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Reform of the Criminal Justice Process in other jurisdictions

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1 Introduction

This briefing paper provides information in response to the Committee for Justice's request regarding:

- what other relevant jurisdictions have reformed or removed the committal process and the impact and/or effectiveness this has had on reducing delays in the criminal justice trial process; and
- the proposed changes and the anticipated impact of the introduction of a pre-trial hearing in the criminal trial process in the Republic of Ireland.

Identifying ways in which to address trial delays and improve efficiency within the criminal justice system is not a Northern Ireland specific issue. This briefing paper details some of the latest developments and reforms relating to the committal processes and case management system in England and Wales, the Republic of Ireland and a number of Australian States. Where possible, it aims to outline the debate surrounding these changes and the practical impact of these reforms.

2 Summary

Committal hearings are a procedural part of the criminal court process. They are used to determine whether there is sufficient evidence to support putting a defendant accused of an indictable offence, or one that may be tried either way, on trial in the Crown Court.

England and Wales

England and Wales have abolished committal proceedings for indictable and either way offences on the basis that they were costly and that the indictable matter would go to the Crown Court in any event. Subsequent analysis of these legislative changes has indicated that reforms to the committal process have not necessarily reduced delays but rather shifted delays to the higher court. In 2016, the allocation process was reinforced by government policy to further reduce demand on the Crown Court by keeping more 'either way' cases in the Magistrates' courts. Those reforms aimed to ensure that only the most serious triable 'either way' cases are referred to the Crown Court.

Australia

Committal reform has been the subject of many reviews across various Australian states over the past two decades. These reforms have taken three distinct directions:

- the abolition of the committal with statutory disclosure;
- making non contested committals mandatory with provision for cross-examination of witnesses in special circumstances; and
- the exemption of certain categories of witness from giving oral evidence or from being cross-examined at committal.

In Tasmania and Western Australia, where committal reform was earliest introduced in 2004 and 2007, subsequent examination of these changes has not found any substantive improvement to trial delay. Instead, it appears that delays have been shifted to the higher courts and issues of disclosure between the prosecution and defence remain. Committal reform in New South Wales is too recent for comprehensive analysis but anecdotal evidence from Victoria Legal Aid indicates that there still appears to be delays due to a lack of disclosure of evidence. The Law Commission of Victoria has recommended that committal proceedings should be abolished there, but this is not supported by Legal Aid or the Magistrates' Court.

Republic of Ireland

In the Republic of Ireland, excessive trial delay is a longstanding issue that has been scrutinised by the European Court of Human Rights on a number of occasions. Such delay has repeatedly been found to be in violation of Article 6, the right to a fair and public hearing within a reasonable time, and Article 13, the right to an effective remedy by a national authority when there has been a violation of a convention right.

The principle of preliminary hearings is to avoid unnecessary trial adjournments and delays. They are considered part of the case management process. Irish criminal courts currently lack pre-trial procedures which means that issues relating to the admissibility of evidence or other aspects of the proceedings are usually addressed during the course of the trial itself, thereby contributing to delays and interfering with the unitary nature of a trial. Following calls

for the introduction of preliminary hearings by a number of reports dating back to 2003, the Criminal Procedure Bill 2021 was introduced in January 2021 to make provision for preliminary hearings for relevant indictable offences.

3. Committal Reform in Other Jurisdictions

3.1 England and Wales

In England and Wales, the Crime and Disorder Act 1998 abolished committal proceedings for indictable-only offences, on the basis that they were costly and that the matter would go to the Crown Court in any event.[1] In May 2013, the phased abolition of committal hearings for triable either way or hybrid offences was introduced, with Magistrates' courts now allocating either way offences to be tried in the Magistrates' Court or the Crown Court, depending on the seriousness of the individual offence. Introducing the measure, the then Justice Minister, Damian Greene MP, said:

> *The changes are the latest stage of a series of moves to make the justice system swifter. These have also included introducing dedicated traffic courts to deal with low level motoring offences and increasing the use of digital technology between courts, prisons and police stations, saving time and money for the whole justice system.*[2]

Defendants charged with an indictable-only offence must be sent for trial 'forthwith' to the Crown Court by the Magistrates' Court where they first appear.[3] The 'sending' is an administrative act, involving only a determination as to whether the defendant faces an indictable-only or related offence. The Magistrates' Court is not concerned with evidential sufficiency but will consider whether the defendant should be sent on bail or in custody.

