Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Criminal Justice (Committal Reform) Bill: Bar Council of Northern Ireland

4 February 2021

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Ms Linda Dillon (Deputy Chairperson)
Mr Doug Beattie
Ms Sinéad Bradley
Ms Jemma Dolan
Mr Gordon Dunne
Mr Paul Frew
Miss Rachel Woods

Witnesses:

Mr Michael Forde	Bar Council of Northern Ireland
Ms Heather Phillips	Bar Council of Northern Ireland

The Chairperson (Mr Givan): I welcome members of the Bar Council of Northern Ireland — Michael Forde and Heather Phillips — to the meeting via StarLeaf. The session will be recorded by Hansard, and a transcript will be published on the Committee's web page. I will hand over to you to give us an outline of the key issues on the Bill. I am sure that members will have questions. I am not sure whether Michael or Heather will take the lead, but I will hand over to you. Thank you.

Mr Michael Forde (Bar Council of Northern Ireland): Thank you, Chair. Good afternoon and thank you to the Committee for the opportunity to present virtually on behalf of the Bar of Northern Ireland on the Criminal Justice (Committal Reform) Bill. Our independent practising barristers specialise in the provision of expert legal advice and advocacy in all areas of criminal law. We serve the public *[Inaudible]* rule of law daily. My name is Michael Forde. I am the chair of the Bar Association. Joining me today is Heather Phillips, who has extensive experience in criminal proceedings *[Inaudible]* during her career at the Bar. I hope that we can give *[Inaudible]* some of the issues *[Inaudible.]* We are happy to *[Inaudible.]* To begin, we appreciate *[Inaudible]* approach that a number of *[Inaudible]* in this area over the last number of years. However, we urge members to bear in mind *[Inaudible]* cases ultimately involve serious criminal offences that could see defendants being deprived of their liberty for many years if proven guilty. I appreciate that the Bar is in a minority in presenting that viewpoint, but our members consider that committal proceedings can perform a useful role in a number of circumstances. For example, they can help to narrow the issues at an early stage, which should reduce the need for lengthy trials in the Crown Court. They can also lead to *[Inaudible]* being *[Inaudible]* that become vital pre-trial for the prosecution and defence.

The complete abolition of oral evidence at the committal stage is something that we believe that the Committee should reconsider. As members will appreciate, the Justice Act (Northern Ireland) 2015 resulted in oral evidence by way of preliminary investigations and mixed committals being retained

under sections 7 and 8 where required in the interests of justice, allowing a district court to order that only when it is persuaded that it is necessary.

The figures show that oral evidence is only ever used in a very small number of cases, but its retention is an important safeguard that is held solely at the discretion of the judge. We believe that that is necessary. Essentially, I am saying that preserving the ability for a court to hear oral evidence through the retention of the committal proceedings, where it is in the interests of justice to do so, akin to section 7 of the 2015 Act, should be given attention by the Committee.

The Bill's other main policy objective is the introduction of the direct transfer of cases to the Crown Court for all indictable-only offences without the need for a committal hearing. The rationale for such a change appears to be that it will increase the efficiency of the justice system. I have not seen any figures to support that, so I would caution that it seems optimistic to forecast that the removal of that stage will significantly reduce the time taken for cases to come to trial in the Crown Court.

Members must appreciate that the proposed reforms will involve the front-loading of more work in the justice system, particularly given the likely impact on the Crown Court. It will only work effectively if investment in the system is forthcoming. Otherwise, delay will only be shifted from the Magistrates' Court to the Crown Court, which will be expected to adsorb the increase in cases.

The clauses relating to direct committal raise a number of concerns for us, such as whether an accused can be directly committed to the Crown Court without any evidence having been presented by the prosecution. There are also practical considerations, such as how the investigative process around the compiling of evidence on the part of the PSNI and the Public Prosecution Service (PPS) will link all that in a timely fashion. Indeed, it seems that it is a distinct possibility that cases may face lengthy periods in the Magistrates' Court only to be transferred up to the Crown Court due to delays in the gathering of evidence to support them.

The Bar has previously talked at length about delay in our response to the Gillen review on serious sexual offences and elsewhere, but there remains a need for greater resources to be directed towards a more efficient and effective investigation and disclosure process. I regularly talk with counseI who have experience in encountering very late or even non-disclosure in serious criminal cases. In our experience, that is often a key driver of unnecessary delay in cases at the Crown Court.

I want to address subsection 4, which relates to amendments of the process whereby the accused or their representatives can apply to dismiss charges with which they have been directly committed for trial. This seeks to remove the use of oral evidence during applications to dismiss. We are of the view that it is necessary instead to retain the potential for oral evidence during applications to dismiss but only where required in the interests of justice as detailed in subsection 14(4) of the Justice Act (Northern Ireland) 2015. It seems overly restrictive to us for the Bill to remove this judicial oversight function as an option for the court in its entirety. We ask members to look at clause 4 again.

I hope that that provides a quick summary of the Bar's views on the Bill. We are happy to answer members' questions.

The Chairperson (Mr Givan): OK. Thank you, Michael. We were able to pick most of that up. However, the sound quality was not great at our end, but I got the gist of it.

I suspect that the Bar does not feel that the proposed changes will achieve what the Department wants. We are told that the changes are primarily to reduce delay, but if they do not reduce delay, why introduce them? I will pick up on the response thereafter.

Mr Forde: It appears that this is driven by the Department in order to reduce delay. Our concern, and that of many others, including the Criminal Justice Inspection (CJINI), has been that a lot of the delay is caused at the investigatory stage of proceedings, rather than when case papers are provided to the defence. There are significant delays that the Committee will be aware of relating to awaiting matters from forensic staff; other investigations that the police have to undertake, such as obtaining medical reports, medical notes and records; the drafting of witness statements; and compiling the case for the PPS to consider. There was also criticism by the Criminal Justice Inspection in its 2018 report, which the Committee will be familiar with, that, when a file is submitted by the police, it is not in a satisfactory form.

