Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Criminal Justice (Committal Reform) Bill: The Law Society of Northern Ireland

11 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
Ms Emma Rogan
Miss Rachel Woods

Witnesses:

Mr Pearse MacDermott	The Law Society of Northern Ireland
Mr Eoghan McKenna	The Law Society of Northern Ireland

The Chairperson (Mr Givan): I welcome to the meeting Pearse MacDermott and Eoghan McKenna, who are representing the Law Society of Northern Ireland. The session will be reported by Hansard, and a transcript will be published on the Committee web page. I will hand over to you to provide a brief outline of the key issues in respect of the provisions of the Bill, and then members will move into a question-and-answer session with you. Thank you.

Mr Pearse MacDermott (The Law Society of Northern Ireland): Thank you, Mr Chairman. I intend to make a few remarks, but we intend to keep our submissions brief today as we are aware that the Committee has already had the benefit of our written submissions and that the Committee heard evidence from the Bar Council last week, which touched on the same issues. We are also fully aware that the Committee is very familiar with the committal process.

It appears to us that the Bill has two clear objectives, namely, first, to abolish all physical evidence in court in advance of a trial and, secondly, to introduce direct transfers to the Crown Court in all indictable cases. The rationale of the Department of Justice appears to be threefold in relation to that. First, the Department says that it will reduce delay in criminal cases. Secondly, it says that it will reduce costs, and, thirdly, it says that it will prevent witnesses from having to give evidence on more than one occasion. We believe that the current proposals in the Bill before the Justice Committee will not have the desired effects as mentioned by the Department.

At present, the process is that the prosecution prepares a bundle of papers called committal papers or preliminary inquiry (PE) papers that contain all the evidence relied on by the prosecution, and it then serves that on the defence. The matter is then listed before the Magistrates' Court, and, at that stage, a legally qualified magistrate examines the papers to consider whether or not there is a prima facie

case to return the case to the Crown Court. At that stage, witnesses can be called if the magistrate believes that it is in the interests of justice. At that point, the said judicially qualified judge decides on the strength of the prosecution case and whether it should proceed to the Crown Court or not.

We submit that that is a very important filter in the criminal justice process that allows cases in which the prosecution case is either weak or flawed to be filtered out of the system, making a trial, the costs of a trial and the delay of a trial unnecessary. Therefore, we say that, rather than creating delay, the committal process reduces delay in that it allows those cases that should never proceed to trial to be taken out of the justice system without that delay and without the expensive costs of having to go to a Crown Court trial.

We would point out that there is a major distinction to be made between the process in Northern Ireland and that in other jurisdictions, such as England and Wales. That distinction is that our Magistrates' Courts are staffed by legally qualified judges who are in a position to make rational legal decisions based on the evidence before them. Therefore, we believe that, rather than increasing delay in criminal cases, the committal process reduces delay in a number of cases by taking them out of the system.

Furthermore, the Department of Justice would have the Committee believe that the removal of committal proceedings will somehow be a panacea in removing delay in criminal cases. The Minister herself has mentioned that on recent occasions. We submit, as does the Bar Council, that the main cause of delay in criminal cases is in the investigation stage. From an incident occurring to a set of PE or committal papers being prepared, the main delay occurs in the police's gathering of evidence. The police have to obtain witness statements. They have to seek forensic evidence in many cases. They have to examine telephones, computers and CCTV. As the Committee will be well aware, all those matters take considerable time and resources. That is the major cause of delay in the criminal justice process. That has been acknowledged by most parties involved in the system, including the judiciary. We would support more resources being placed into the investigative stage of the case and strict time limits being imposed by a supervisory judge.

The current committal process allows a legally qualified judge to keep a supervisory view on the case and to progress it as quickly as possibly by putting pressure on the Public Prosecution Service (PPS) and police, where necessary, to obtain whatever reports are necessary to move the case forward. The removal of the committal process will merely put that supervisory role onto the lap of a Crown Court judge, who will have the same powers and same supervisory jurisdiction. Therefore, it will not result in any reduction in delay. In fact, it will just transfer that from a magistrate to a Crown Court judge.

I turn now to costs. It is very unclear from the Bill before the Committee what process the DOJ intends to put in the place of committal proceedings. It refers to direct transfer, but it does not indicate when that will take place. Will it be at the start of the case? Will it be on charging? Will it be when all the documents are gathered? Will it be at the end in the Magistrates' Court? It is very hard to say what DOJ intends at this point. We believe that the Committee should take that up with the Department.

At present, a case can run for a number of months — in fact, many cases can run for a number of years — pending preparation of all of the prosecution papers. That will happen whether it is in the Magistrates' Court or the Crown Court. This is the investigative process that I talked about earlier. It should be pointed out to the Committee that the length of time that a case takes to progress to committal does not impact in any way on the remuneration offered to lawyers in the case. There is a fixed composite fee for *[Inaudible.]*

The Chairperson (Mr Givan): Sorry, Pearse. We are having a slight technical difficulty.

Pearse is trying to get back onto the call. We will give it a moment to see if he can come back.

Mr MacDermott: Can you hear me now?

The Chairperson (Mr Givan): Yes, Pearse. That is you back.

Mr MacDermott: Apologies. The wonders of modern technology. It is no way to do business, but, unfortunately, it is the modern way. I had turned to costs. I am not sure how much of that you got.

The Chairperson (Mr Givan): We missed that slightly. At least you did not turn into a cat. *[Laughter.]*

Mr MacDermott: There is, of course, the famous Meowsy McDermott lawyer in 'Family Guy', but that is not me. *[Laughter.]*

The Chairperson (Mr Givan): You had mentioned that there is a composite fee; that is pretty much where we had got to.

Mr MacDermott: OK. Thank you very much, Chairman. As I said, there is a composite fee in place. So, the longer that a case takes, the less economically viable it becomes for the lawyer. There is a myth out there that defence lawyers drag out cases in order to make more money; that is simply incorrect. The standard fee is payable irrespective of how quickly or how long a case takes to get progressed in the Magistrates' Court.