The procedure for sending indictable only cases to the Crown Court is governed by the Criminal Procedure Rules 2015. When sending the defendant to the Crown Court for trial, the Magistrates' Court must ask whether the defendant intends to plead guilty. If the answer is 'yes', the court must make arrangements for the Crown Court to take the defendant's plea as soon as possible, or if the defendant does not answer, or the answer is 'no', make arrangements for a case management hearing in the Crown Court.[4]

Subsequent analysis of these legislative changes demonstrated that reforms to the committal process have not necessarily reduced delays but rather shifted delays to the higher court. In March 2016, the National Audit Office observed that:

> *Initiatives to improve efficiency in one area may have unforeseen consequences. For example, abolishing committal hearings, which reduced pressures in magistrates'*

[1] Crime and Disorder Act 1998, Section 51: https://www.legislation.gov.uk/ukpga/1998/37/section/51

[2] Ministry of Justice Press Release (May 2013): https://www.gov.uk/government/news/faster-justice-as-unneccessary-committal-hearings-are-abolished

[3] Crime and Disorder Act 1998, Section 51

[4] Criminal Procedure Rules 2015, Rule 9.7: https://www.legislation.gov.uk/uksi/2015/1490/article/9.7/made

> *courts, was followed by a significant increase in delays in the Crown Court, which did not have the resources to absorb the increase.*[5]

It concluded that the increase in duration of Crown Court cases was likely to be caused, in part, by the abolition of committal hearings in May 2013:

> *Before committal hearings were abolished, in the year to September 2012, cases spent an average of 31 days in magistrates' courts, and a further 100 days waiting to be heard in Crown Court. In the year ending September 2015, cases spent just 5 days in the magistrates' court on average, but then waited a further 134 days for a Crown Court hearing. While the abolition of committal hearings has reduced waste in the system by getting rid of a hearing that added little value, it increased pressure on the Crown Courts as cases now arrive more quickly, adding to the existing backlog. HMCTS and CPS did not have any additional resource to accommodate the increase in cases.*[6]

Statistical analysis by the Court Service has similarly observed that:

> *The effect of this procedural change can be seen in the increase in receipts in Q2 2013 - which pushed receipts above disposals for around two years and saw outstanding cases increase. Since 2015 until recently, the volume of disposals has been higher than receipts and as a result outstanding cases fell, initially sharply. Case receipts and disposals have been stabilising over the past few years and are now at very similar volumes, however, since Q1 2019 receipts have consistently overtaken disposals for the first time since the end of 2014. At the end of December 2019 there were 37,434 cases outstanding at the Crown Court, an increase of 13% on the previous year and the highest level seen since Q4 2017.*[7]

[5] National Audit Office(2016) *Efficiency in the criminal justice system,* pg 27: https://www.nao.org.uk/wp-content/uploads/2016/03/Efficiency-in-the-criminal-justice-system.pdf

[6] Ibid, pg 15

[7] Ministry of Justice Criminal Court Statistics Quarterly, England and Wales, October to December 2019, March 2020, pg 6: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875838/ccsq-bulletin-oct-dec.pdf

Leveson Reforms

In February 2014, the then Lord Chief Justice asked The Rt Hon Sir Brian Leveson to conduct a review into the efficiency of criminal proceedings. The Review was conducted against a backdrop of decreasing public funding available for criminal justice agencies. The subsequent report made 56 recommendations, including that:

