

THE **LAW SOCIETY**
OF NORTHERN IRELAND



Committee for Justice
Call for Evidence on
CRIMINAL JUSTICE (COMMITTAL REFORM) BILL

**Response of the Law Society of
Northern Ireland**

January 2021

*96 Victoria Street
Belfast BT1 3GN
Tel: 02890 23 1614
Fax: 02890 232606
Email: enquiry@lawsoc-ni.org
Website: www.lawsoc-ni.org*

ABOUT THE LAW SOCIETY OF NORTHERN IRELAND

The Law Society of Northern Ireland (the Society) is a professional body established by Royal Charter and invested with statutory functions primarily under the Solicitors (Northern Ireland) Order 1976 as amended. The functions of the Society are to regulate responsibly and in the public interest the solicitor's profession in Northern Ireland and to represent solicitors' interests.

The Society represents over 2,837 solicitors working in approximately 482 firms, based in 65 geographical locations throughout Northern Ireland and practitioners working in the public sector and in business. Members of the Society thus represent private clients, government and third sector organisations. This makes the Society well placed to comment on policy and law reform proposals across a range of topics.

Since its establishment, the Society has played a positive and proactive role in helping to shape the legal system in Northern Ireland. In a devolved context, in which responsibility for the development of justice policy and law reform takes place at a local level, this role is as important as ever.

The solicitors' profession, which operates as the interface between the justice system and the general public, is uniquely placed to comment on the particular circumstances of the Northern Irish justice system and to assess the practical out workings of policy proposals.

January 2021

RESPONSE

1. INTRODUCTION

- 1.1 The Law Society of Northern Ireland (The Society) welcomes the opportunity to provide a response to this call for evidence on committal reform by the Justice Committee of the Northern Ireland Assembly. The Society notes that the Criminal Justice (Committal Reform) Bill (the Bill) was introduced to give effect to a commitment under the Fresh Start Agreement 2015 in an effort to speed up the criminal justice system and offer support to complainants to give their evidence. In addition, the Bill will incorporate recommendations by Audit Office, CJINI and the Gillen Review into serious sexual offences all of which suggested that committal proceedings provided minimal value and were imposing on complainants and witnesses. Since the publication of the Bill in the Assembly, the Independent Reporting Commission has reiterated its disappointment about the additional time taken for criminal cases to be disposed of in Northern Ireland as a result of the committal process, but noted the commitment by the Justice Minister to progress legislation to that end.
- 1.2 There are two clear policy objectives offered in the Bill, to abolish all oral evidence in advance of the trial and to introduce direct transfer to the Crown Court for *all indictable cases*. The latter extends the provision available in the Justice Act 2015 (the 2015 Act) which removed committal for murder and manslaughter cases. Notably the draft Justice Bill in 2015 endeavoured to remove the use of oral evidence pre-trial, but was unsuccessful. The amendments to the draft Justice Bill 2015 in that regard will be repealed on this occasion if accepted by the Assembly.
- 1.3 England and Wales (E&W) removed committal hearings in 2012 for indictable and either way offences because they were too costly, given that the cases would proceed to the Crown Court in any event. Australia has also reviewed its committal process in the last 6-8 years, with some States abolishing the process. It is of interest that the Department of Justice (the Department) have suggested that analysis of reforms in those jurisdictions have not necessarily reduced delays but rather shifted delay to the higher court. The Republic of Ireland continue their debate on the introduction of a Criminal Procedure Bill which will provide for preliminary trial hearings similar to a committal hearing and aim to reduce delays, increase efficiency and fairness in the criminal trial process. A preliminary trial hearing would allow for procedural arguments which arise during trials at present to be dealt with before a jury is empanelled, thereby saving time and allowing juries to focus on the facts of the case. The Irish Government have also suggested that the proposed change would benefit victims and witnesses by reducing delays and deciding which evidence is admissible before the main trial
- 1.4 The Department conducted a 12-week consultation exercise in 2012 regarding committal reform. The Society at that juncture did not think removing a step in the process would necessarily lead to cost savings or result in 'speedy justice'. Although the Society indicated that it understood the concerns expressed regarding vulnerable witnesses, it was highlighted that special rules already existed to ensure that they are

not unduly subjected to the stress of having to give evidence and a view was expressed that a more measured approach might be for District Judges (DJ) to have limited discretion to allow the calling of key witnesses where they believed that it would be in the interests of justice to do so. Upon consideration of the Bill, the Assembly made amendments to the Bill's original clauses which retained the use of oral evidence at committal proceedings where the court deems it to be in the interests of justice.