I turn now to the detail of the proposed process for direct transfer to see whether or not it will involve any increase in costs. It is hard to say at this point because we have not actually seen how the proposed process works. What we can say is that the current system, which allows for a filtering out of a number of cases at an early stage in the Magistrates' Court, clearly results in a reduction in costs, a reduction in the time spent in court and a reduction in delay. Those are cases that never progress to trial and do not have to be involved in further costs and further time spent on them by a Crown Court judge.

The third rationale of the Department seems to be witnesses having to give evidence on more than one occasion. We acknowledge that there is currently a mood abroad, both generally and in political society, that witnesses and victims should be protected as much as possible. We support that, and we have always supported all measures taken to do that. There is currently a system in the justice system that allows witnesses to have special measures when giving evidence. That allows them to do such things as give evidence by video, from behind screens or in the absence of a defendant. While we acknowledge that witnesses are entitled to be protected, we state clearly that that should in no way undermine the right of the person accused of a serious criminal matter to challenge the evidence against them.

It is a fundamental tenet of the justice system that a person accused of a very serious crime should be entitled to challenge the evidence against them at the earliest possible stage. We believe that the removal of committal proceedings could interfere with a defendant's article 6 right to a fair trial at an early stage. We appreciate that these are competing interests. We appreciate that there are difficult questions to decide on, but we believe that a person who is facing serious charges, criminal offences and possibly a period in custody is entitled to have their rights exercised fully.

Further, we wish the Committee to note that witnesses who are giving evidence at a committal stage are not always what would be called victims. Some are identified witnesses, some are police officers, and some are witnesses giving evidence in relation to a chain of events. The ability of a court to assess a witness's evidence at an early stage, given all the protections that are afforded to that witness, is a very important stage in allowing the court to assess whether or not that witness could be mistaken or even dishonest. As the Committee will be well aware, many honest witnesses can be mistaken. The sooner that those mistakes are highlighted to a court, the better it is for the justice system.

We acknowledge that the Department has made some progress in progressing cases faster through the system. A recent pilot scheme was introduced to allow defendants who wished to plead guilty to fast-track those cases without having to obtain all the necessary paperwork and reports. We believe that that is a very useful tool and can avoid long delays in waiting on forensic evidence, drugs analysis or phone analysis. We believe that the system can well satisfy a twin-tracked approach to allow both for a speedy return to the Crown Court for those cases in which the defendant intends to plead guilty and for a legally qualified magistrate to supervise and assess the evidence against the defendant.

It should also be noted that committal proceedings are a very useful tool in focusing the minds of both the prosecution and the defence in how best to progress a case. It is very often at this stage that the lawyers on both sides get involved in discussion on how best to progress the case. We are very unclear at this stage as to how a direct transfer process would work. However, we believe that the focus, at an early stage, of both parties on the evidence of the case leads to a reduction in delay.

In short, we submit that the removal of the ability to call witnesses at a preliminary investigation (PI), which is the committal stage, and the imposition of direct transfer in all indictable cases is the wrong approach for the Department to take to try to reduce delay or to protect witnesses. We make no apology for saying that a defendant should be allowed to challenge evidence at the earliest possible

stage. In this jurisdiction at present, that means at the Magistrates' Court during committal proceedings.

We do not believe that the current proposals will reduce the delay in cases, which, as we have said, mostly takes place at the investigation stage, or will reduce costs. We further do not believe that it will protect any witnesses any more than the current system does. The Law Society understands the importance of a person's article 6 right to a fair trial. We also understand the importance of the legal principle that the prosecution must prove its case to a certain standard.

The Committee may comment, and does note, that the number of cases not returned to Crown Court at committal stage is relatively small. The most recent figures appear to say that it is about 4% in any given year. In the last year that we can find, which was 2019, 4% of those cases returned to Crown Court would be 72 cases. While it would be easy to sit in isolation and say that that is a very small number, if you are one of the 72 people who have been wrongly brought before a court for a very serious charge, you would wish to have that case dismissed at the very earliest possible opportunity. We see it as a very important function.

We believe that the current interests of justice test, embodied in the 2015 Act, protects the rights of all parties and allows the justice system to speedily deal with those cases that should not be in the system in the first place. The new Bill does not achieve its stated aims of reducing delay. The rights of a defendant, who, we stress, is innocent until proven guilty, should be protected. We are happy to take any questions from the Committee.

The Chairperson (Mr Givan): Pearse, thank you for that and for your written submission. I read through it, and there is a lot of very good information in there. You have made the point about the 4% and the 72 cases today. In the written submission, you highlight 4%, but my reading of it is that a lot of cases that could have been considered for preliminary inquiry maybe did not happen. Is my reading of that correct? Is this a process that is being underutilised, which, if utilised more extensively, would maybe generate different statistics?

Mr MacDermott: You might have a point there, Chairman. The issue seems to be that a lot of lawyers do not, because, over the years, the threshold for returning someone through the Magistrates' Court has remained quite low and any prima facie evidence will get returned. A lot of lawyers do not use it as a method of challenging the evidence, but we submit and believe that, if it was utilised more, those figures may well go up. We believe that, once you scrutinise the case in any depth and a judge has a chance to look at it, a lot of cases that will result in an acquittal at the Crown Court could well have been dismissed at the earlier stage of proceedings.

The Chairperson (Mr Givan): Your point around article 6 and defendants is well made. One of my questions in considering that is that, yes, defendants have a right, but I am also trying to put myself in a victim's shoes. What is more traumatic: potentially having a case dismissed at a preliminary inquiry or going through a full court case, where, as we know, it has to be proven beyond reasonable doubt, at that stage, as opposed to establishing a prima facie case? One could argue that it is worse for victims to have gone through a lengthy Crown Court case to then not have a successful outcome.

