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BY EMAIL ONLY

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Clerk to the Committee for Justice
Room 242
Parliament Buildings
Ballymiscaw
Stormont
Belfast
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15 January 2021

Dear Ms Darrah,

CRIMINAL JUSTICE (COMMITTAL REFORM) BILL

Thank you for your letter dated 27 November 2020 inviting a written submission to assist the Committee's consideration of the contents of the Criminal Justice (Committal Reform) Bill. The Bill is undoubtedly an extremely important piece of legislation designed to ensure that the very significant statutory reforms to criminal procedure in Northern Ireland as contained in the 2015 Act are implemented as effectively as possible to deliver the maximum benefit for all users of the criminal justice system, including the victims of crime.

You have requested that our submission be structured so as to address specific clauses within the Bill or the Schedule, and I have sought to present our observations accordingly.

In summary, there are three key aspects of the Bill upon which we consider it appropriate to comment at this stage. They are:

(i) The abolition of oral evidence at committal and at an application to dismiss;

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(ii) The repeal of section 10 of the 2015 Act (which provided a mechanism to directly commit cases where there was an early indication of an intention to plead guilty) and the need to deal proportionately with early guilty pleas; and

(iii) The extension of the direct committal provisions to all cases where an accused is charged with an indictable only offence.

We provide more detail on each of these issues below.

Section 2: Abolition of mixed committals (and also section 4(8) – removal of oral evidence at an application to dismiss).

The context in which the Department has introduced reforms relating to the ability to require witnesses to attend and give evidence at committal hearings is set out in the Explanatory and Financial Memorandum: see, in particular, paragraphs 3-7. I recognise that this is an area in which there are alternative views and continuing debate. However, I would respectfully support the Department's proposal in this regard. Mixed committals at which oral evidence is heard are undoubtedly a source of delay in the criminal justice system and create additional stress for victims and witnesses. Whilst we are aware of the previous proposal to amend the Act to limit the right to call witnesses to those circumstances where a District Judge was satisfied upon application that it was in the interests of justice, our preferred position is that a victim or witness has clarity at the outset of any investigation that they will only be required to give evidence once (subject to any re-trial); and that a decision as to whether oral evidence should be adduced at committal proceedings in particular cases is not left to the discretion of individual judges. In our experience the prospect for victims and witnesses of having to give evidence twice can considerably add to their level of anxiety and ability to give best evidence. Therefore, removal of any uncertainty in this regard would be welcomed. We have also adopted this position mindful of the fact that, where a case is sent to the Crown Court by way of committal, there still exists the opportunity to challenge the sufficiency of evidence on the papers. This occurs both at a preliminary inquiry at the Magistrates' Court and again by way of a No Bill application in the Crown Court. We also note the generally recognised position that complete abolition of the right to call witnesses at committal is in no way incompatible with a defendant's absolute right to a fair trial.

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It also worth highlighting our view that the right to require witnesses to attend committal for the purposes of giving evidence is, on occasion, used tactically by the defence in order to test whether the victim is resilient enough to withstand the pressure that this creates. Given that the defendant can still plead guilty at an early stage in the Crown Court and receive credit for an early guilty plea, there is no significant disincentive for the defence to take this course. In those cases where the victim does physically attend court it is not uncommon for the defence to withdraw their demand that the witness be called and for the case to be returned to the Crown Court on the basis of the papers. The abolition of the potential for oral evidence at committal would mean that this tactic can no longer be pursued.

Related to the above submission is the provision within the Bill (section 4(8)) that removes the right to call oral evidence at an application to dismiss in a case that has been directly committed to the Crown Court under the new provisions. For similar reasons we support this proposed amendment and indeed it would be anomalous if a victim could not be called to give evidence pre-trial in a case that proceeded to the Crown Court by way of a traditional committal hearing, but could be in those cases where the matter has been directly committed to the Crown Court under the 2015 Act. In our submission the basic position is the same. The benefits of allowing an opportunity to cross-examine a victim or witness pre-trial (even if the right is limited to circumstances where an interests of justice test is applied) are outweighed, having regard to the remaining safeguards that exist, by the potential delay and stress for victims in having to give evidence or even being subject to the uncertainty, pending a ruling from the Judge, as to whether they will be required to do so.

In summary, we find ourselves in agreement with the view expressed by Sir John Gillen in his Report into the law and procedures in serious sexual offences in Northern Ireland, where he stated (at paragraph 9.157):

"I am in favour of the present steps already enshrined in statute to reform the committal system for complainants. The paucity of cases where any material benefit is achieved for the defendant is completely outweighed by the disproportionate cost of and stressful nature of such hearings. More importantly is the fact that precisely the same issues of liability can be dealt with by the Crown Court at an equally early stage. I can see no justification, therefore, for continuing with the present system, which is wasteful of time, costs and

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resources in circumstances where the vast majority of cases will be transferred anyway to the Crown Court."