2. POSITION IN NORTHERN IRELAND

- 2.1 The position in this jurisdiction is that committals are conducted in the Magistrates' Court by way of a Preliminary Inquiry (PE) or Preliminary Investigation (PI) and on occasion mixed committals take place. PIs will take place only when deemed appropriate, and involve oral evidence and cross examination. PEs are more commonly used and require the Public Prosecution Service (PPS) to demonstrate sufficient evidence against the accused on the basis of written statements.
- 2.2 In 2019 the average time between committal and the commencement of the trial was 118 days which was a reduction from previous years – 2015 and 2016 the average was 168 days.
- 2.3 The committal hearing is a process to establish whether there is a prima facie case to commit an accused to stand trial with no obligation on the accused to contest their guilt or present evidence. It effectively distils the case against the accused by narrowing issues and allows the prosecution to take a pragmatic look at the case as a whole. The primary purpose of this pre-trial process will identify the key issues of the case; those in dispute and those that could possibly resolve. The reason for this is twofold: first, it encourages all relevant issues to be identified at an early stage to prepare the parties for the contested trial; and secondly, to allow for the resolution of any non-disputed issues. The possible benefits that arise from the early identification of issues – namely early guilty pleas, reductions in pending case lists, and a diminished likelihood of last-minute adjournments through increased trial date certainty – is what underpinned and legitimised committal hearings to date. Some DJs have indicated to defence solicitors that they favour the retention of committals (or a similar process) due to their effectiveness in narrowing issues.
- 2.4 During Committal Hearings, the PPS will present evidence, including witness testimonies, the accuracy of which may be challenged by cross-examination. In theory, the committal hearing provides an opportunity to scrutinise the Crown's case at an early stage, thereby filtering out cases which will not meet the necessary threshold to support a conviction at trial. The committal can therefore provide a check on the discretionary powers of criminal justice agencies (the police and prosecutors) by ensuring unjust or speculative prosecutions do not proceed. This supports the basic due process rights afforded to accused persons within the criminal justice system. The committal hearing also provides a mechanism to inform an accused person's pleading decision, including some encouragement towards the entering of an early guilty plea. This is because it provides the accused with a full understanding not only of the

charges, but of the evidence that will be used to support those charges. In light of this, at the conclusion of the committal, the accused has a more complete understanding of the case against them and what evidence and approaches are required in order to best respond to the Crown's case, if it proceeds to a contested trial. Accordingly, the weeding out of weak prosecutions and the encouragement of plea-bargaining discussions in committal hearings can save significant costs, time and resources. At the conclusion of the committal hearing, regardless of whether it has proceeded orally or by way of written statements, the DJ must determine whether the Crown has presented sufficient evidence to support a conviction at trial. If the DJ does not consider there is sufficient evidence, the charges are dismissed, otherwise the accused is returned for trial to the Crown Court.

- 2.5 The Society is aware that committal is sometimes viewed as a 'hearing within a hearing' creating unnecessary delay which is of little value. The Justice Minister informed the Assembly last November that the committal process is not an effective filtering mechanism in practice as only 4% of cases did not proceed to the Crown Court for trial in 2019. However, it cannot be overlooked that 95.5% of all cases went on trial in the same year without a committal or PI taking place and therefore the suggested delay to the criminal justice system may not be as significant as first appears.
- 2.6 In England and Wales (E&W) committal reforms introduced in 2012 included direct transfer of cases. Post implementation data of these reforms shows that this method of committing an accused to trial is not a demonstrably more efficient process in terms of its impact on court delays than first having the Crown's case tested for its sufficiency in the lower court either orally or by way of hand-up brief/written statements. The E&W experience is that abolition of committal proceedings did not result in 'speedy justice' as expected. The Society considers it significant that a major difference between this jurisdiction and E&W, is that the decision-making DJ in a PI is a legally qualified Judge, which results in the case receiving proper and full legal scrutiny. The process for a lawyer considering such evidence is much quicker than a lay DJ which is the case in E&W.