Mr MacDermott: I find myself agreeing with you again, which is unusual. It may even be twice now. We also believe that, in the process, it is really down to the standard of the prosecution case and the nature of the evidence to be given by a witness. If a witness is not to be believed in a Crown Court trial, or a witness or a victim is mistaken in a Crown Court trial, if that takes place at an earlier stage, it may well be in the victim's or the witness's interest to have the matter dealt with earlier and without having to go through the entire process and the longer delays in getting to the Crown Court. So, yes, we echo your views that this process, if used properly, can be an effective method for protecting defendants and for bringing closure, if that is the right way of putting it, to witnesses and victims.

The Chairperson (Mr Givan): In terms of that article 6 argument and considering that there may not be a lot of preliminary inquiries, how intrinsic is this form of committal process to upholding those article 6 rights? Would removing those preliminary inquiry type processes from the committal process be in breach?

Mr MacDermott: As the Committee will know, the article 6 right allows a person to have a fair trial. Part of that encompasses allowing them to have a speedy trial. Given the length of time that even the most complex case takes to get to committal stage, I do not think that the European Court would hold that the removal of committal proceedings would result in a breach of article 6 potentially, and only in

the most extreme cases potentially. The time limits allowed by article 6 and by the courts' jurisprudence on article 6 are quite extensive. My view is that the removal of the committal proceeding would not result in a successful challenge on an article 6 basis to a case not progressing, and, obviously, you have your rights protected by having a Crown Court trial in due course. I would not go as far as to say that the removal would be an automatic breach, but we should err on the side of caution and should err on the side of the defendant's rights to have a speedy resolution of his or her case rather than waiting for a Crown Court trial.

The Chairperson (Mr Givan): OK. On that comment about speed, I noted from the submission that you provided some data. I do not have it in front of me, but I think that it was that, from 2015-16, it was an average of 166 days and that the most recent figures are 110 or 111 days. In that context, part of the basis for this is to speed up the delays. What I want to figure out is this: if the policy position is to speed up the courts' processes, will it actually achieve that?

Mr MacDermott: It is fair to say, from our submission, that we do not believe that it will. The main thrust of delay in the criminal justice system is in the investigation stage. I know that you have heard that time and time again. The difficulty, particularly for cases that require forensic analysis of drugs, for instance, or of computers or phones, is that there is a major backlog in getting those items identified and triaged and checked for material that can be of use to the prosecution. That is where the delay arises. We do not believe that abolishing the committal proceeding will increase the speed; all that it will do is kick it further down the road and mean that a Crown Court has to deal with the issues of delay instead of a Magistrates' Court. The same time frame will be in place. The time between a set of papers being served on a defence solicitor and a committal proceeding taking place, even by way of challenging evidence, is not very long; it is a matter of weeks. The delay, really, is in the preparation of the prosecution's case and getting a date for a Crown Court trial. The committal process itself does not take very long at all to get set up from the time that the papers are sent, so this proposal will not remedy the major delays that are in the system.

The Chairperson (Mr Givan): OK. In moving it from the Magistrates' Court into the Crown Court, is there a potential increase in costs from that delay?

Mr MacDermott: We do not know what the Department's proposal is for the legislation that will return somebody to the Crown Court. We do not know whether it will be done at first charging. For instance, in England, you appear in the Magistrates' Court and go straight to the Crown Court, but we do not know if that is the proposal. Or, will it be to gather the paperwork in the Magistrates' Court and have a direct transfer at a later stage? We are unclear. It certainly could increase costs, because, if you are having to review cases on a regular basis in the Crown Court, there are increased costs from having a Crown Court judge and two sets of lawyers involved, whereas, in a Magistrates' Court, it is usually only the solicitor and the magistrate who would deal with it. So, there is the potential for increased costs if it is a direct transfer.

The Chairperson (Mr Givan): I picked up in your paper the benefit of having that judicial oversight when looking at the evidence. How widespread is the view among district judges, in the feedback that they are giving to defence solicitors, that this is a process that should be retained? Would that view be widely held?

Mr MacDermott: Do you want the honest answer?

The Chairperson (Mr Givan): Always.

Mr MacDermott: No, it would not. District judges do not like preliminary investigations, particularly committal proceedings, and the very simple rationale for that is that they take time. If you are bringing a witness before a district judge's court, their evidence has to be transcribed, which takes time in a committal process. Like everybody in life, district judges are happier to take the easy way out, and, if they can knock it down the road to a Crown Court judge, they will happily do so. So, it would be wrong to say that district judges are keen to retain committal proceedings, but the importance is not so much that they do or do not want to keep them; it is that they are legally qualified and are in the best position to assess the evidence and make a legal decision on whether there is sufficient evidence to return someone to the Crown Court.

The Chairperson (Mr Givan): It is important at that stage of the process that you have judicial oversight before it goes into the Crown Court. Thank you for answering those questions from me. There may be a couple that I want to come back on, but I am keen to bring other members in.

Ms S Bradley: Thank you for the presentation, Pearse. You said that you are not fully aware of the proposal that is being made by the Department, and it is not the first time that we have heard that. Is it because there is no clarity in the way that the proposal is being presented to you? What is the problem there?

Mr MacDermott: It is the fine detail. Basically, the proposal is relatively clear in the sense that it wishes to get rid of the calling of witnesses at the first stage, and the second stage is to have all indictable matters returned and a direct transfer to the Crown Court, which means that you do not have a committal process. That principle is fairly clear, but the mechanics, the nitty-gritty and the detail of that are not clear.

At what point in time does it happen? To talk you through it briefly, at the minute, if someone is charged with, for example, the offence of murder, they will appear in court tomorrow morning charged with that murder. That case then stays in the Magistrates' Court until the prosecution has gathered up all the paperwork and material on which it intends to rely. They then serve the papers on the defence and have the committal process. It is unclear whether the Department's proposal means that, tomorrow morning, when the person appears before the Magistrates' Court, the case automatically gets transferred to the Crown Court with a date set for that; or, does it mean that the same process takes place to gather all the evidence, which can take months, but then, at the end stage when the prosecution has gathered all the evidence, they press a button that says, "Direct transfer", which does not involve a committal process? We just do not know how the process is intended to work, and, because of that lack of knowledge, it is very difficult to talk about the costs, because we do not know at what stage we will be moved to the Crown Court or how we will be moved. The principle is clear, but the practical process is very unclear.

