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# Criminal Justice (Committal Reform) Bill

Committee Stage – Written Submission

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## Introduction

1. The Bar Council is the representative body of the Bar of Northern Ireland which comprises 650 self-employed members who operate on an independent referral basis. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy, serving the administration of justice and upholding the rule of law across this jurisdiction. The Bar welcomes the opportunity to provide a response to the Justice Committee’s call for written evidence on the Criminal Justice (Committal Reform) Bill. The short briefing note set out below has been prepared to assist the members in their consideration of the Bill. This submission also reflects the views of the Criminal Bar Association which represents the views of prosecuting and defence counsel, serving to ensure an independent and quality source of specialist criminal law advocacy in Northern Ireland. Our submission begins with an overview of our position on committal reform before being structured according to the specific clauses contained within the Bill which the Bar takes a view on.

## Overview

2. The Bar recognises that the Criminal Justice (Committal Reform) Bill is intended to give effect to the commitment made by the Executive in the Fresh Start Agreement of 2015 and more recently as part of New Decade New Approach of 2020 in an effort to “speed up the justice system, benefiting victims and witnesses”. It also aims to reflect recommendations made by a number of other recent reports, including from the Criminal Justice Inspection Northern Ireland, the Gillen Review Report into the Law and Procedures in Serious Sexual Offences, the Northern Ireland Audit Office and the Independent Reporting Commission.
3. In broad terms, we note that the Bill contains two predominant policy objectives, namely the abolition of oral evidence at committal and the introduction of direct transfer of cases to the Crown court for all indictable offences. Committee members will already be aware that committal proceedings generally take place by way of either a Preliminary Inquiry, Preliminary Investigation or Mixed Committal but that oral evidence only rarely occurs in practice. Our view is that it would be necessary to retain this important safeguard by preserving the ability of the court to hear oral evidence where necessary in the “interests of justice”, as per the provisions contained in the Justice Act (Northern Ireland) 2015, which will only apply in a very small minority of cases. Indeed the figures for sexual offence cases, as highlighted by the Gillen Review, already indicate how infrequently oral evidence is required at the committal stage. For example, 2017 saw 127

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committals for sexual offences with a Mixed Committal in seven cases and a Preliminary Investigation in three cases.

4. However, it is worth highlighting that committal proceedings do perform a useful function in a small number of cases in terms of potentially reducing the need for a lengthy contest in the Crown Court as it can narrow the issues at an early stage in the case. Evidence adduced at committal hearing can be very relevant to pre-trial negotiations. On occasion it can also provide a defendant with an opportunity to assess the case against him/her which can result in a plea of guilty if he/she does not believe they can defend the case with appropriate advice from legal representatives or the prosecution may decide that there is insufficient evidence to bring forward all charges which the defendant is accused of which could lead to a number being dropped.
5. The Department of Justice also appears to have concluded that “extending the roll out of direct committal to offences which are triable only on indictment provided the best basis for tackling delay in the Crown Court”. However, we would query the basis for such a conclusion given that analysis of legislative changes in other jurisdictions such as England and Wales has shown that reforms to the committal process alone have not reduced delays but instead shifted them to the higher court tier which then struggled to absorb the increase.<sup>1</sup>
6. The removal of this step in the process may not in itself necessarily have the impact that Committee members are hoping for given that other issues causing delay across the system still remain to be addressed too, including ensuring that greater resources are directed towards a more efficient and effective investigation and disclosure process which are often the key drivers of delay in the Crown Court. Despite recommendations from reports such as the Gillen Review, practitioners have highlighted that they regularly encounter examples of non-disclosure or very late disclosure in criminal cases. The DOJ’s recent creation of a Digital Justice Strategy 2020-2025 alongside the Disclosure Improvement Plan between the PPS and PSNI are to be welcomed but there remains a pressing need to develop a more robust method to deal with the sharing of digital evidence as soon as possible, particularly where large volumes are involved. We understand that some work is underway in this area and hope that the wider legal profession and defendants may benefit from this at some point in 2022.
7. The Committee must appreciate that committal reform alone cannot be a panacea for tackling delay across our criminal justice system. Steps to address

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<sup>1</sup> National Audit Office, *Efficiency in the Criminal Justice System*, 2016 at <https://www.nao.org.uk/wp-content/uploads/2016/03/Efficiency-in-the-criminal-justice-system.pdf>

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disclosure are vital but we recognise that robust case management with strong and proactive early engagement between all parties is also of vital importance in reducing delays. Therefore if the Criminal Justice (Committal Reform) Bill becomes legislation in its current format, then there must be a shared vision right across our criminal justice institutions, including the Police Service of Northern Ireland, the Public Prosecution Service, the Northern Ireland Courts and Tribunals Service and the Department of Justice alongside the judiciary and legal profession, to ensure greater collaborative and integrated working across the system and address these other areas of concern which are causing delay too.