> *Magistrates' Courts must be encouraged to be far more robust in their application of the allocation guideline which mandates that either way offences should be tried summarily unless it is likely that the court's sentencing powers will be insufficient. The word 'likely' does not mean 'possible' and permits the court to take account of potential mitigation and guilty plea, so can encompass cases where the discount for a guilty plea is the feature that brings the case into the Magistrates' jurisdiction.* [8]

The recommendations in the report were accepted by the Lord Chancellor. In March 2016, the Sentencing Council's Definitive Allocation Guideline came into force. The Guideline instructs courts to retain cases for trial and sentence in the Magistrates' Court unless:

> *The outcome would clearly be a sentence in excess of the court's powers for the offence(s) concerned after taking into account personal mitigation and any potential reduction for a guilty plea; or*
>
> *For reasons of unusual legal, procedural or factual complexity, the case should be tried in the Crown Court. For example a very substantial fine is the likely sentence.* [9]

Although these reforms were introduced to reduce demand on the Crown Court by keeping more 'either way' cases in the Magistrates' courts, it has been argued that the retention of more cases by the Magistrate's Court has added to the complexity of cases proceeding in the Crown Court.[10] For trials where a 'not guilty' plea was entered, the median hearing time remained stable in 2019 at around 8 hours, but overall it experienced steady increases between 2010 and 2016.[11]

[8] Judiciary of England and Wales Review of Efficiency in Criminal Proceedings (2015) pg 25: https://www.judiciary.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf

[9] Sentencing Council Allocation Definitive Guideline (2016): https://www.sentencingcouncil.org.uk/wp-content/uploads/Allocation-definitive-guideline-Web.pdf

[10] Institute for Government Criminal Court Performance Tracker: https://www.instituteforgovernment.org.uk/publication/performance-tracker-2019/criminal-courts

[11] Ibid, at 7

3.2 Committal Reform in Australia

Committal reform has been the subject of a number of reviews across Australian states over the past two decades. These reforms have taken three distinct directions:

- the abolition of the committal with statutory disclosure;
- making non contested committals, also known as hands up committals, mandatory with provision for cross-examination of witnesses in special circumstances, and
- the exemption of certain categories of witness from giving oral evidence or from being cross-examined at committal.

Western Australia and Tasmania

Western Australia and Tasmania have both introduced significant reforms which have effectively abolished the original committal hearing process.

In 2004, **Western Australia** introduced an administrative committal process with strict disclosure obligations on the prosecution and defence. Under the system, the prosecution is required to provide a committal brief to the defendant at least 14 days before the committal hearing. At the committal mention day hearing, the defendant is required to enter a plea and all documentary evidence is tendered. Parties are not required to attend the hearing in uncontested matters. Once the court is satisfied that disclosure obligations have been complied with, an administrative committal for trial or sentence is made.[12]

In 2007, **Tasmania** abolished committal proceedings completely. The defendant is now committed directly to the Supreme Court for trial or sentence. In certain circumstances an accused may apply to have a post committal but pre-trial hearing to cross-examine witnesses. These hearings occur before a Magistrate, for sexual and murder offences, and before a Justice of the Peace for other matters.[13] If either party seeks an order for witness examination at a pre-trial preliminary proceeding, the parties must first confer and identify:

- areas of agreement or disagreement with respect to the request;
- an estimated hearing time for the preliminary proceedings; and
- a tentative date upon which, and place at which, the preliminary proceeding can be heard.

[12] Criminal Procedure Act 2004: https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_43186.pdf/$FILE/Criminal%20Procedure%20Act%202004%20-%20%5B03-h0-00%5D.pdf?OpenElement

[13] Supreme Court of Tasmania, Practice Direction No 2 of 2016: Applications for Preliminary Proceedings Orders, 5 September 2016, [6].