Our concern is that the real delay is being caused at the investigatory stage. A provision for direct transfer could, in some circumstances, speed matters up, but, overall, we think that it would have a nominal impact on the significant delays in the criminal justice system.

The Chairperson (Mr Givan): There are arguments on resource. The Department says that, with the different expenditure in resources that would be required in the Crown Court, it does not expect any additional costs to come about by these changes. Does the Bar think that removing oral evidence at committal hearings and the direct transfer of cases to Crown Court for indictable offences would be cost-neutral?

Mr Forde: I have not seen the data that you have seen, Mr Chairman. To give you a bit of background, what happens in a normal committal proceeding is that, at first appearance, the defendant appears before the court. The case is then reviewed by the district judge, usually on a four-weekly basis whilst the police compile their evidence. They then submit *[Inaudible]* consider the charge *[Inaudible]* Magistrates' Court *[Inaudible]* but be prosecuted *[Inaudible.]* That process could be six, 12, 18 or 24 months. There is a *[Inaudible]* fee paying for a solicitor and barrister for undertaking that work. It is a set fee whether there is one appearance or there are 20 appearances. By removing that process from the Magistrates' Court to the Crown Court, it would appear that there would have been replication of the fee. So, I do not see how this would save money, and there is always the potential that it could increase costs. I am unaware of the data and information that you have, Mr Chairman, from the Department.

The Chairperson (Mr Givan): Thank you. Having talked about delay and costs, one of the arguments for abolishing the mixed-committal approach is that it would remove the necessity for victims or witnesses to have to give oral evidence twice. What is your view? Is that in the interests of justice?

Mr Forde: There are two points that I want to make in response, Mr Chairman. First, I wholly understand the concerns about victims, witnesses and complainants having to give evidence once never mind twice and perhaps more times before a court. A victim wants justice, and I imagine that it is unlikely that they want to appear in a court to go over and over again the incidents or the offence.

However, our criminal justice system does provide the opportunity, through a special measures direction from the judge, for facilities to assist witnesses who are giving evidence under fear or who are in distress about giving evidence. The Committee will be aware that there is the use of live link to allow complainants and witnesses to give evidence away from court and appear over a screen, as I am doing now. There is also the opportunity for screening so that only the judges and lawyers involved can see the witness giving evidence. There is the opportunity for *[Inaudible]* is provided by way of recorded evidence, by way of achieving the best evidence interview, which is undertaken at the outset of the case by the police.

We, of course, have the victim support services, such as Women's Aid. We have the PPS. We have the investigating officer in the PSNI to provide support before and during the course of criminal proceedings to victims, witnesses and complainants. Over and above that, we have very professional counsel at the Bar, who are highly experienced in undertaking these types of cases and who do not want to make the experience more traumatic for a witness, no matter what the case. There is in place a professional judge, who would stop any question that goes beyond the bounds of the counsel's professional obligation. There is also the prosecution counsel, who would intervene if there were ever any inappropriate questioning. So, there are a number of measures in place to support a witness, complainant or victim, no matter whether they are giving evidence once or more than once.

I understand the motivation to reduce the number of times that a complainant has to attend in court to give evidence. However, it is not necessarily always the case that a complainant who attends for mixed committal will thereafter have to give evidence at a trial. In some circumstances, I will of course accept that a complainant will have to give evidence at a mixed committal and then at a trial. However, there are other circumstances that pertain. For example, a complainant may give evidence before a defendant and before a district judge in mixed-committal proceedings and then, on occasion, a defendant, having heard the live evidence of a complainant, which, bear in mind, takes place in a Magistrates' Court with no judge, no jury and no wigs and gowns and at a much closer time to the offence, will say, "I accept that I did wrong; I want to plead guilty". That obviates the need for a trial.

There are other circumstances where, having heard *[Inaudible]* discussions begin before defence and prosecution to see whether there is a resolution to the case. If there is, that obviates the need for a trial. There may be circumstances where the PPS considers the evidence that has been heard and

perhaps believes that the charges are no longer sustainable and may reduce them. There may be other circumstances where the evidence simply was not credible and the PPS reconsidered the decision to prosecute, which would obviate the need for a trial. There are circumstances when, because *[Inaudible]* where they do not then have to come to the trial, and the case may then resolve more swiftly.

It is not always the case that a complainant will be called to give evidence at mixed-committal hearings. Often, expert witnesses in technical prosecutions will be called to give evidence and *[Inaudible]* clarifications or concessions that they provide during their testimony, their evidence may not then be required at trial. That ensures that an expert does not have to take time out of their busy diary to attend court proceedings and also speeds up the trial process. There is a concern that removing oral hearings at one fell swoop, even with good intentions, to prevent complainants having to give evidence more than once may have unintended consequences. That is why we urge caution and ask the Committee to look at this matter again.

We say that the right balance was struck in the 2015 Act, where mixed-committal *[Inaudible]* an independent judge was of the view that it is in the interests of justice. We have judicial oversight and judicial scrutiny that you cannot have a mixed-committal simply because you have asked for one. It is allowed only when a judge determines that it is in the interests of justice. As I say, we believe that the right chord was struck in 2015, and that is why we believe that the clauses should not go forward, Mr Chairman.

The Chairperson (Mr Givan): OK. Thank you, Michael.

Ms Dillon: Can I suggest that all members check and make sure that they are on mute? That sometimes causes the feedback. There is quite bad feedback.