Ms S Bradley: OK. I appreciate that; thanks, Pearse.

For clarity, I want to go over the costs again. You said that there is a set fee. At what point is that triggered? What is that payment? How does that work? Could you just give us a wee bit more detail on that, please, Pearse?

Mr MacDermott: OK. Usually in any criminal matter where somebody appears in court, the judge will decide whether their means are such and the offence is such that they are entitled to legal aid. Legal aid is granted at that point. If at the committal stage, which is what we are talking about now, the person is returned to the Crown Court, the lawyer can claim a fee for that. It is a composite fee. Irrespective of whether that takes place in four weeks' time, six months' time or two years' time, it is the same fee. You have to understand that, in that period — say, for instance, you are waiting six months — the defendant will have been in court every four weeks if they are in custody or every six weeks or so if they are on bail. The lawyer has to appear on every occasion, so, in one sense, it is the law of diminishing returns for the lawyer. The less time in court, the better. It is the same fee irrespective of how quickly it gets returned or how long it takes.

Ms S Bradley: Right. So, the proposal is to cancel that fee altogether; that would not be part of it.

Mr MacDermott: I do not know. That is part of the fine detail that we are unaware of.

Ms S Bradley: OK. There is another reoccurring event. To be honest, Pearse, it is not adding up for me in respect of that one objective. I get that we are trying to make the experience for victims a much more comfortable one, if possible. However, on the part about speeding up the justice system, if the same processes have to be gone through and those processes are problematic, it does not really matter what heading is on it. Do you have any paper, even from the past, that identifies the very real day-to-day obstacles that slow the process down? Do you have any constructive solutions or ideas as to how that can be improved? I do not understand. We are talking about telephones and so on. What is happening there? Why is that so slow? Is it resource? Is it manpower? What is the problem?

Mr MacDermott: Unfortunately, as the Assembly will be well aware, resource is the big issue. Resource is the big issue in all these matters. If you appear in the Magistrates' Court for a case that is going to the Crown Court, you will regularly hear the judge ask, "What is the progress in this case?",

and the prosecution say that it is waiting on a forensic report in relation to footprints, DNA or a phone or computer that has been seized. It can literally take over a year to get a phone completely analysed, because that is an expert and difficult thing to do. So, resource is the main issue. That is where the real delay in these cases lies.

A standard committal is a five-minute hearing in court. If I am served with papers, I can appear for committal tomorrow. In fact, I did one yesterday, where the client arrived in, the charge was read to him, he was returned, and it took five minutes. The committal itself does not slow the process down. We have yet to see any evidence from the Department as to how its proposal to get rid of committals will speed up the system. The delay does not lie in that process. The delay lies in getting all the evidence for the prosecution so that it can give it to the defence. The delay lies on the investigation side. As I said, we would certainly support increased resources being given to the investigation stage. Obviously, there is a finite pool out there, and you cannot just throw money at it. However, the problem is that Forensic Science and the police force are under extreme pressure. The delay lies in their not having the resources to get witness statements and all the other material through.

As regards constructive suggestions, we would certainly work with the Department. As I talked about in my opening remarks, we have worked with the Department on, for instance, the cases where a defendant knows that he is guilty of the offence, is happy that he is guilty of the offence, and wants to get his case sentenced. In such a case, there is a fast-track approach where you can say, "We do not need those reports. We are happy to accept that". The prosecution can then prepare a reduced file, which will speed things up. However, again, that does not impact upon committal; that impacts upon *[Inaudible.]*

Ms S Bradley: OK. I have one last point. I do not even know if there is such a thing and if this is a valid question, but is there an average fee that is paid to a lawyer in a committal process? What would that look like, or what would that be?

Mr MacDermott: You are not allowed to ask about money; you know that. Come on.

Ms S Bradley: Roughly. We are trying to —.

Mr MacDermott: It is fully available on the Legal Services Agency site. The fee paid to a lawyer for committal, whether it lasts for one week or two years, is £820. That can encompass 25 appearances in the Magistrates' Court.

Ms S Bradley: OK. Thanks, Pearse. Thanks for the answer.

Ms Dillon: My connection is not brilliant. Pearse and Eoghan, thanks very much for coming today. I have a number of questions. I am not sure whether they are questions that you can answer or whether I will have to put them back to the Department.

Do we have any figures for committal hearings where a guilty plea is made and the case does not have to proceed to a full hearing? That is one of the points put forward in your proposal. The Bar Council made the same point last week. It is a fair enough point, but I am just wondering what the facts are around that.

Do you have any ideas of what there could be in the absence of a committal hearing? You talk about a committal hearing or a similar type of process. Do you have a similar type of process in mind? Is there an example of best practice in any other jurisdiction?

Do we have any figures for committal hearings that do not proceed to full hearing because they do not meet the evidential threshold? The PPS may say that a case meets the evidential threshold, but, as you outlined, when it goes to committal, a witness may, for whatever reason, recall things differently.

Do you want to answer those questions first, Pearse? I do not want to give you a whole list.

Mr MacDermott: Yes. You cut out a bit at the start, unfortunately, but I will try my best.

The gist of it is that we do not have any facts or figures before us, unfortunately. The facts and figures are within the gift of the Department of Justice.

A number of cases that are returned at committal stage from the Magistrates' Court to the Crown Court do not proceed to trial at the Crown Court on the basis of the judge looking at the papers and deciding that there is insufficient evidence. That is called a no bill application. It is where the defence makes an application to a trial judge to say that there is insufficient evidence in the papers to allow the case to proceed. A number of those cases are successful. I do not have any facts or figures, but I am certainly aware of a number. If a Crown Court judge takes that view at that stage, that case probably should have been challenged at committal stage. There are a number of those cases.