Impact of Changes

In Tasmania, the Supreme Court list increased by 182 people being committed for trial the year after the changes were introduced.[14] It appeared that the delays present in the lower court were essentially shifted to the next stage in the criminal justice process. Addressing the increase in numbers, the Office of the Director of Public Prosecutions' stated that the committing of defendants to the superior court without disclosure or testing of the evidence, provided no expectation that the time from arrest to trial will shorten, nor that pleas of guilty will be entered significantly earlier than they have been in the past.[15]

Furthermore, the Tasmanian Director of Public Prosecutions (DPP) stated that overall, the reforms had 'not proven an outstanding success'. The reforms were based on an expectation that a completed police brief would be provided to the DPP and disclosure made to the defence prior to the first appearance in the Supreme Court. However, this 'almost never' happened, meaning that defendants were committed to the Supreme Court without disclosure of the case against them.[16]

A comparable outcome was identified by the Western Australia Chief Judge, Antoinette Kennedy, four years after the state's abolition of committal hearings. Discussing the delays still present in the court system, she stated:

> *Progressing matters from the Magistrates' Court into the District Court is not the answer to delays if all it means is that there is then a bottle-neck in the District Court and the District Court cannot deal with the matters in a timely way or the matters are not ready to be dealt with once they get to the District Court.*[17]

She also observed that:

> *One of the unintended consequences of abolishing the committal hearing has been the inadvertent elimination of opportunities for discussion and negotiation between the prosecution and defence. This has led to the need for more intensive judicial supervision in the District Court before there is a plea or trial.*[18]

The experience in Western Australia also identified that the trial counsel did not become involved until after the matter was committed to the District Court. Therefore, decisions about admissibility of key evidence were still not being made at an early stage.

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[14] Tasmanian Office of Director of Public Prosecutions, Annual Report 2007 as referenced in the Magistrates Court Submission: https://lawreform.vic.gov.au/sites/default/files/Sub_14_Magistrates'%20Court%20of%20Victoria_27Aug19.pdf

[15] Ibid

[16] Ibid

[17] Kennedy A, Getting Serious about the Cuases of Delay and Expense in Criminal Justice, Presented at the 24th AIJA Conference (Adelaide, 15 – 17 September 2006)), as referenced in the Magistrates Court Submission at 14.

[18] Personal communication of Chief Judge Antoinette Kennedy District Court Western Australia 26 August 2008 cited in Moynihan QC, Review of the civil and criminal justice system in Queensland, December 2008 as referenced in the Magistrates Court Submission at 14.

New South Wales

Committal procedures were reformed in New South Wales in 2018 as a result of amendments to the Criminal Procedure Act 1986.[19] A primary purpose of the reforms was to reduce delays in indictable cases being finalised in the District Court. The Attorney General stated that the reforms would do this 'by improving productivity and ensuring that cases are effectively managed'.[20]

Under the new system, defendants charged with indictable offences no longer have the right to a committal hearing. Committal hearings have been replaced with a new committal process of charge certification and case conferencing. The Magistrate's role is now limited to overseeing the procedural steps required, which means ensuring a brief of evidence is served on the defendant and that a charge certificate is filed and served on the defendant. The Magistrate must also guarantee that a case conference is held between the prosecution and the defence and that a case conference certificate is subsequently filed with the court. The accused must then enter a plea to the charge and the Magistrate will commit the matter for trial or for sentence.

After a charge certificate has been filed, the Magistrate can direct the attendance at committal proceedings of a witness whose evidence is referred to in the brief. An application can be made for such a direction by either defence or prosecution. A magistrate may only make the direction if satisfied that there are substantial reasons why the witness should give oral evidence. A Magistrate may not request the attendance of a complainant in a sexual offence matter if they are 'cognitively impaired' or were under 16 when the offence was alleged to have occurred.[21]

Victoria

At present, all criminal prosecutions meant for the County or Supreme Courts in Victoria must proceed through a committal hearing. The committal can occur in two forms – orally or not contested.[22]

At an oral committal hearing, witness testimonies can be cross-examined by the defence, if approval has been received from the Magistrate, who can limit the types of questions that can be asked if they do not appear to be justified. In cases involving sexual offences,

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[19] Criminal Procedure Act 1986: https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1986-209. Amended by the Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017.