Thank you for the presentation. I have a couple of points. You mentioned victim support services, particularly in cases involving sexual abuse, and that there was support from organisations such as Women's Aid. I do not know how to word it correctly, to be honest, but I am talking about a rounded approach where there is no unprofessional questioning of a victim. That has not been the experience of victims, and report after report, particularly the Gillen report, has highlighted that. We all know the statistics on the numbers of victims of sexual crime who go through the judicial process, so there is enough evidence to say that the process is not working. That is certainly the perception of some victims, although it may not be the reality either, and their advocates; it does not just come from the victims. In all honesty, I have to say that I do not accept all of what you said.

Having said that, I will come to my question. The process is not in place in other jurisdictions, such as the South, and if it has met the evidential basis under the PPS requirements, why do we need the committal hearing process? I have read your written submission. I am not saying that I do not accept what you are saying, but I want a bit more detail on it. Chair, I will leave it at that and come back in with one or two other points, if that is OK?

Mr Forde: On your first point, a similar issue was raised by the chief executive of Victim Support during a seminar with the criminal Bar in 2019. At that stage, we made it clear that, if there are incidents of inappropriate questioning, we expect that to be referred to the Bar, because we do not want that to be the case. It is not my experience, but I appreciate that I am not in every court.

It may be of interest to the Committee to know that the Bar has drawn up an extensive programme of advocacy training for our membership on the examining and cross-examining of vulnerable witnesses. That was due to commence last spring. For obvious reasons because of COVID, that was not possible. However, as recently as last week, I linked in with our education and training officer to see if we can progress that as soon as possible once the COVID restrictions permit.

If there is inappropriate questioning, we would expect the prosecution to object and the judge to overrule. The inappropriate questioning I have not seen, but I appreciate the views of the victim or complainant that the case may be different. We have a very professional Bar and extensive, ongoing training, and, as I say, very soon we will be rolling out the detailed programme of questioning of vulnerable witnesses.

The new Recorder of Belfast has been working closely with the Criminal Bar Association to draw up a talk that he intends to deliver before Easter on the questioning of child and vulnerable witnesses. That will be available to all members of the Bar before Easter, so we take our responsibilities very seriously.

I do not know whether Heather has anything to add.

Ms Heather Phillips (Bar Council of Northern Ireland): No, that is very comprehensive, Michael. The Bar supports measures that protect and allow for appropriate questions to be directed to witnesses to ensure that their experience of the justice system is not a traumatic one, whilst ensuring that a fair trial is maintained for all.

Michael has dealt comprehensively with the proposed and ongoing measures that are considered in providing ongoing training and judicial oversight, which I think is becoming more interventionist in the appropriateness and nature of questions that are asked of victims and witnesses in sexual cases.

Mr Forde: I think, Ms Dillon, your second point was why oral hearings are required if the PPS is satisfied that the test for prosecution is met. The evidence is quite often in paper format. The evidence that it is considering is quite often just witness statements, albeit there can often be interviews as well to consider as part of the evidence.

However, there is no opportunity until there is an oral hearing to stress-test that evidence. It is simply words on a page. It is part of the adversarial trial process, and has been for many years, that evidence needs to be tested in court. I understand the concern about witnesses, complainants and victims having to give evidence more than once. However, I ask the Committee to be alive to my point that an oral hearing in a Magistrates' Court, which is more informal and held closer to the time of the events, can, in some circumstances, obviate the need for a trial. So, it speeds things up and provides justice to a victim and/or defendant earlier.

Therefore, I ask the Committee to bear in mind the other circumstances outlined and that a victim or complainant will not always have to give evidence on more than one occasion.

Ms Dillon: Thank you, Michael; I appreciate that. Just to be make clear, I am not questioning the professionalism of lawyers and barristers. What was considered appropriate questioning is where the issue was, not with the individuals doing the questioning. That is where the concern lies for me. I feel reassured that real changes have happened, supported by your profession, so I have no doubt that it is something that you will follow through on. I am certainly not questioning your professionalism or that of your colleagues.

The Gillen review report will be focused on, but, as you said, there are a number of reports from very different backgrounds coming at this from very different angles and all recommending reform. So, whilst I accept what you are saying, I find it difficult to believe that all those reports are wrong. Justice Gillen was a judge, so I would like to think that he has a fair understanding of the potential benefits and downsides of a committal process. I am not convinced of the value of a committal process, and I heard what you said and read your written submission. Will you come back on those reports? You mentioned them, but I did not hear you say that they are not right.

I agree with a lot of what is in your submission: in isolation, the Bill will do little to speed up justice, even though its main aim is to speed up justice and make it easier for everybody, defendant and alleged victim. It is important that the Department shows us what else it will do and put forward a package of measures. That should not be done in isolation if it does go ahead. I am supportive of you in relation to that.

Has there been much improvement between the PPS and PSNI in the preparation of cases that go to court?

Mr Forde: One of the issues that has existed for a number of years has been the ability to get a copy of CCTV evidence or body-worn video footage that the police record when they are out on the street or when they attend to the victim. For a long time, there have been significant delays in obtaining that. There are many remand hearings that I attend where we are told that the CCTV footage is not available, the body-worn video footage is not available and the 999 call is not available. To their credit, the police and the PPS have in place a system where CCTV or body-worn video footage are uploaded to a cloud so that the PPS has much earlier access to it. However, the defence does not have access to the cloud, so we do not obtain copies of the body-worn video or CCTV footage as swiftly as we would like; it still has to be burned onto a CD and be provided to us. It may seem like a very simple thing to do, but there is a significant delay in it being done.

The practical difficulty that practitioners encounter is that new computer devices often do not play the CCTV or body-worn video footage. If we had the access to the cloud that the PPS and the police have access to, we would be able to view footage with our clients much more quickly, which could lead to a lot of the delay being removed. For example, if a defendant sees that they are on CCTV breaking into a car, and can see quite clearly that it is them, they will put their hands up and admit it. However, if we are waiting a year to get a copy of that CCTV footage, human nature dictates that the defendant will sit on their hands in case the CCTV footage, which may be the only evidence against them, is of very poor quality.