Whilst it is fair to point out that this view was expressed in relation to the abolition of committal proceedings more generally (as opposed to the particular issue of oral evidence at committal), it clearly echoes a number of the observations that we have made above.

Section 4(3): repeal of provisions allowing for direct committal in circumstances where defendant wishes to enter an early guilty plea

The PPS has always been supportive of the principle that those cases in which a defendant is prepared to admit their responsibility and plead guilty at an early stage should be dealt with expeditiously and proportionately. Whilst we were disappointed that the Bill was drafted so as to remove the potential for direct committal in such circumstances (in non-specified offences), we were consulted on the relevant considerations and understand the position that the Department has ultimately adopted.

It remains important that there exists the framework to deal proportionately with those cases that are directly committed and which are capable of early resolution by way of a guilty plea. We note and welcome the provision (section 4(6) of the Bill) whereby reports and inquiries can be directed in the Magistrates' Court upon indication of an intention to plead guilty and hope that the formal process by which such an indication is provided and recorded will be addressed within the relevant court rules. The formal provision of an early indication first and foremost provides much needed certainty for the victim and witnesses in terms of the resolution of the case. It also allows the prosecution to proceed on the basis that the case does not need to be prepared for trial, thus increasing speed and efficiency for PPS, PSNI and other stakeholders such as FSNI. The prosecution would be able to approach the service of evidence on the basis that the central allegations are not going to be challenged and serve only that material which is required for there to be an effective sentencing hearing. In this way considerable nugatory work that presently occurs in building trial-ready cases for committal can be avoided with a consequent reduction in delay and saving of resources.

The different nature of proceedings in which an early indication of a guilty plea is provided was reflected in the provisions to be repealed which dealt with direct committal (s.10 of the

2015 Act). The position was that, after the prosecution served the evidence upon which it relied, the defence were *not* able to make an application to dismiss based upon an insufficiency of evidence. The reason for this provision was that such an application would not be appropriate in circumstances where the defendant had provided an early indication of an intention to plead guilty and the prosecution responded by not building a trial-ready case capable of withstanding challenge on all potential issues. In the absence of section 10 all direct committals will now take place under section 11 and, regardless of an indication from the defence of an intention to plead guilty, the legislation will provide for a potential application to dismiss. This is a potential risk for the prosecution, although we consider that it can be adequately addressed through careful drafting of the relevant rules and proper case management by the judges. Such case management might helpfully be aided by the introduction of formal guidance, such as a Practice Direction, to practitioners that has been prepared specifically to address the handling of cases that are directly committed to the Crown Court under the new provisions.

Section 4(4) - application of direct committal to cases where an accused is charged with an offence triable only on indictment

A further significant change introduced by the Bill is the scope of the direct committal provisions upon their commencement. It was originally intended that they would apply only to cases where an accused was charged with murder or manslaughter. The Bill broadens the scope of offences that will be brought within the provisions upon commencement to those where an accused has been charged with any indictable only offence.

The reasons for the Department's approach to this are set out at paragraphs 15-19 and 33-34 of the Explanatory and Financial Memorandum. Given PPS commitment to reducing avoidable delay and the period of time that has lapsed since the 2015 Act was passed, we are supportive of a more ambitious approach to the initial roll-out. We also consider that the approach of limiting the application of the provisions to offences that are triable only on indictment is one that is clear, easily understood by practitioners, and workable in practice. It will also capture the most serious cases and the volumes should be appropriate to an initial phase of roll-out.

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That said, the change does mean that a significantly greater volume of cases will be subject to the direct committal provisions upon commencement than was original planned. The potential impact upon each of the criminal justice agencies is therefore considerably greater. Analysis is ongoing in relation to the impact upon resources for each of the affected agencies, including the PPS. There is the potential for additional IT costs and the extent of training required for staff will now increase. It is, however, very difficult to accurately predict the impacts in the absence of clarity in relation to how cases will be managed in the Crown Court and what legal aid reforms are introduced in relation to the payment of counsel. In his report Sir John Gillen noted[1] the importance of a comprehensive resource impact assessment in relation to his recommendations (which included making provision for the direct committal of serious sexual offences), to include the direct costs arising from additional PPS resources; and also that the PPS must be sufficiently resourced to speed up unacceptable delays in decision-making[2]. Once there is greater definition in relation to the current unknowns, the PPS will give careful consideration to any business case that may be needed for additional funding to support the delivery of these reforms.

I hope that the observations that we have provided are of assistance to the Committee as it performs its scrutiny function. We would be more than happy to expand further upon any of the points made and answer any queries that the Committee may have.

Yours sincerely

STEPHEN HERRON
Director of Public Prosecutions

[1] See, for example, recommendation 16.
[2] See recommendation 109.

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