[20] NSW, Legislative Assembly, Debates, 11 October 2017, p 6.

[21] Amendments to sections 83 and 84 of the Criminal Procure Act 1986 by the Crimes Legislation Amendment (Victims) Act 2018 restrict calling vulnerable witnesses to attend committal proceedings for offences involving violence and prescribed sexual offences:

[22] The Criminal Procedure Act 2009: https://content.legislation.vic.gov.au/sites/default/files/2020-02/09-7aa073%20authorised.pdf

additional provisions are placed on the cross-examination process. This includes restrictions on questions regarding a victim's sexual history.

If the committal is not contested, then no oral evidence or testimony is offered by the Crown. Instead, the Crown submits written evidence to inform the Magistrate's decision, which may also include a verbal summary of the case. After receiving this evidence, the Magistrate will enquire as to whether the defence intends to present any evidence in written or oral form – including testimony from the accused or other witnesses.

Committal Reform

In March 2019, committal hearings for sexual offence matters involving cognitively impaired and child complainants were removed. The Justice Legislation Miscellaneous Amendment Act 2018 precludes any witnesses from being cross-examined at a contested committal in sex cases involving children or cognitively impaired adults.[23] An accused can still apply to cross-examine witnesses other than the complainant in the higher court.[24] These changes are expected to comprise 70-150 additional County Court days, the jurisdiction in which these cases are almost always heard. No additional funding has been provided by the government to support the impact of these changes.[25] Therefore, it is too early to assess whether this change has assisted to reduce trauma for complainants, promoted resolution or avoided delay.

In October 2018, the Victorian Law Reform Commission was asked by the Attorney-General to consider whether Victoria should maintain or reform its current committal system. The Commission's Report recommended the following:

> *The test for committal, which involves a magistrate assessing if the evidence is of sufficient weight to support a conviction for an indictable offence should be abolished.*
>
> *In place of an order for committal, the mechanism for transfer of indictable charges from the lower courts should be an order of the Magistrates' or Children's Court that the accused either:*

[23] It amended section 123 of the Criminal Procedure Act. https://content.legislation.vic.gov.au/sites/default/files/c467ce51-2e5a-37a2-923b-7132d6cdb125_18-048aa%20authorised.pdf

[24] Under section 198A of the Criminal Procedure Act

[25] Figures cited in the Victoria Legal Aid *Submission to the Victorian Law Reform Commission on the Review of Committals* (2019) https://www.lawreform.vic.gov.au/sites/default/files/Sub_13%20VLA_%20FINAL%20APPROVED%20VERSION%20WITHOUT%20APPENDIX-%2020%20August%202019_for_website.pdf pg 43

> *(a) appear for plea and sentence in a higher court on a date to be determined, or*
>
> *(b) stand trial in a higher court on a date to be determined.*
>
> *The Criminal Procedure Act 2009 (Vic) should be amended to provide that the accused may apply to the Magistrates' or Children's Court for an order that the accused be discharged and to empower the Magistrates' and Children's Courts to discharge the accused on the relevant indictable charge or charges if satisfied that there is no reasonable prospect of conviction*.[26]

The Magistrates' Court of Victoria believes that the current committal system should be maintained. It has argued that '*causes of delay such as forensic analysis will not disappear merely by transferring committals to a different jurisdiction'*.[27] It believes that '*committal proceedings play a fundamental role in ensuring proper and timely disclosure. Serious indictable matters should not be proceeding directly from a charge to a lengthy, costly jury trial without concerted attempts having been made to facilitate disclosure and resolution'*. It has also advised that there '*should be identifiable benefits if pre-trial opportunities to scrutinise evidence and engage in resolution discussions are to be further removed'*.