As regards an alternative process, it is hard to know how you could think up a better process than what we have at the minute, which is like a filtering exercise. The prosecution gathers evidence and gives it to the defence, and then a legally qualified judge decides *[Inaudible.]*

The Chairperson (Mr Givan): We have lost Pearse. No pressure, Eoghan, but I will bring you in to pick up where Pearse left off.

Mr Eoghan McKenna (The Law Society of Northern Ireland): Sure. Thank you, Chair. What is often missed in this is that it is not just about the procedure in the court for that number of minutes or whatever period it takes. It is about ensuring fair and just outcomes. For me, access to information is the key. The main benefit of the current procedure is that it is a mechanism to get the paperwork to the suspect, their lawyer and all parties in the proceedings. Solicitors have a unique insight into this because they deal with a suspect, or, indeed, a victim, from the very outset. Solicitors often represent victims, be it in terms of compensation or in representations to the Public Prosecution Service or the police. However, in their role of representing *[Inaudible]* they will want to try to assist by obtaining information. This is the best process that one can imagine for obtaining that because, in all cases, effectively, you are given one sheet of paper at the start of the case, and you might wait months and months, if not years, to get a second page. Then, thankfully, the balance of that information deficit is addressed in the committal papers. It is about getting the papers behind the committal proceedings and getting the evidence against the suspect.

Ms Dillon: OK. Thanks for that. I have a couple more questions. You have just outlined for me the nub of the problem. Last week, the Bar Council referred to this as well. The problem is not removing the committal process; the problem is the disclosure process. Is that fair to say? The Bar Council outlined that there may be slightly different issues between different organisations. It said that, where there is evidence on CCTV and body-worn cameras, there is now a process whereby that can be electronically shared between the PSNI and PPS, but that there is not yet a facility to share that with people in your profession, such as solicitors and lawyers. Are those not the things that we need to address? Could we add to this Bill amendments to the disclosure process? I accept that there is a resourcing issue. We and the Department will worry about that. We are well aware of the PSNI's resourcing issues when it comes to investigation and disclosure. However, is the issue around disclosure not the problem that we need to fix?

Mr MacDermott: I hope that you can hear me. Disclosure is a secondary process. The first process is *[Inaudible.]* There are major difficulties with disclosure and *[Inaudible]* for many years. The problem is that the prosecution should get the disclosure done at a very early stage. The prosecution should consider disclosure issues at an early stage and progress it. It does not affect the committal, as such, because we are not given the disclosure material at that stage. Bizarrely, we get that only after the committal.

You are touching, Linda, on the issue that Michael Forde touched on last week, which is the failure to access body-worn footage, CCTV and that type of thing. The prosecution has now set up a system called Box that allows prosecutors to look at it, but they cannot share it with us, and that is a big problem. Last week, the issue that you raised was why it was taking a year for the prosecution to roll that out to the defence. You would be better asking the witnesses who are up after us about that. If we could access CCTV and body-worn footage, that would certainly speed things up *[Inaudible.]*

Ms Dillon: I got what Pearse was saying there, Eoghan, and I am content with his response. He is right, and I will ask the PPS the question on body-worn footage and CCTV evidence.

My last point is this: to be blunt, given much of the evidence from the Bar Council and you, I query how much this will speed up justice. For me, this was attractive for a different reason: the specific issue of the potential for witnesses and victims to be cross-examined twice. That is a real focus for me, and I have real concerns about it. I do not like it, to be honest. I do not like that potential, given how traumatic it is to be cross-examined on one occasion. I certainly hope that the other suggestions in the

Gillen report will improve the situation for victims and witnesses, but we have a long, long way to go, in my view, in how we deal with victims and witnesses, particularly, but not exclusively, in serious sexual offences cases. Whilst *[Inaudible]* protections are in place at the moment, and they really are welcome, they do not remove the extremely traumatic process of giving evidence once, never mind twice.

Mr McKenna: Again, that is one of the points where there must be more detail, because no one knows when information — papers, statements of evidence and disclosure — will be provided in a new era. That applies to suspects but also to victims. Our submission indicates that, as part of the Gillen review, reference was made to the fact that, under the UN's 'Handbook on Justice for Victims', there must be, for victims:

> *"provision in full of information on the procedures and processes involved".*

If we do not have the detail on how this new procedure will work, that will not only cause difficulties on the defence side but will cause difficulties on the prosecution side, with Victim Support and with individuals, who will be unclear as to when, if at all, or how many times they will be required to give evidence. Again, more detail would help everyone, including victims and suspects.

Ms Dillon: Thanks very much for that, Eoghan and Pearse. That is the end of my questions. Some of the issues that you raised *[Inaudible]* Department. It was a helpful and informative presentation, so thank you for that.

The Chairperson (Mr Givan): Before I bring in Doug, I want to say that, once members have asked a question, they should mute themselves again, and Pearse and Eoghan should do the same. There is quite a lot of feedback round the room, and that will affect the recording, the transcript and so on. I appreciate that, technically, we are trying to navigate all of this, but we are dealing with legislation, and it is important that we get an accurate transcript.

Mr Beattie: I hope that you can hear me. The line has made it really difficult to hear all the answers. Pearse and Eoghan, thank you for a really useful presentation and for answering questions. Linda and Sinéad have covered most of what I was thinking about, but I am struck by the fact that the committal Bill seems to be focused completely wrongly. You are saying that there is no issue with committal right up to the Crown Court but that all of the issues seem to sit with the evidence gathering, and that lies with the PSNI, Forensic Science and the PPS. Therefore, there needs to be a focus on that if we are to speed up justice and deal with the cost issues. Can you comment on that, just to make sure that I am getting right what you are saying? Is there anything in your processes — anything at all — that you could tweak or amend to speed that up? I am really interested in the speeding up of justice.