We are hopeful that by next year we will have access to the cloud. To the credit of the police and the PPS, that is something that we hope will assist us. Since 2017, the PPS has also had an indictable cases process (ICP).Following a successful pilot in Ards, which started in 2015, the ICP was rolled out across the jurisdiction in 2017. It encourages greater work between the defence and prosecution at an early stage to try to move a case into the Crown Court more quickly and to try to agree *[Inaudible.]* To give you a practical example, if the police attend somebody's house and discover a kilo of a suspect item that everybody believes is cannabis, it has to be sent off to Forensic Science to be examined. However, with the ICP, the prosecution can reach out to the defence and ask, "Would your client accept that this is cannabis?", and if the defence says, "Yes, they will", that obviates the need to take up Forensic Science's precious time; it speeds up the case, because there is no need for a report and statement from a forensic scientist; and it means that the case can progress to the Crown Court much more swiftly. To the credit of the PPS, there are steps in place. I believe that those types of practical measures will have much more of an impact than direct transfers or the removal of mixed committals.

Ms Dillon: Thank you, Michael and Heather, for your answers.

Ms S Bradley: Thank you for the presentation so far. Can everyone hear me OK? I am trying, ultimately, to measure this in relation to the number of cases where there is currently the requirement to give evidence. It is suggested that they are actually quite low. The proposal is that retention of the investigation should be considered in the interests of justice. You refer to section 7 of the Justice Act 2015. I am curious about the numbers that make it through, where there is still the requirement to present evidence for the reason that it is in the interests of justice. How do you propose that there would be a consistent approach across the judiciary on when that would be required? Are current cases filtering through that process? Would they be reduced in number if your proposal were to be upheld, or is that the status quo?

Mr Forde: The latest figures that I have seen are from 2017. I think that they may have been included in relation to sexual offences only in our submission. Unless my maths fails me, I think that fewer than 10% of the sexual-offence cases that make their way to the Crown Court have oral hearings, which means that 90%-plus are dealt just on the papers by the judge without the witness having to attend. That is by applying the current test, which is that the district judge has to consider whether it is in the interests of justice. Simply because a defence barrister or solicitor says that they want a mixed committal, it does not automatically mean that there will be one; it has to be in the interests of justice.

Obviously, there are around 28 Magistrates' Courts throughout the jurisdiction. There is a similar number of district judges. I hear your point about standardisation. What I can say about district judges is this: unlike in England and Wales, where many of the magistrates are not legally trained or full-time professionals, our district judges are all legally qualified — either previous solicitors or barristers — and, quite often, have extensive experience in criminal law, either as prosecutors or defence lawyers. They are highly experienced, dealing with upwards of 100 cases per day in court. Each and every one of them is highly professional. They have to apply an interests-of-justice test across many decisions that they make on all sorts of applications. That is not the only type of interests-of-justice test that they apply. It is regularly applied in many types of circumstances, such as when we are trying to have evidence ruled as inadmissible, deal with certain types of applications in court, or even deal with legal aid applications and things of that nature. Therefore, they are very familiar with the test. There is the prospect that, if they were to misapply that test, their decision could be judicially reviewed by either the prosecution or the defence. To give the Committee some comfort, perhaps, and to allay any concerns that you may have, Mrs Bradley, I am aware of a judge who was judicially reviewed in 2015 because they misapplied that test.

Ms S Bradley: Thank you, Michael. A body of work happens during the committal process, regardless of your opinion on it, and, obviously, in the interests of justice, that work will still happen. Do you see most of the filtering that the committal process does shuffling downwards to the PPS or shuffling upwards to the Crown Court? I cannot see how this proposal will not have an effect on resources at

either of those two points in the system. I am interested to know where, in your opinion, that body of work will shuffle to, who will pick it up and how labour-intensive or resource-intensive you think that it might be on those bodies?

Mr Forde: We have some concerns about direct transfer cases, those cases that would normally be managed in the Magistrates' Court but will now go to the Crown Court, because, it does, at times, take months or, sometimes, well over a year for a case to be ready for trial. There is a significant *[Inaudible]* about the *[Inaudible]* investigatory process. At present, as I have already outlined — sorry to repeat myself or labour this point — a case is managed by a district judge in the Magistrates' Court until it is ready for committal. That is what happens at present. Usually, every four weeks, a case will be reviewed, with the district judge asking for an update on progress, and if they believe that there is some slide or that things are not being done swiftly enough, they can, for example, ask the investigating officer to attend and give evidence before them to try to put some pressure on to keep things moving. Judges have target times to deal with cases. They are very conscious that victims are awaiting their day in court, and they are very conscious as well that the defendant may either be in custody or on bail with strict conditions, awaiting their hearing. Defence practitioners also use the four-weekly remand hearing to try to put pressure on to keep a case moving.

If there is a direct transfer to the Crown Court, that same process will have to happen in the Crown Court, but it will simply be before a different judge. Our Crown Courts are already extremely busy. The COVID backlog has only added to that, because, for very understandable reasons, it took from the start of the pandemic until August last year for court houses to be set up and ready to hear trials. There is no criticism there, because the Courts and Tribunals Service had an awful amount of work to do to put in place mitigations to ensure that the court estate was safe. If a case that is normally managed now by a district judge is moved to the Crown Court, it will simply be reviewed by a Crown Court judge on a regular basis. The fact that a more senior judge is managing it does not mean that things will necessarily be done more swiftly. If you are still awaiting a consultant to provide a medical report or if you are still waiting for notes and records, for a mobile phone to be triaged, for a laptop to be interrogated or for CCTV or body-worn video footage, it does not matter which judge is getting angry about that, be it the Lord Chief Justice, a Crown Court judge or a district judge in the Magistrates' Court. If the resources are not there to deal with the investigation, things will not be dealt with swiftly.