Also responding to the Law Commission review, Victoria Legal Aid raised doubt about the beneficial outcomes arising from committal reform in the other states:

> *In the absence of any formal evaluation of these reforms, we have consulted extensively with legal aid commissions in other states and territories. Feedback from practitioners with extensive experience in the indictable system in other Australian jurisdictions, gives practical insights into the impacts of various reforms across Australia.*
>
> *The anecdotal experience of our interstate counterparts is the that significant committal reforms in those jurisdictions has neither improved disclosure nor reduced delays, stymying any efficiency benefits sought to be gained.*
>
> *The experience of New South Wales defence practitioners is that the significant 2018 committal reforms and investment have not yet translated into meaningful improvements in the levels of disclosure (although other elements of the process have improved). Despite the early allocation of senior crown prosecutors to review the brief and engage in negotiations, defence practitioners continue to experience delays with timely disclosure. Where the matter proceeds to trial, the OPP Charge*

[26] Victoria Law Reform Commission *Committals Report* March 2019 https://www.lawreform.vic.gov.au/sites/default/files/VLRC_Committals%20Report-forweb.pdf

[27] Magistrates' Court of Victoria, *Response to the Victorian Law Reform Commission Committals Issues Papers* (2019) https://lawreform.vic.gov.au/sites/default/files/Sub_14_Magistrates'%20Court%20of%20Victoria_27Aug19.pdf

Certificate is not always meaningfully holding the prosecution to account, and it is commonly found that important brief items are missing.[28]

[28] Victoria Legal Aid, *Submission to the Victorian Law Reform Commission on the Review of Committals* (2019), pg 20

4. Criminal Justice Reform in the Republic of Ireland

The Criminal Justice System in the Republic of Ireland

As in Northern Ireland, criminal cases in the Republic of Ireland are divided into two types – indictable offences and summary offences. Summary offences are less serious crimes which carry a maximum prison sentence of 12 months and are heard by a judge without a jury in the District Court. Indictable offences are more serious crimes and are heard by a judge and jury in the Circuit Court or the Central Criminal Court.

Criminal offences are reported to the Gardaí. In serious crimes, the Gardaí will send a file to the Director of Public Prosection who decides whether or not to prosecute the suspect. When a decision is made to prosecute, the Gardaí charge the suspect who they bring before a District Court judge. Once the Gardaí have charged the accused, the prosecution will write down the evidence against the accused. The document that contains the evidence is called the book of evidence and is an important part of the case as:

- It includes statements from witnesses, including the victim;
- It includes other documents and a list of any physical evidence, such as photographs or weapons, that will appear in court; and
- It sets out the evidence that the prosecution thinks witnesses will give in court.

When the prosecution has gathered all the evidence it needs for the trial, the Gardaí will give the book of evidence to the defence. Once this happens, the District Court judge will set a date for the trial and, in most cases, decide which court will hear the case.

Issue of Delay

Delay has been an adverse feature of the Irish criminal justice system for many years. The European Court of Human Rights has found the Republic of Ireland to be in violation of its obligations under articles 6[29] and 13[30] of the European Convention on Human Rights on a number of occasions. Between 2002 and 2018, the European Court of Human Rights decided approximately nine cases brought against Ireland regarding the sufficiency of remedies for court delays in Irish Law.[31]

[29] Article 6 specifies the right to a fair and public hearing within a reasonable time: https://www.echr.coe.int/Documents/Convention_ENG.pdf

[30] Article 13 provides for the right to an effective remedy by a national authority when there has been a violation of a convention right: https://www.echr.coe.int/Documents/Convention_ENG.pdf

[31] As referred to by the Houses of the Oireachtas Library and Research Service's *Criminal Procedure Bill 2021- Bill Digest*: https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2021/2021-03-01_bill-digest-criminal-procedure-bill-2021_en.pdf

The European Court's definitive ruling came in *McFarlane v Ireland (2010)*.[32] In this case, the Republic of Ireland had argued that effective remedies for court delays were provided through the possibility of taking actions for damages for constitutional rights and for damages under the European Convention on Human Rights Act 2003, the ability to apply for an order for prohibition and early hearing dates in a criminal trial.[33] However, the European Court held that none of these remedies could be considered to discharge the State's obligations under Article 13.

