on jury trials in United States, but not specific for sexual offences

Melissa Breger (2019) Making the invisible visible: exploring implicit bias, judicial diversity, and the bench trial

- **Scope:** Study looking at implicit bias in single judge trials (in the United States)
- **Relevance:** Reflection on judge alone trials and implicit bias, but not specific for sexual offences

Bethany Sager et al (2021) Bench vs. Jury Trials: Sentencing and Conviction Outcomes for Criminally Charged Police Officers (poster)

- **Scope:** Poster giving overview of study comparing conviction rates between bench and jury trials for criminally charged police officers in the United States
- **Relevance:** Empirical data on conviction rates in United States, but not of rape cases.

## Literature on other modes of trial

Louise Elaine Ellison (1997) A Comparative Study of Rape Trials in Adversarial and Inquisitorial Criminal Justice Systems

- **Scope:** Comparative study between The Netherlands and England, with a focus on needs and interests of rape complainants
- **Relevance:** Direct comparison between two different mode of trials/justice systems

Anna Offit (2021) Dismissing the Jury: Mixed Courts and Lay Participation in Norway  
In: Juries, Lay Judges and Mixed Courts: A Global Perspective

- **Scope:** Discussing the change in Norway from jury to mixed courts (lay and professional judges)
- **Relevance:** Considers a change in mode of trial, although not single judge trials. Not specific for sexual offences

Dimitri Vanoverbeke and Hiroshi Fukurai (2021) Lay Participation in the Criminal Trial in Japan A Decade of Activity and Its Sociopolitical Consequences

- **Scope:** Evaluation of the new Japanese system (introduced in 2009)
- **Relevance:** Provides empirical data but change is from judge only to lay participation. Not specific for sexual offences

Mika Obara-Minnitt (2018) The Sacrifices behind the “Success” of Saiban-in Seido (Quasi-Jury System)

- **Scope:** Reflections on the new Japanese system (introduced in 2009)
- **Relevance:** Provides empirical data but change is from judge only to lay participation. Not specific for sexual offences

Mark Levin and Virginia Tice (2009) Japan’s New Citizen Judges: How Secrecy Imperils Judicial Reform

- **Scope:** Comparison of new Japanese judicial system with other systems around the world and challenges it faces
- **Relevance:** Compares modes of trials, but not specific for sexual offences. No empirical data

# Annex III – Modes of Trial in Different Countries

Overview of the modes of trials in different countries. Note that the list is not exhaustive but illustrates the variety in alternatives to the Scottish system.

## Australia

**Mode of trial:** Single judge or jury

In some of the States and Territories of Australia it is possible for the defendant to request a trial by judge instead of jury. States have slightly different rules when a single judge trial will be granted (see box 3).

All States and Territories follow an adversarial system.

## Belgium

**Mode of trial:** Single judge or 3 professional judges and 12 person jury

Serious offences (including rape) should be tried by 3 judges and jury, however cases can be 'correctionalised' – artificially downgraded to a less serious offence – in order to be tried in a lower court by a single judge (as alternative to plea bargaining).

Follows an inquisitorial system (pre-trial), although jury trial has adversarial elements.

## Canada

**Mode of trial:** Single judge or 12 person jury

Rape cases can be tried both in front of a single judge or a jury.

The Criminal Code of Canada provides the accused the right to elect a trial by single judge or a trial by judge and jury. (with the exception of the most serious offences including murder, treason and terrorism, in those cases the crown attorney has to consent to a single judge trial).

Most criminal offence cases are tried in provincial/territorial courts.

## Denmark

**Mode of trial:** Single judge or panel of judges and lay judges (either 1 judge with 2 lay judges or 3 judges and 6 lay judges depending on severity of crime)

Rape cases are heard by a panel of 3 judges and 6 lay judges.

The lay judges are nominated by social organisations, mainly political parties. The judges sit together with the jury when considering the verdict. Two of the three judges and four of the six lay judges must agree on the verdict.

## Germany

**Mode of trial:** Single judge or panel of judges and lay assessors

Rape cases are heard by a panel of three judges and two lay assessors. The panel works collaboratively and decisions are made by majority. Lay assessors are drawn from a list of people who self-nominate.

It follows a mainly inquisitorial system (judges have a leading role and court has duty to control examination although defence and prosecution support by presenting evidence)

## **Japan**

**Mode of trial:** Single judge, panel of 3 judges or *saiban-in* system (panel of 3 professional judges and six lay judges)

The *Saiban-in* system was introduced in 2009 and hears serious criminal cases, including rape. The panel is responsible for both verdict and sentencing.

In the *Saiban-in* system a guilty verdict can be given by a majority vote of the lay judges plus at least one of the professional judges. A majority not-guilty verdict by the lay judges is enough for acquittal.

Follows an inquisitorial system

## **The Netherlands**

**Mode of trial:** Single judge or panel of 3 judges

The most serious sexual offences will be tried by a panel of three professional judges.

Follows an inquisitorial system.

## **New Zealand**

**Mode of trial:** Single judge or a 12 person jury

In serious sexual offence cases the defendant can opt for a jury trial (judge can override request in offences that carry less than 14 years imprisonment and case is either long/complex or there is a risk of intimidation or jury tampering).

New Zealand is also running a Sexual Violence Pilot Court in Auckland and Whangarei.

Follows an adversarial system.

## **Norway**

**Mode of trial:** Mixed court (lay and professional judges share decision-making)

In first instance criminal cases are heard by 2 lay and 1 professional judge, with more complex cases having 3 lay judges and 2 professional judges. In appellate court there is a mixed panel of 5 lay and 2 professional judges. Lay judges are picked the municipality for a four year period, mainly nominated by political parties. Follows an adversarial system.

## **Sweden**

**Mode of trial:** Panel with one professional judge and three lay judges

Follows an adversarial system, with the victim not regarded as a witness but assuming the role of party in the trial alongside the prosecutor. The victim is entitled to a lawyer who has the authority to challenge proceedings.  
The lay judges are nominated by social organisation, mainly political parties.

### **Trinidad and Tobago**

**Mode of trial:** Single judge or jury

Since 2019 the defendant can choose whether they want a trial by jury or single judge in (serious) criminal cases.

Follows an adversarial system

### **United states**

**Mode of trial:** Single judge or jury

In some of the States in the US it is possible for the defendant to request a trial by judge instead of jury.

For example, in Texas defendants have the right to waive a jury trial (unless charged with capital murder), but the prosecution and judge have to agree. In Maryland, the defendant can choose a trial by judge with the prosecution having no say in the decision.

All States follow an adversarial system

### **How to access background or source data**

The data collected for this social research publication:

- ☐ are available in more detail through Scottish Neighbourhood Statistics
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