Mr MacDermott: Thank you, Mr Beattie. Yes, you have got our point exactly. We do not believe that removing committal proceedings will achieve any improvement in the speed of process. The difficulty is simply down to resources. When it comes to the investigation stage, a lot of the police work involved in prosecutions these days is of a technical nature. It involves CCTV, phones and computers. All of that takes time, and we need to get more resources to get that moving forward. That said, the police also need to engage with the prosecution at an early stage, and the prosecution should engage with the defence at an early stage, because there are issues that they do not need to be adversarial about at all. There will be material on which we can agree on a perfunctory basis. They do not need to deal with every issue as a contested matter. Early engagement between the prosecution and the defence and between the police and the prosecution will help to speed things up.

Speeding up matters other than those is really down to the number of cases coming through at a given time. Court resources are finite: there are a certain number of courts that can hold trials. The pilot scheme on guilty pleas is a very useful exercise, which we all need to look at more. If a defendant in a police station admits the matter, do we really need to get a forensic report to say that what he had in his pocket or his bag was cannabis when he has said that it was his? In such cases, we do not need that report. We need to look at that, and we need to look at a way that copper-fastens the process and allows the defence, at an early stage, to say that it accepts its client's guilt and wants to move the matter to sentencing as quickly as possible.

That does not deal with trials; it deals with cases in which there are guilty pleas. Trials are more problematic. Chiming with what Linda Dillon said, I agree that sexual cases are always the most difficult because they nearly always go to trial, and that is what causes a problem. Those are the ones

with the most vulnerable victims and, usually, the ones in which defendants are most adamant that they are not guilty, which is why they always go to trial.

Speeding those matters up is very difficult because the police often have to interview young witnesses and young injured parties, which can take time. There is a need for disclosure of all medical and mental health records in relation to the injured parties and defendants, and all of that can take time. It is hard to know exactly how to speed things up. Adding resources to the investigation stage is one thing but, generally, a more collaborative view between the prosecution and the defence on what issues can be identified and agreed on in order to move things forward would be of benefit. At the moment, we do not really engage with the prosecution until late in the process, and that is a difficulty. There is some work to be done around that engagement, which could benefit the system.

Mr Beattie: Very briefly, Pearse — I will not trouble you further — how does that engagement work at the moment? Is it done informally with the investigatory agencies or is it done in a specific forum? What mechanism is used?

Mr MacDermott: COVID has been of benefit in that regard because, until the pandemic occurred, we had very little contact with the prosecution apart from what took place in court. In the morning, you approached the prosecutor in court to speak about the case but you would not have had a lot of contact beyond that. COVID has led to a situation where there is much more contact now between defence and prosecution by email, telephone and criminal justice secure email, which allows for an interaction. We have not, however, got to the point where we discuss a case until all the material has been gathered. There is no forum to allow us to have an informal conversation about where we are going with a case. That does not happen until there is a formal process when all the paperwork is available. In reality, in a Crown Court case, the full engagement with the prosecution does not take place until arraignment at the Crown Court. All parties could look at earlier engagement to see what issues can be resolved.

Mr Beattie: That is really informative, thank you.

Ms Dolan: Thank you, Eoghan and Pearse. I have only one question, so I hope that the connection stays up. In the absence of a committal hearing, is there any other way of resolving non-disputed issues between parties?

Mr McKenna: I am not sure whether I am supposed to come in here. In relation to a solicitor's role, we take that approach from the outset. If we are contacted by an individual who is under arrest in the police station, as much as there have been significant challenges because of COVID — the inability to get direct access to a detained person, let alone access to information to assist them — we try, from the outset, to get information to allow us to better advise the individual and to speak to the police officers who are involved in the question sessions and interviews or even the detention of a suspect. When the case proceeds to court, we will engage with the prosecutor or police officers as best we can.

What is missed in the debate is that a lot of these indictable only cases are withdrawn before their PE papers are committal suggested, and that is with the defence involved in the negotiations, discussions, or however you want to phrase it. That can happen in and around committal proceedings. When you see the papers, information opens up those debates. Sometimes, the solicitors have an advantage over the prosecution and the police because we know the instructions from the suspect or individual, which is a part of the jigsaw that the prosecution and police do not have.

As Pearse indicated earlier, although we operate within an adversarial system, there is room for collaboration and working together on certain points that are worth discussion and are non-controversial. COVID has shown some examples of good practice but also highlighted the challenges. The Box system was talked about early in the COVID difficulties, when there was disruption to courts. There was a suggestion that the Public Prosecution Service would allow the defence access to that in order to share papers, rather than technology-orientated evidence. That, unfortunately, floundered. In more recent times, the Box system has clicked into action, as discussed previously with the Committee, whereby the police and the prosecution collaborate more through the use of that technology. The defence has not been pulled into that. It goes back to the sharing of information and the disclosure of papers. The more information that is shared, the more fairness and justice there is, and the more easily everyone can work to a conclusion that is just and swift. Admirable phrases, such as "avoidable delay" and "identification of an early guilty plea" can all be worked out collaboratively, if the structures and mindsets are in place.

Quite often, you will find that individual police officers, for example, become too bedded into an adversarial approach from an early stage, and, because they do not disclose information, that blocks any progression. If everyone buys into the mindset of sharing information to help the criminal justice system, it will absolutely speed up all the processes. If some concrete processes to do that can be put in place to choreograph it, all the better. Those efforts are much better than the movement, rebranding or, indeed, redecoration of delay, such as a case being placed at another court venue rather than the Magistrates' Court.

Ms Dolan: Thank you, Eoghan.

Miss Woods: Thank you very much, Eoghan and Pearse, for your presentation and written submission. A lot of my questions have already been answered, so I will not labour them. I want to pick up on Doug Beattie's question about collaboration and early engagement between the prosecution and the defence to help to eliminate delay. Does that require legislation, or, if is it a change of practice and policy, what would need to happen to get to that point?

Mr MacDermott: I do not think that it requires legislation; simply a change in policy and in the process up to now. COVID has, strangely, worked out quite well. We have had a large number of meetings with the PPS: some fruitful; some less so. However, we need to get to a situation where we can collaboratively share information. As Eoghan rightly said, the information about a case is what progresses it. Until you have all the information, you cannot progress a case. I cannot advise a client unless I know exactly what he is charged with and what evidence he is facing. The sharing of information is crucial.