3. NORTHERN IRELAND COMMITTAL REFORM

- 3.1 Reform of the Committal process will include the abolition of oral evidence before the commencement of the trial. The potential trauma to complainants and witnesses of facing cross examination in a Magistrates' Court is not underestimated, and may leave them feeling that it is a trial within a trial. Highlighting the impact on complainants is important as they may be required to give evidence on more than one occasion. The removal of oral evidence in advance of a trial may well improve the experience of complainants and witnesses in the criminal justice system and indeed offer them some confidence in the process. The Society recognises and supports the importance of everyone involved in the process being in a position to give their best evidence to the court. The Department has indicated that it will be a priority to focus on areas that will deliver the greatest impact for complainants from Sir John Gillen's comprehensive review into how the criminal justice system deals with cases of serious sexual assault

– which resulted in 253 recommendations. Sir John specifically analysed the issue of whether the criminal justice system failed complainants and whether the process actually offered them a fair trial process in serious sexual offences. Indeed, he referred to the UN Handbook on Justice for Victims (1999) –

“Victims should be supported in their efforts to participate in the justice system through direct and indirect means; timely notification of critical events and decisions, provision in full of information on the procedures and processes involved; support of the presence of victims at critical events; and assistance when there are opportunities to be heard.”

Complainants do not have individual legal representation and therefore may well feel that they have little control over the process they are involved in. Sir John’s recommendations will go some way to correct that position and support complainants as they progress through the justice system. The Department indicated that they will now advance a 2-year pilot project to make legal advice available to adult complainants in cases of serious sexual offences where they wish to object to disclosure of certain types of evidence. Three fixed term salaried positions within Victim Support will be funded as part of the pilot with a possible one-year extension. This is welcomed by the Society, but thought might be given to extending the scope of the pilot so that complainants may be free to go to a legal adviser of their own choice.

The increasing use of video evidence by complainants and vulnerable witnesses in the ABE process is a welcome move to allow such participants in the criminal justice process to feel more at ease in offering their evidence. This arrangement and other available special measures should be widely adopted to allow these participants to fully engage in the process and feel as supported as possible and enable them to give their best evidence.

- 3.2 Committal reform including removal of the need to give oral evidence pre-trial may allow complainants to have more faith and confidence in the justice system. However, this should only be achieved by not compromising the rights of the accused and the need to prove a case beyond reasonable doubt. The interests of both parties must be delicately balanced at all times so that justice can be delivered to all in the system. To date the committal process has been intrinsic to upholding article 6 rights in the trial process. The proposal for improvement of the trial process should not be to the detriment of another participant. An imbalance should not be created as a result of reforms.
- 3.3 Currently an accused who is committed for trial before their peers in the Crown Court, goes through a committal process whereby the essence of the evidence against someone is presented in written form in a set of committal papers. A DJ reviews those papers, and there is an opportunity at that time for the defence and indeed, in some circumstances, for the prosecution, rather than simply proceeding on the papers of the case, to have selected parts or all of the evidence called to be heard in the Magistrates' Court. The purpose of that, of course, is to test the validity of the evidence and the

witness, because one can only be returned for trial in this jurisdiction if the court is satisfied that there is a *prima facie case against the person*. This is distinctly different from the ultimate test in the Crown Court: before one can be convicted, there has to be *proof beyond all reasonable doubt*.