I think back to a now retired judge, Lord Justice Weir, who was a former Court of Appeal judge and was previously the senior criminal judge in Northern Ireland. He often complained about the delays with Forensic Science in High Court bail applications. He was often across the media complaining about the delays and about defendants spending significant time in custody awaiting trial. However, with the greatest respect, even though one of the most senior judges in the country was raising concerns, it did not stop the delay. I am concerned that, following the direct transfer, our already busy Crown Courts will be even busier and will be clogged up with administrative issues about delay in the investigatory procedure.

Ms S Bradley: Thank you.

Miss Woods: Thank you, Heather and Michael. I have a few comments. Like Linda and others, I have some sympathy with what you have said about the Bill's rationale and if it is, indeed, to speed up justice. It is important that other measures to deal with delays in the justice system are looked at if the Bill goes ahead. I had the eye-opening experience of reading 'The Secret Barrister' over Christmas, so I understand what you are talking about now, which is good.

You mentioned access to the cloud, and that seems like a very simple thing to do. You also mentioned that it would take until next year for the defence to access it. Can you explain why it will take nearly a year for that to happen? Is it because of the General Data Protection Regulation (GDPR) or does something need to come through in regulations? What is the delay there?

Mr Forde: I cannot answer that because I do not know the specific reason. As far as I am aware, the PPS only recently got access to the cloud. Given that there is technological involvement, I would imagine that it would take some time to make sure that there are no teething problems and that it is ready for roll-out. There are 600-plus barristers and over 2,000 solicitors in around 600 firms in the country. A significant roll-out to all members of both branches of the profession would have to be done. I do not think that there has been any deliberate delay. We would all like to see it done as soon as possible.

I cannot give you a correct answer. I am sure that if representatives of the PPS appear before you — I believe that they may appear before you in due course — they could give you more detail on that. I certainly do not think that it is deliberate delay on the part of the PPS. We would all like to see it rolled out ASAP.

Miss Woods: Thanks, Michael. I appreciate that, and I certainly will direct that question to them. I suppose what I was trying to get at is that, if there are practical things that we can do without having to legislate and those would speed up justice, those should be done.

Throughout your submission, you mentioned the need for resources. I appreciate that those are needed to speed up justice, again, if that is the rationale for removing the committal process. You touched on a lot of that already, but do any other issues need to be addressed to speed up justice, where it is needed, of course? Not all cases in the justice system need to be quick. Although we are dealing with criminal justice, it should not always be done at speed. Can we look anywhere else to speed up the justice system?

Mr Forde: First, I completely agree with you that things should not just be done quickly for the sake of it. Cases have to be prepared properly on both the prosecution and defence sides.

There are often significant delays with Forensic Science, be they very serious cases where they are examining firearms or dealing with drugs cases or things like that. There are significant delays with the police in triage and interrogating mobile phones and laptops. We have noted significant delay with that. There is now a wealth of information on mobile phones and laptops that would not have been available 10 or 20 years ago. If more resources were focused there, it could really speed cases up. I will not go into the detail of some types of cases, but if information is found on a mobile phone or a laptop that is demonstrably owned by the defendant, it is quite compelling evidence. It might take a year, two years or more to get that information, but, once it is received, it is likely to lead to a guilty plea in a lot of circumstances. If that type of evidence were obtained more swiftly, it might lead to an earlier guilty plea. Those are two areas that I think the Committee should focus on in trying to deal with investigative delay. The PPS has target dates for having a decision in place. The judiciary has targets dates as well for case completion. It tries its best to stick to those, but, unfortunately, due to investigative delay, those targets are sometimes breached.

I have already referred to the box system, as I understand it is called in England. That is the access to CCTV, body-worn and other audio and visual footage on the cloud. I do not know whether that is what the PPS and the police are calling it, but I understand that, in England, it is referred to as the box system. Once that is rolled out, we really hope that it will remove a lot of the delay.

I understand why the Committal Reform Bill has delay at the forefront of its mind, but I am concerned that it will not lead to the improvements in timescale that the Department hopes to achieve. I think that there are other things that could be done that would speed cases up. To emphasise this point, I have never met a defendant who does not want to get his case finished swiftly, and I have never met a lawyer who does not want to get the case finished swiftly. It has to be done efficiently, as you quite rightly say, Rachel. It has to be done properly, and it has to be prepared properly. I think that defendants, victims and lawyers all want cases dealt with quickly. There is no benefit to anyone in delaying cases.

Miss Woods: Thanks, Michael. I appreciate that. My third question was touched upon earlier. What do you think the impact on legal aid would be if this Bill were to go through as it is?

Mr Forde: Part of the issue is that I still do not quite understand what direct transfer and direct committal will look like. If committal proceedings are removed, I do not know whether first appearance *[Inaudible]* Crown Court or whether it is case-managed for a period of time in the Magistrates' Court and then is transferred to the Crown Court. I think that we may wish to ask the departmental officials what their plan is. At present, I cannot read that from the Bill. Is it that they want to transfer the case at first appearance or is it halfway through the Magistrates' Court proceedings? If it is at a later date, after first appearance, what is the trigger for transferring it to the Crown Court? Is it when a decision has been made that there is sufficient evidence for it to go to the Crown Court? Is it when certain witness statements have been provided? What is the trigger for moving it?

I understand the queries about legal aid. Lawyers will still be representing their clients, and, with respect, the lawyers are still entitled to payment for the representation that they provide. When we

look more precisely at what the mechanisms of the system are, it would be impossible for me to comment on what implications that would have on legal aid.