## Clauses One – Three

8. The Bar notes that clauses one and two provide for the abolition of mixed committals and preliminary investigations. These issues were last consulted on by the Department some time ago back in 2012 as detailed in the Explanatory Memorandum attached to the Bill. As highlighted above, the passing of the Justice Act (Northern Ireland) 2015 by the Assembly 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” to allow a Magistrate to order this if persuaded that it is necessary. The retention of the “interests of justice” safeguard at the discretion of the court is important in taking account of the right to a fair trial, access to justice and in certain cases helping to narrow the issues so as to shorten the trial or obviate the need for one entirely.
9. Some of these cases ultimately involve serious criminal offences which could see a defendant being deprived of their liberty for many years if proven guilty beyond all reasonable doubt and convicted. The Bar remains to be convinced that there is any need to remove this option as a safeguard in its entirety as the fundamental principles involved, such as the role committal can play in establishing a prima facie case against a defendant at any early stage, remain unchanged since the passing of the Justice Act in 2015. Essentially, we are of the view that the retention of the preliminary investigation with oral evidence where it is in the “interests of justice” to do so, akin to Section 7 of the Justice (Northern Ireland) Act 2015, should be given consideration by the Committee.
10. Furthermore, the Bar is very conscious of the needs of complainants and witnesses involved in criminal cases but it is worth noting that the court already has a range of special measures at its disposal which are frequently adopted either singularly or in combination with another to support individuals to give their best possible evidence, such as live links and screens. See our comments elsewhere in this response which highlight the pressing need to devote resources towards improving the investigation and disclosure process as the one of the key

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factors in addressing delay which would in turn help to improve the experience of complainants and witnesses involved in the process.

## Clause Four

11. The Bar notes that this section of the Bill amends provisions within the 2015 Act which provide for the direct transfer of cases to the Crown Court without the need for a committal hearing. The amendments at subsection 4(4) to section 11 of the 2015 Act extend the offences which are to be directly committed to the Crown Court to include all offences which, in the case of an adult, can be tried only on indictment and seeks to provide a single list of offences to which direct committal will apply. The Bar understands that it is the Department's long-term aim to eventually eradicate the traditional committal process entirely and this subsection also provides the Department with the power to bring forward an order(s) to designate any other offence(s) to which direct committal under Chapter 2 of Part 2 of the 2015 Act will apply. Section 11(1)(b)(ii) within subsection 4(4) refers to "any other offence which is for the time being designated for the purposes of this subsection by an order made by the Department... [the court shall forthwith commit the accused to the Crown Court for trial for the offence]". Therefore Committee members may wish to explore the process around how and when the Department intends to add to this list of offences in future.
12. We also note that subsection 4(4) provides that where an accused is charged with an offence to which direct committal applies, any other offences which the Magistrates' Court considers to be related to the qualifying offence will also be directly transferred to the Crown Court at the same time. A related offence is then defined as one which the court determines could be included on the same indictment as the offence which is to be directly committed. In addition, there is provision for an accused, where charged with an offence not falling within the direct committal offence types, to be directly committed to the Crown Court if the offence is related to an offence for which a co-accused has been directly committed.
13. There is reference under subsection 4(4) to "the functions of the court in relation to the conduct of committal proceedings for that offence then cease, except as provided by... Article 29(2)(a) of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 or any regulations under Article 26(3) of the Access to Justice (Northern Ireland) Order 2003". It is evident that the proposed reforms contained within the legislation will involve the front-loading of more work within the justice system, particularly given the likely impact on the Crown Court. These will only work effectively if investment into the system is forthcoming by the Department

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of Justice and the Legal Services Agency which should include a bespoke system of payment for legal practitioners involved in this work. The Bar has been involved with the Protocol to Expedite Serious Sexual Offence Cases involving Witnesses under 13 years in Belfast alongside a number of other organisations since 2019. The protocol may provide a useful guide for members to consider, particularly in relation to how direct transfer may operate more widely in practice. Whilst the detail is beyond the scope of the main primary legislation, provision for legal aid in these proceedings must be a consideration for the DOJ and LSA. The Bar believes that legal aid in any relevant cases impacted by these reforms should continue to be issued by the court subject to the existing statutory tests with an assumption that a criminal legal aid certificate for both solicitor and junior counsel will be granted at the first appearance in the Magistrates' Court.

14. Subsection 4(5) in the Bill seems to make some amendments to section 13 of the 2015 Act to add flexibility to the nature of court rules required to support the direct committal process, by adding that further arrangements in respect of the documentation associated with direct committal can be provided for in either the Magistrates' Court Rules or Crown Court Rules. This suggests that the Crown Court Rules will provide further detail on arrangements for serving documents containing the evidence on which the directly committed charge is based if they are not available to the Magistrates' Court at the point when the accused is to be directly committed to the Crown Court.
15. However, we would reiterate our concerns that an accused could be directly committed to the Crown Court without any evidence having been presented by the prosecution as this will likely only add another layer of delay into the system at this level. If this is to operate effectively it will necessitate a much more efficient investigative process on the part of the PSNI in compiling any evidence and the PPS around arrangements for presenting an indictment to the court. We would query whether an accused might be required to make a number of appearances in the Crown Court before it becomes clear whether any evidence can be presented to support the case; the cost to the public purse of managing the case at this level is likely to be higher than in the Magistrates' Court. Alternatively it seems very possible that cases may instead just face lengthy periods sitting with the Magistrates' Court before they can be transferred up to the Crown Court due to delays with the gathering of evidence to support them.
16. Subsection 4(3) in the draft Bill already makes provision to repeal section 10 of the Justice Act (Northern Ireland) 2015 which provides for the direct transfer to the Crown Court of an accused, upon his or her indication to a Magistrates' Court, before it has begun to conduct traditional committal proceedings, of an intention to plead guilty to an offence to be prosecuted on indictment. Subsection 4(6) will