- 3.4 Defence solicitors are of the view that removal of the committal stage will inevitably result in some cases that could have been removed from the system due to insufficient evidence remaining in the system for a considerable time and accumulating sizeable costs which ultimately have to be met by the public purse. Currently there is a composite fee awarded to a legal representative acting for an accused in a committal hearing. The fee remains the same regardless of whether the case against the accused is accepted (and a transfer to the Crown Court is made), or a committal hearing (PI/PE or mixed) takes place. The benefits of committal outlined above in terms of reducing charges, narrowing issues and on occasion complete removal of all charges, in terms of economics cannot be ignored.
- 3.5 Under the new proposals an accused will participate in a Crown Court trial without a statement against him/her being sworn or a witness against him/her being heard. Committal papers are accumulated by the PPS and PSNI and include witness statements signed but not sworn by the witnesses at the time they are made. The 'truth' of the witness statement is not tested until the stage of oral evidence. To date committal has allowed evidence to be tested at an early stage in the life of a case within the system. It is widely accepted that there are a minority of cases that are inherently weak. Such cases will not be successfully prosecuted and need to be identified at the earliest opportunity. The proposed reforms provide new powers to the Director of Public Prosecutions in Northern Ireland to discontinue proceedings to which direct transfer provisions in the 2015 Act apply between the case being committed to the Crown Court and the presentation of an indictment setting out charges for which the accused is to be prosecuted. These powers will address the situation where there is a material change in the circumstances of the case eg new evidence emerging which will lead the PPS to conclude that the test for prosecution is no longer met. The expectation is that direct transfer of cases in such situations *may arise more frequently* as cases will transfer at an earlier stage in the criminal justice system. Defence solicitors are concerned by this assumption i.e. cases will transfer at an early stage. Many solicitors fear that cases to be the subject of direct transfer may well languish for a considerable period of time in the Magistrates' Court before they are ready for transfer, unless resources are heavily applied to the PSNI and PPS to allow them to offer a complete file so that the case may transfer.
- 3.6 Solicitors suggest that the main cause of delay in criminal trials currently, is not the actual committal process, but the time taken by investigatory agencies to accumulate evidence to support a prosecution. These resources are not adequate with examples of delays up to 18 months to await the outcome of computer/laptop investigations and several months to receive body cam recordings. These problems will still exist after committal reform unless additional focus and resources are applied. A direct transfer of proceedings will not eliminate this issue, indeed, as suggested above it will lead to

cases being paused in the lower court awaiting a full prosecution file as is the case currently. It would be of interest if the Department were to offer statistics on delays due to the prosecution service awaiting material to complete their file.

- 3.7 The proposed Committal Reform Bill retains the process whereby the defence may make an application to dismiss – or a ‘no bill’ application. Oral evidence will not be permitted in such an application in keeping with the proposal to abolish oral evidence pre-trial. An application to dismiss will allow the defence to apply to the Crown Court for some or all charges to be dismissed on the basis that the evidence is insufficient for the accused to be properly convicted. Defence solicitors are concerned that this right will now be eroded by the recent case of *R v Charles Valliday [2020] NICA 43* an appeal which raised issues concerning the ‘No Bill’ jurisdiction of the Crown Court under section 2(3) of the Grand Jury (Abolition)(Act)(NI) Act 1969. One of the main grounds for appeal in the Valliday case was that the depositions did not disclose a sufficient case to justify putting the accused on trial and that the trial judge erred in law in determining that the evidential deficit in the depositions amounted merely to a formal defect The Court of Appeal’s analysis made it clear that the central issue of law in the appeal was whether the judge, having determined that the statutory test of insufficiency of evidence was satisfied, erred in law in exercising his statutory discretion to nonetheless reject the ‘No Bill’ application. The appeal judges dismissed the appeal stating that the judge had made an evaluative judgement that the defect in the prosecution case could be easily remedied – by serving additional evidence. The judge did not have concrete material before him. However, the appeal judges stated that ‘this is not required in every case’. Defence solicitors see this judgement as tantamount to limiting the usefulness of a ‘No Bill’ application by the defence.
- 3.8 The Society awaits details of the Department’s proposals for the introduction of time limits *within* the proposed reforms. There is no Bail Act in this jurisdiction and therefore it is vital that custody time limits are included in the proposed reforms. Solicitors have indicated that they have experienced delays in the system of more than 18 months whilst awaiting a committal hearing date, due to the prosecution file not being complete. The impact on an accused who is in custody during that period is obvious. Provision must be made for bail applications in such instances and be embodied in the proposed reforms. Legislation exists in Northern Ireland to enable Regulations to be made for time limits at the prosecution stages and remands at pre-trial stages (Articles 12 to 16 of the Criminal Justice (NI) Order 2003). To date such Regulations have not yet been made, although the Minister for Justice in 2012 had suggested a commitment to introduce statutory time limits initially in youth courts.
- 3.9 In Scotland Statutory Time limits have been incorporated into the Criminal Procedure (Scotland) Act 1995 (as amended) to prevent delays in trials. The statutory time limits focus on the pre-trial stages of criminal proceedings. If the accused is on bail, a preliminary hearing must take place in High Court cases within 11 months and a trial within 12 months. The consequences of non-compliance are that the accused is discharged from indictment with respect to any offence and cannot at any time be tried on these charges. There are three-time limits in respect of persons in custody. An