I think that it would be very useful if the Committee could follow up with the Department to find out whether it wants to transfer a case to the Crown Court at first appearance or some later date. If it is at some later date, what is the trigger for transferring? What has to be in place to transfer it at that stage? If the case is transferred to the Crown Court, the other query is whether the counsel for the prosecution and the defence will be instructed at that stage. For example, if the direct transfer takes place at first appearance, is defence counsel instructed and is prosecution counsel instructed to see whether progress can be made in the case to narrow issues and, perhaps, discuss resolution, or does that come at a later stage? The timing of the involvement of prosecution and defence counsel will, obviously, have an impact on legal aid. At the minute, there are some unknowns out there, so I simply could not answer your question. I think that it is more a matter for the Department to address.

Miss Woods: Thanks, Michael. I appreciate that. I certainly will ask. It is not an area of the criminal justice system that I pretend in any way to be an expert on, so I will be taking that up. I do not understand it myself. Thank you for that.

Mr Frew: Thank you, Michael, for your presentation. I think that I caught most of your commentary and your answers, but I did not catch it all because of the system that we are using here. It is not adequate, I believe, for scrutinising legislation. That is neither your fault nor mine, and we will try proceed as best we can. I think that I heard everything that you said and the answers that you gave. If I ask a question that is similar to something that you have already answered, please forgive me. We have this sequence where the PPS is involved and you have to go through certain tests with regard to reasonableness, chances of conviction and all of that; my terminology will not be correct. Explain to me again why, if the PPS is doing the job that it is meant to do, we really need a committal stage.

Mr Forde: First, I agree with you. We are operating the vast majority of our courts online at present. Similarly to you, Mr Frew, I would like to see the return of advocacy in court rather than over a computer screen. I completely empathise with your position. I would much prefer to be making my remarks and answering questions in the Senate Chamber right now than doing it on a screen, but I appreciate that we are where we are right now.

You are quite right. The PPS has to apply a two-stage test when a person is prosecuted. There is the evidential test: is there enough evidence before a prosecutor to determine that there is a reasonable prospect of a conviction? Secondly, there is the public interest test: is it in the public interest to prosecute this person? For example, if they are a person of advanced years with a clear criminal record and a very minor offence has been committed, is there a need to prosecute them at all, or can that be diverted by way of a caution, a warning or something of that nature? That is the test that the PPS has to apply. However, it is applying the test based on written statements. It is not applying the test based on evidence that has been challenged in court.

It has been the case in our justice system for many hundreds of years that evidence is stress-tested in a court. The reason for that is simple and straightforward. If the prosecution puts you on trial, you are entitled to challenge that evidence. You are entitled to have the prosecution prove its case to an immutably high standard of beyond reasonable doubt. It is for the prosecution to prove its case and to prove it to that very high standard. The reason for that is simple and straightforward: an innocent person should not be found guilty of a crime that they did not commit. However, when the PPS is making a decision whether to prosecute, it is basing it largely on written or documentary evidence, not having had the tests and not having the evidence stress-tested in court.

We operate an adversarial system here, not an inquisitorial system as is in place in many European countries. The committal proceedings are the first stage in being able to test that evidence. As outlined to the Chair, at times, after that evidence is stress-tested, a defendant will turn around and say, "I have heard the evidence. I know what the case is against me. I know that my defence will not stand up to scrutiny. I am pleading guilty". There are other times when, having stress-tested the case, the prosecution may look at the charges made and reduce the charges *[Inaudible.]* There may be other circumstances where the evidence has been stress-tested and the prosecution, as it continually has to do, reapplies the test for prosecution and comes to the decision that there is no longer a reasonable prospect of conviction. It is the first stage in that process of stress-testing the evidence.

I understand where you are coming from. I understand that the prosecution, which is staffed by very experienced and very able prosecutors, will apply that test to the evidence in front of it. However, the committal proceedings is the first opportunity to test that evidence in court.

Mr Frew: Is it not the case that the Crown Court could do just as good a job in weeding out unjust or speculative prosecutions and, in doing that, save the defendant and witness, or witnesses, the traumatic rigmarole of having to give evidence in court? With the best will in the world, to most people who have never entered the world of the judicial system, a courtroom is a courtroom, whether it is the Crown Court or a Magistrates' Court. For them, it is a very serious place and, in a lot of cases, a very scary place. If you have just gone through the shock and trauma of being a victim or alleged victim — I will keep my wording right — or have experienced some sort of traumatic incident in your life that needs to be tested as criminal, going to court is one of the most unpleasant experiences that you will experience in your life. You guys know that. You guys are in the court scenario every day. The witnesses and defendants are not. Maybe the Bill should be not so much about speeding up justice — that, in itself, is a very serious thing — but about trying to limit the shock or the re-echoing of trauma that defendants and witnesses will have to go through.

To get to my question, could the higher court not do that just as well as a Magistrates' Court? I get that you will then create a delay in another court, but you are still cutting out a level that takes time. With time, comes frustration. You have built up defendants and witnesses to get to a certain date, they go through that rigmarole, there is then further delay and those people are told, "You will have to do all this again". This is the first question: could the higher court not do the same job?

Do you have any percentages on where the committal proceedings go? How many cases go on to a higher court and how many are, for want of a better word, thrown out because they are unjust or speculative? We are talking about a small percentage of cases going to committal. Of that small percentage, what percentage of cases then go on to a higher court or get thrown out for being speculative or unjust?

Mr Forde: If you do not mind, I will go back to your initial remarks about how giving evidence on a live link is not an appropriate way to scrutinise legislation. I would prefer to be before you to allow you to ask me questions in person, because the Committee and MLAs perform a very important function in scrutinising legislation. We have to bear in mind that I was invited to come along and give evidence today because of the vital role that the Assembly has in scrutinising legislation, and you want the opportunity to ask me, the Law Society, the PPS and the Department of Justice questions so that you can properly scrutinise the legislation and do your job effectively. The same applies to the role of lawyers. It is not the case that we can simply put a set of papers before a Crown Court judge and say, "Judge, you decide whether this person is guilty or not". We have to stress-test and scrutinise the evidence, and that is best done in a court arena.