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instead provide the Magistrates' Court with powers to order the making of inquiries and reports relevant to the sentencing of the accused, if they indicate an intention to plead guilty to the offence to be directly committed to the Crown Court. This may support the sentencing and early disposal, if appropriate, of the case should the accused enter a guilty plea at arraignment in the Crown Court. We welcome the important clarification within this subsection that "the court must afford an opportunity to the accused and the prosecution to make representations" prior to the Magistrates' Court making a decision regarding the ordering of relevant inquiries or reports.

17. The Bar notes that subsection 4(7) provides new powers for the Director of Public Prosecutions to discontinue proceedings, directly transferred to the Crown Court under Chapter 2 of Part 2 of the 2015 Act, between committal and the time that an indictment has been presented in the Crown Court. The Bar accepts that this may be necessary, if the Bill is passed in its current format, to deal with scenarios in which there is a material change in the circumstances of a case such as new evidence which leads the prosecution to conclude that the test for prosecution is no longer met. However, we would highlight again that early stage investigative procedures will need to improve in order to avoid any unnecessary delay and enhanced early joint engagement between the prosecution and defence will be important in such cases in the Crown Court.
18. Subsection 4(8) relates to amendments to the process whereby the accused or their representatives can apply to dismiss charges on which they have been directly committed for trial. It also seeks to remove the use of oral evidence during applications to dismiss which is described as being designed to maintain consistency with the Department's commitments to remove the option for victims and witnesses to be called to provide oral evidence on oath in advance of trial. The Bar considers that it would be necessary to retain the potential for oral evidence during applications to dismiss only where required "in the interests of justice" as already detailed in Subsection 14(4) of the Justice Act (Northern Ireland) 2015. This judicial oversight function would help to maintain the rights of both defendants and complainants in the criminal justice process.
19. The application to dismiss mechanism could also be useful where there is a relevant pre-trial point which is terminating in nature but requires oral evidence to address that issue through evidence adduced at the application of either prosecution or defence. We anticipate that it would rarely be used but it seems overly restrictive to limit the court to considering an application to dismiss only on the papers. The Criminal Procedure Rules 2015<sup>2</sup> in England state that for an

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application to dismiss, both the defendant and the prosecution may ask for a hearing if required and must explain why it is needed. Specifically, they can also identify any witness they want to call to give evidence in person, with an indication of what evidence the witness can give.

20. Subsection 4(9) makes a number of changes to Schedule 2 of the 2015 Act, including reference to the timeframe in which a prosecutor must disclose to the defence copies of, or provide access to, material which could reasonably be considered to undermine the prosecution case or assist the case of the accused in cases directly transferred. The duty on the prosecution is to provide this material as soon as is practicable after the service of the notice of committal and the evidence on which the charge is based. As highlighted previously, the lack of timely disclosure remains a significant issue for practitioners in the Crown Court as it is frequently delivered at the last minute or even, on occasion, during trials. We remain of the view that the outworking of this legislative change is very much contingent upon resources being committed to ensuring that the disclosure process operates effectively. This means that all police investigations, including lines of enquiry pointing away from the accused, must be exhausted and statements from all relevant witnesses, medical and forensic reports and all third-party enquiries must be completed in advance to allow this to work effectively.
21. Finally, the Bar considers that Committee members should seek assurances that if the Bill is passed in its current format, adequate resources will be provided to the Crown Court to ensure that it can accommodate the likely increase in cases so that we do not encounter some of the same difficulties seen in England and Wales. Members may be interested to note that there is widespread concern in that jurisdiction around the chronically under resourced criminal justice system, which has deteriorated further due to delays caused by covid-19, with a mounting backlog of cases and serious problems in delivering timely justice<sup>3</sup>.
22. Representatives from the Bar would be delighted to engage further with the Justice Committee on any aspect of the Criminal Justice (Committal Reform) Bill should members wish to discuss the issues further.

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<sup>3</sup> The Bar Council of England and Wales, *New report reveals England & Wales spends more on coffee than on law and order*, July 2020 at <https://www.barcouncil.org.uk/resource/new-report-reveals-england-wales-spends-more-on-coffee-than-on-law-and-order.html> and The Guardian, *Covid leading to four-year waits for England and Wales court trials*, 10 January 2021 at <https://www.theguardian.com/law/2021/jan/10/covid-leading-to-four-year-waits-for-england-and-wales-court-trials>