What we are really looking at — this is an argument for the Law Society and the Bar Council to meet with the PPS more regularly — is putting in place protocols. That type of thing would allow us to engage at an earlier stage, share information and get to a place where we can progress things more quickly. I do not think that it requires legislation.

We have not talked about this, but it is in our paper. Where legislation might be useful is where, in some jurisdictions, they have a custody time limit issue for the prosecution. If you go beyond a certain time, you have to be considered for bail. We do not have that in this jurisdiction, but we have very long delays. Very kindly, we describe it as the "investigative process", but it is down to the prosecution and the police not having put forward the material. At the moment, we accept that. However, custody time limits would certainly focus the mind of the prosecution.

Miss Woods: Thank you, Pearse. You must be reading my notes, because that leads on nicely to my next question, which is on the part of your submission that talks about introducing the time limits within the proposed reforms. You note that there is no bail Act for Northern Ireland and that custody time limits are included in the proposed reforms. This, too, could be a matter for the Department, but do you know why regulations currently at our disposal have not yet been made? Also, would you support proposals for the amendment of these committal reforms, if applicable, regarding the Bail Act?

Mr MacDermott: My short answer to that is yes. The reason why the regulations have not been put in place is that all those involved in the process realised that they would not be met. The Department of Justice is realistic enough to appreciate that. It depends what time limits are set, obviously, but those involved would be very hard pushed to meet the current time limits imposed in other jurisdictions. That is why they have not been implemented. Again, that is probably a question for the Department, rather than us. We support such things. We support debating the influence of the Bail Act, and we also support the idea that the prosecution sits *[Inaudible.]* Look at Scotland, for example, where the time limits are very short: I think that the prosecution has 90 days or 96 days to get a case to Crown Court. That focuses the mind of the prosecution very strongly. I do not necessarily advocate that, but we need something to focus the mind. At the minute, and this is part of the reason why we think that committal is important, a district judge can focus the mind of a prosecutor by saying what has to be done and setting a strict timetable for the officers in charge to attend court and explain why things have not been done. That is a good pressure, and it is used in the acquittal process *[Inaudible]* at this stage. We do not want to lose that. To allow the case to progress quickly, it is important that there are strict time frames for the prosecution and police.

Miss Woods: Thanks, Pearse. Chair, my third question has already been answered, so I will leave it there.

Ms Rogan: My question on time limits follows on from Rachel's. With COVID-19, the recent delays are a result of unforeseen circumstances. This time two years ago, we would not have even thought about it. We have been dealing with the onslaught of the pandemic.

What is the potential impact if the timescales are not adhered to? Is it the case that people who are guilty could go free? Is that a potential outcome?

Mr MacDermott: Guilty people would not go free. What would happen is that a person who had been remanded in custody — not found guilty of anything but charged with a matter — would be entitled to be considered for bail at a certain point. They would try to get bail, which would not necessarily be a case of, "Off you go, down the street". Strong conditions would be attached, such as tags, curfews, reporting to the police and all that sort of thing. The importance of the time limits is not that people who are potentially guilty will be set free; it is that a person who is in custody, who may not be guilty, should not stay in custody any longer than they have to. That is the purpose of the custody time limit. It prevents a situation where somebody who may ultimately be acquitted has spent a long time in custody, way beyond that considered reasonable. If found guilty at the end, that person will still get whatever sentence they get. This means only that, when on remand, before they get their trial, they will be considered for bail, possibly bail with conditions.

Ms Rogan: Thank you. I have asked all my questions, Chair.

Mr Dunne: Thank you very much, Pearse and Eoghan, for your presentation. I have just a couple of points. In the progressing of cases, how are they prioritised? I am thinking mainly of the gathering of the evidence, which, you emphasised, is a heavy, slow process. How are cases prioritised, and who is responsible for progressing them? Is it PPS staff or others? I appreciate that the police and the other services are involved, but who progresses the cases and links up the chain — that is one way of putting it — to make sure that things are moving forward and not sitting still? With all due respect, legal eagles do not have a reputation for speed, and those two terms do not really work well together.

I have heard a lot today, but I wonder whether you are pushing back on something. There is a resistance there, and we are all, I suppose, resistant to change, but change has to come. We have noted your points, and I appreciate that change is not always for the best, but the legal process needs to be speeded up.

Mr MacDermott: Gordon, I think that you have been going to the wrong solicitor if you have not had a speedy response. He is maybe in France, where they are more efficient and faster, just like me and Eoghan.

Mr Dunne: Even for property these days, it is slow.

Mr MacDermott: Prioritisation-wise, it is an interesting question, and, again, is probably one that you could ask the PPS when it appears after us.

Within the initial structure, the police have a system whereby a senior officer looks at individual cases and decides, for instance, which forensic cases should be prioritised. The police do that initially, and then the PPS supervises it. However, I am not 100% sure who priorities it at the investigation stage. I would like to think that the PPS witnesses who appear after us will be able to tell you.

I understand what you are saying about delays. Joking aside, I do not accept that the delays in the justice system, the criminal justice system in particular, are down to solicitors. There is no benefit to us whatsoever in delaying cases. We are very anxious to get on with cases.

Once we get a set of papers and the documentation, we work on them immediately. We instruct counsel, if counsel is required. We get instructions from clients. We indicate where we are going with the case, and move on as quickly as we possibly can. There is no benefit to solicitors in dragging a case out in the current environment.

There are areas that can be worked on, and the investigation stage is, clearly, one of those. I accept that we need to work on the collaboration point with the prosecution. However, resources are key to all this. With regard to the investigations and court resources, COVID has made court availability difficult for court staff as well.

Certainly, we are keen to get things moving. Prioritisation is an interesting point, but I will defer that to the PPS representatives coming after us for you to ask them who prioritises.

Mr Dunne: OK, grand. Thanks very much.

The Chairperson (Mr Givan): Linda Dillon, you wanted to come back in on a point of clarity.

Ms Dillon: Chair, it has been clarified, so thank you, and thank you to Pearse and Eoghan.