I appreciate that there are many cases in which defence counsel agree that witnesses should give evidence on a live link or from behind a screen. Quite often, the defence agrees to that, but it is so important, in the same way as you are all carrying out your role today, to scrutinise and stress-test that evidence, because it is not until that is done that you can get down to the real answers. The Crown Court does the same scrutinising that a magistrate does. If they were allowed to have oral hearings as part of the direct transfer procedure, and if oral evidence could be scrutinised and stress-tested, yes, that could be done. We say that it is better done at an earlier stage in a Magistrates' Court and in a different environment where it is done swiftly and it is done closer to the commission of the alleged offence, in a forum where there are no wigs and gowns and in shorter proceedings by way of a mixed committal. However, if it was left by way of direct transfer to the Crown Court judge, they should still have the opportunity to stress-test that oral evidence, in the same way that it is vital that the Assembly stress-tests and scrutinises legislation before *[Inaudible.]* In relation to your second question about the percentage of committal proceedings, first, you are quite right: there are only about 2,000 defendants per year before a Crown Court. There are many more in a Magistrates' Court; it can be upwards of 40,000. So, there is quite a significant difference in the numbers that the two courts deal with. I would not have the percentage of cases to hand where committal proceedings are dismissed. I imagine that the Department would have ready access to that. However, respectfully, that is not the only statistic that you should look at. It would be important to look at the number of cases that are mixed committals and then at what happens after that. Are the committals dismissed? Yes. However, what happens after that at the Crown Court? Do the cases resolve or do they go to full trial? I imagine that quite a number of those cases would resolve. It would be difficult to find out, but the bald statistics could give some steer as to whether those mixed committal hearings have moved the case towards a point where it can resolve at a later stage. Therefore, I think that it would be important and that you are quite right to raise this question: what are the statistics for the number of cases that are dismissed?

However, the second question should be this: what number of cases then go to full trial, and what percentage resolve before trial? That would answer the question as to how many cases — particularly in sex cases — are ones where a complainant has to put evidence more than once. I imagine that, in looking at the entirety of the Crown Court cases, it is a very small number.

Mr Frew: Thank you, that was very informative. I want to ask about the range of offences and pieces of legislation that are going to be repealed if this Bill passes in its current guise. One of them is terrorist-related. The question that I put to the Department was about the situation in which a defendant just happened to be a terrorist, but it was not a terrorist offence, and there were witnesses, with all the pressure that that would apply. I know that you have principally objected to the Bill. However, you will get my point that a defendant who just happens to be a terrorist and a terrorist offence could be two different things. Do you think that that protection is covered for the witness in the Bill?

Mr Forde: You are talking about a circumstance where somebody is either a convicted or a suspected terrorist but they have committed an offence of burglary, for example.

Mr Frew: Yes. It is to do with all the power and persona that that individual would bring and the pressure that that person could bring to bear on a witness. I suppose that it is the same principle with a jury and the Diplock system. You can imagine the pressure being applied on a witness if a terrorist — someone who is known in the community — is a defendant in another incident, which is, as you say, burglary or suchlike. Should that be covered?

Mr Forde: First, you are quite right to state that, if somebody is up on a terrorism charge or has suspected involvement with particular organisations, the director of the PPS can issue a certificate to say that that case should be tried without a jury. It does not necessarily have to be an offence under, for example, the Terrorism Act 2000; it could be any type of offence. That provision is in play and is quite often utilised, and there is very little challenge to the director's decision. However, we have quite strong laws on protecting witnesses. If a defendant was charged with an offence and tried to intimidate, or tried to have a third party try to intimidate, a witness, they could face additional charges on top of that. That is a protective measure. Once the witnesses have already gone to the extent of making a complaint to the police, they would, obviously, have a police liaison officer whom they could link in with, and if other offences, such as intimidation, arose, there would be an opportunity to make a further complaint to the police.

Mr Frew: Given some of the summaries of evidence that have been given by other organisations, you, Michael, and your colleague must feel a bit like salmon; you are swimming against the tide in that regard. This might be an unfair question: if you thought that you were going to lose the battle of the Bill being passed in some guise, but, through your daily experience, you have ideas of how to quicken up the justice system, as you have outlined in some cases today, have you considered what should be in the Bill by way of amendment rather than just having the blue pages as we see them now and you guys saying, "No, we don't support this"? Has any work been done by your organisation to say, "Well, look; here's what we think should actually happen" and, "Here's what we think those clauses should actually look like"?

Mr Forde: We appreciate that we are very much in the minority. With respect to the other reports, the *[Inaudible]* Bar Council, the prosecution and defence barristers and the solicitors on the ground are the ones dealing with those types of cases day and daily from both sides — prosecution and defence. We have a good sense and feel for cases on the ground. I appreciate that we are in the minority, but I ask the Committee to give some weight to the submissions that we have made in writing and orally.

In essence, we think that the 2015 position is satisfactory. We would not like to see clauses 1 and 2 in the Bill. You asked me what else we would like to see if the Bill is passed. First, all the matters that I outlined to Miss Woods about how investigations can be improved and made quicker would have a more demonstrable impact on delay. I will not repeat them, but you could bear in mind the comments that I made to Miss Woods.

Over and above that, we need more flesh on the bones from the Department. I repeat what I said: questions should be asked of the Department. How does it expect direct transfer to work on a practical, day-to-day basis? Is it saying that, at first appearance before a Magistrates' Court, the case is transferred to a Crown Court? If it is transferred at first appearance, is a prosecution barrister and a defence barrister to be appointed? That happens automatically in a Crown Court case to manage it and to try to progress it, to narrow issues and to try to ensure that it is resolved speedily. Or is it the

case that that direct transfer will happen only at a later date? If it is at a later date after the first appearance, what are the criteria that have to be reached to move the case there? If it is the case that there is provision for direct transfer but it comes only when the full file is ready, that pretty much mirrors what already takes place and may not have the impact that the Department wishes. That is not so much about what else I would like to see in the Bill; it is the additional information that I would like to see about the pragmatic outworkings of the Bill. I think that it is pretty important for the Committee to ask those questions of the Department. I would be very interested to hear those responses.