indictment must be served upon the defendant putting the charges to the defendant within 80 days. Preliminary hearings must take place within 110 days and in High Court cases, a trial must take place within 140 days. The sanction for non-compliance with these time limits is that the accused is entitled to be admitted to bail. This position was changed in 2004, as previous sanctions for non-compliance were that the accused would forever be free from question and process about that offence. In respect of Sheriff court cases a trial must take place within 110 days. A review of Sheriff and Jury Procedure in 2010 recommended that the 110-day rule in Sheriff cases is brought into line with High Court cases. Extensions of time limits may be granted on a single ground of cause shown.

- 3.10 In the Republic of Ireland summary offences are subject to 6-month limitation periods. However, there are no such time limits in indictable offences unless specified by legislation. The Irish Constitution does not explicitly guarantee the right to a speedy trial. However, the courts in Ireland have interpreted the Irish Constitution to include the entitlement to a trial with reasonable expedition. As suggested in paragraph 1.3 above, the Republic of Ireland continue their debate on the introduction of a Criminal Procedure Bill to provide for preliminary trial hearings similar to a committal hearing with the aim of reducing delays, increase efficiency and fairness in the criminal trial process.
- 3.11 In E&W legislation exists giving the Secretary of State power to make Overall Time Limits and Custody Time Limits. Regulations were introduced in England and Wales to fix the maximum periods an accused can be held in custody and were implemented nationally in 1991. Failure to comply with those limits results in an accused's immediate right to bail. An evaluation of this process in 2003 suggested that the time limits had speeded up the process and also complied with the standards set in the European Convention on Human Rights.
- 3.12 Being remanded on bail for extended periods of time without an examination of the case against an accused will have implications on their family and work life. Abolition of committals in this jurisdiction without the introduction of custody time limits will inevitably lead to defendants suffering unjustified deprivation of liberty, as cases could foreseeably sit in the Magistrates' court for up to 2 years before a direct transfer. Time limits for custody as well as overall time limits must be introduced in this jurisdiction at the earliest opportunity if reforms are to be of value. Currently there is no time limit for commencing criminal proceedings in this jurisdiction except where provided by statute for example there is a general six-month time limit for the complaint of a summary only cases. Currently legislation exists that would allow the Justice Minister to make regulations to provide for statutory time limits in prosecutions and pre-trial stages. However, to date regulations have not been made. Such measures will assist in reducing delays in the criminal justice process.
- 3.13 The Society suggests that the proposed reforms must also provide for focused, reasonable and achievable case management time limits to be applicable to all direct transfer cases. If this is not provided for in the proposed changes then inevitable

delays will be experienced by victims, witnesses and the accused. Such time limits would represent a significant improvement to the current system.

4. CONCLUSION

- 4.1 The Society welcomes this opportunity to submit a response in respect of the call for evidence by the Justice Committee on committal reform.
- 4.2 We trust our contribution is constructive and we are happy to meet with officials to discuss and expand any of the issues raised in our response.
- 4.3 The Society would like to be kept informed of any subsequent proposals formed as a result of this consultation and also any changes to the overall policy direction of the topic under discussion along with a stated rationale.