Mr Frew: Thank you for your presentation. We are going round the houses with the issue of delays. This is not really about solving delay. For me, it is probably more about the impact of a court case on witnesses and everybody involved.

Last week, we heard from the Bar Council, whose representatives told us that the stress test was important for evidence and that that was what the committal was useful for. Is there any way to stress-test the files, evidence and documentation without stress-testing the witnesses — victims, in many case — and even the accused?

Mr MacDermott: Thanks, Mr Frew. Yes, I heard that last week. The current proposal has two stages. The first stage is to prevent witnesses from being called to give evidence on the basis that they may have to give evidence twice. The second stage is the abolition of committal.

We have made arguments in relation to the witness point, which you may or may not find attractive, but it seems to me that the Committee has an interest in protecting witnesses and victims, which is a justifiable interest, rather than the false delay argument. There is a provision that could be allowed whereby calling the witnesses may be prevented but that a judge still assesses the documentation and evidence in the case, and the strength of the prosecution case. That would not involve witnesses being called or cause any particular stress on anybody, apart from the lawyers who have to make representations to the judge. The entire abolition of committal proceedings to try to prevent witnesses giving evidence twice is throwing the baby out with the bathwater and defeats and removes a very important filtering process in the current criminal justice system. In short, you could have a situation in which the Bill could prevent oral evidence being called by witnesses but still allow for a legally trained judge in the Magistrates' Court to assess the evidence and see whether the case should progress. That is a possibility.

Mr Frew: I will have to go over the Hansard report of this meeting to digest the questions. I think that it was Rachel who asked about the Bail Act and time limits. If we are to tackle the delays, that may well be a tool to speed up justice. You might have covered this and I have not understood it, but you triggered me with your answers: when do you apply for bail? Is it before or after committal? Surely the information that a judge sees at committal would be useful for the judge in an application for bail, one way or the other.

Mr MacDermott: The issue of bail arises immediately when a person is brought before a court. When someone is in a police station and being interviewed about an offence, there are three potential outcomes. First, the file can be sent off to the prosecution and the individual receives a summons in due course. Secondly, the individual may get charged and bailed by the police to come to court in four weeks' time. Thirdly, and, perhaps, most relevant to indictable-only offences is that the person is remanded in custody from the police station to the court, and the first appearance in court takes place. Those are the cases that you read about in the paper every day about so-and-so appearing and being charged with x, y and z.

The issue of bail arises for the first appearance in a Magistrates' Court, and, at that stage, a magistrate will very often decide whether a defendant should get bail. If bail is refused at a first appearance, the defendant has a right to apply to the High Court for bail and has the right to apply back to the Magistrates' Court if something has changed, but a person will remain in custody during the period before committal. There is a first appearance, when a charge sheet brings you to court, but the committal will not take place until months down the line. You could remain in custody the entire time, you could be on bail the entire time, or you could have a mixture of being in custody and being on bail. At committal, the court will again consider bail. If you are on bail, the court will almost always automatically remand you on bail. If you are in custody, the court will very often remand you in custody, and then you go to the Crown Court. The bail does not impact on committal so much as on the investigative process. The purpose of the Bail Act is to put a time limit on getting it to the stage at

which you get returned to the Crown Court within a reasonable time, and, if the prosecution does not meet that test, you are entitled to be considered for bail.

Mr Frew: I will have to read all this later. I am not an expert.

Mr MacDermott: It is about understanding the process. A committal is halfway through a Crown Court trial in the sense that a person is charged; the prosecution gathers the evidence into documentary form and gives it to the PPS, which then gets the committal papers. That is the halfway stage. The magistrate decides whether there is a case to answer. You then go to the Crown Court trial. The issue of bail arises at all stages, but, at the start, is the first issue.

Mr Frew: Is the statutory time limit a time pressure on getting back to the High Court, or is it a time limit for various things, including the resolution of a case?

Mr MacDermott: There are different models of time limits. We will look at the model that states that the prosecution must gather the evidence in a designated period. That will be 110 days, I think, as it is in the English system. That is the time that you have to gather the prosecution case before a person is considered for bail. It is to put pressure on the prosecution, the police and the PPS to get the material gathered to present to the court and the defence within that time frame.

Mr Frew: I was just about to say that. That seems to be skewed towards client pressure to all the bodies that are involved, such as the PPS and the police. I see that as being where the delay occurs, as you rightly said. Can any other time pressures be applied on the judicial procedures once you get that evidence gathered?

Mr MacDermott: Yes, but there is a second set of time limits. That is the time limit to the committal stage, which is where the prosecution gathers all the evidence and presents it to the court not as evidence but as a bundle.

The second stage is committal to trial. That puts pressure on the judiciary as such to manage the cases so that they fall within the time limits that are provided for. That second half has to be done within a time frame that complies with those conditions. That puts pressure on the court and all parties in the Crown Court to deal with those matters in that time frame.

Mr Frew: Just to be clear, we have no limits like that in this jurisdiction.

Mr MacDermott: None whatsoever. Any number of cases in the Magistrates' Court can take well over a year to get committal proceedings. Getting rid of committal proceedings will not speed that up; it just takes a year to get the papers gathered.

Mr Frew: I take it that, throughout the world, there are varying time restraints, limits and pressures.

Mr MacDermott: There are. In fairness, I have not had a close look at that. Our paper touches on the issue, but we have not looked at it in any detail in other jurisdictions. In the South, for instance, there is a six-month limitation period in getting offences before the court. Scotland has very short time limits, but any number of jurisdictions can be looked at. Australia and New Zealand are always good places to look at regarding time limits, but we have no time limits and no time frame whatsoever for anything in this jurisdiction.

The Chairperson (Mr Givan): I thank Eoghan and Pearse for their answers. The session has been very helpful. It has been a very useful exchange. We appreciate the time that the Law Society has taken to engage with the Committee on the issue, and I have no doubt that, if we need clarity on other issues, you will be happy to engage with us further.

Mr MacDermott: Thank you very much.