Mr Frew: Thank you very much for your time.

Ms Dillon: Thank you, Chair, for letting me back in. Michael, you pointed out to Paul the questions that should be put to the Department. You are 100% right. It is helpful to us. Has the Department engaged directly with you about that process and how it would work and what your thoughts and views are on it?

Mr Forde: The Department engaged with our chief executive some time ago; I saw a PowerPoint presentation that was provided to our chief executive, which he disseminated. I do not know whether Heather has any more information. Although I have done the vast majority of the talking today, Heather was the person who assisted our policy officer and another barrister called Joe *[Inaudible]* in pulling together the written submissions. Sorry if I have taken over today, but it was Heather who did all the background work. I do not know whether Heather has any more information about engagement with the Department.

Ms Phillips: Not at all, Michael. You have managed today exceptionally well, and I am very grateful for your dealing with the questions.

I am not apprised of any specific engagement with the Department. However, I will revisit Mr Frew's question about matters that we might like to see included. One of the Bar's big concerns about the implementation of the Bill is delays and how the justice system would cope with delays. We have had the benefit of reading the submission from the Law Society. One of the suggestions that has been implemented across other jurisdictions was the implementation of time limits and statutory time limits, which might be of benefit in reducing delay or, at best, managing delay.

Ms Dillon: Thank you, Heather. I appreciate that. That is exactly what Paul was alluding to: if the Bill goes through as it is, is there anything that we can do to improve it? Most of us have alluded to the fact that we are questioning you on the basis of our understanding of this, but you are the people who know it best. None of us is doubting that, and we are asking the questions that we are asking not because we know more but because we know less. That is helpful.

Chair, I suggest that we put Michael's questions directly to the Department and ask for answers. I certainly would be interested to hear them, and it would be helpful to us as a Committee in moving forward.

Thank you to Michael and Heather for answering the questions. I really appreciate it, and thank you for the presentation.

Mr Frew: Just a quick one. Heather, you bounced something in on me there. With regard to time restrictions and limits, where do you see best practice around the globe or nearer to here in western Europe? What dangers or negatives would there be with the prospect of time limits on courts?

Ms Phillips: In the overall global picture, we can see that everybody has really taken their own approach. It is difficult. Each single division very much seems to have pluses and negatives. One example is where the Republic of Ireland appears to be considering the introduction of committal proceedings or their equivalent in order to reduce delay, and here we are talking about their removal to reduce delay. Whatever way you look at it, it is very much a case of everybody having a different opinion. The Bar would very much say that committal proceedings do have a purpose in the very few cases in which they are utilised and that they are utilised very productively.

I want to follow on from the point that Michael made. When statistics are being examined, what should be examined in cases in which committal proceedings take place is how many of those hearings proceed to a full trial. Many of the issues have been fleshed out at that important early stage, where issues can be narrowed and minds focused, especially in cases where there is a predominance of expert evidence and detailed expert evidence from a number of different sections, whether that be

ballistics or forensics. Minds can be focused at a very early stage. That is where we are coming from when we say that we support the retention of the "interests of justice" element. It is important for our magistrates to retain that for cases in which a committal hearing, including that in oral evidence, would be essential and necessary in the interests of justice — that is, that it would speed up justice or deliver it in a better fashion. Retaining that at this stage may well truncate the fullness of the trial procedure. If time limits were going to be imposed, it is a matter that greater evidence gathering would have to be completed before one could definitively say that we would recommend a specific time limit being implemented. I say that for a number of reasons, because one can look at other jurisdictions and how things work in those jurisdictions, but other jurisdictions are different and have a number of different and relevant factors specific to their own jurisdiction; whereas, this jurisdiction and its resources are inextricably linked. If one imposes a time limit that is unrealistic, it will simply be surpassed time and time again. Therefore, I think that, if the Committee was minded to include elements of that, as considered by our learned friends in the Law Society, further investigation would have to be conducted of what would be realistic and in the interests of justice.

Mr Frew: OK. Thank you very much.

The Chairperson (Mr Givan): Members, I will wrap this up, because we need to keep the items moving. Sinéad Bradley will be the last member to speak, and then we will conclude this element of the session.

Ms S Bradley: Thank you, Chair. I will be brief. I thank Michael and Heather. That has been helpful. I recall that we had a presentation on some of the operational proposals. However, it would be helpful to know the detail, and I would like to see that level of detail being in front of Michael and Heather, in order that we can take their view on whether the objectives are met. I agree with the Bill's objectives, but I have yet to be convinced that it achieves them. I would appreciate their view, when that operational data — for want of a better expression — is available to them, to see the weight and whether they feel that the objectives are being achieved. Perhaps the Committee, through you, Chair, should have access to those considerations.

The Chairperson (Mr Givan): Do Michael or Heather want to come back on Sinéad's comment?

Mr Forde: We are more than happy to provide any further written information if required. We are also more than happy to work with the Committee on this and any other matter. I know that, in previous years, an invitation has been extended to the Committee that, at any stage, if any members of the Committee want to come to the criminal courts and to shadow a barrister, even if it is for half a day, to see the inner workings of what takes place day-to-day, we are more than happy to facilitate that. If Committee members or Members of the Assembly wish to spend some time on the ground with members of the profession, please get in contact with the Bar Library. We would be more than happy to facilitate that.

The Chairperson (Mr Givan): Michael and Heather, thank you very much for taking the time to spend with us. If there are other areas that we want to follow up on with you, we will certainly do that. Thank you for today.

Mr Forde: Thank you, Chair.