Current Waiting Times

Waiting times for criminal cases can vary, depending on whether the accused is on bail or in custody; the plea entered and whether the trial is scheduled to last two days or two weeks. However, according to the Court Service:

> *In most Circuit Courts outside Dublin, the majority of guilty pleas will be dealt with at the next criminal session – making the waiting time approximately three months. Defendants who are in custody take precedence so their trials are dealt with first, followed by trials of those who are on bail. Waiting times in Dublin Circuit Court have been impacted in recent years by the number of so called 'white collar' cases taken by the State in the wake of the financial collapse that followed the global recession in 2008. The complicated nature of the evidence in these cases together with the number of witnesses called and the additional legal argument required has lengthened the trials with a resulting impact on the number of trial courts available for other cases*.[34]

Waiting times are kept under ongoing review with the Presidents of the Circuit Court and District Court. In the Circuit Court, criminal business 'is given priority to ensure the earliest trial date for those in custody, with separate sittings for crime in the majority of circuits'.[35] In 2019, the court waiting times were as follows:

- In the Central Criminal Court, murder and rape trials took 14 months from the time of the first listing of a case before the Central Criminal Court, to the trial date. Earlier dates were made available for trials involving child and other vulnerable witnesses. This represented an increase of 3 months from 2018.

- In the Special Criminal Court, it took 12 months from the time from when a charge sheet was received to the trial date.

[32] McFarlane v Ireland (Application no. 31333/06, European Court of Human Rights, 10 September 2010): https://www.dfa.ie/media/dfa/alldfawebsitemedia/ourrolesandpolicies/internationallaw/ehcr-mcfarlane-vs-ireland-2010.pdf

[33] European Convention on Human Rights Act 2003 Section 3(2) http://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/html

[34] Court Service Annual Report 2019 https://www.courts.ie/acc/alfresco/9bd89c8a-3187-44c3-a2e9-ff0855e69cb5/CourtsServiceAnnualReport2019.pdf/pdf#view=fitH pg 104

[35] Ibid pg 24

• In the Court of Appeal, the time from when an appeal was entered into the court list to the date of hearing took 20 weeks.[36]

Preliminary Hearings

The concept of case management can take a variety of forms, ranging from a basic statement of readiness for trial, through to a preliminary hearing before trial. The principle of preliminary hearings is that, insofar as possible, all contentious matters concerning the trial process and the admissibility of evidence are resolved before the jury is sworn in. This should result in the smooth presentation of evidence to the jury without any unnecessary disruptions for legal argument. Equally, it should identify any matters in advance which may ultimately prevent a case being submitted before a jury. Under the Civil Liability and Courts Act 2004, there is a pre-existing statutory provision for a hearing to be held before the trial of a personal injuries action, for the purposes of determining what matters relating to the action are in dispute.[37]

On the other hand, the criminal courts have traditionally lacked pre-trial procedures. Issues relating to the admissibility of evidence or other aspects of the proceedings are usually addressed during the trial itself on an ad hoc basis or by way of a *voir dire*. A *voir dire* resembles a trial within a trial, without the jury, which 'may involve arguments on points of law relating to the admissibility of evidence such as an alleged confession, the hearsay rule or the validity of search warrants. This process can be comparatively lengthy and disruptive, contributing to delays and interfering with the unitary nature of the trial.' [38]

As the courts and practitioners are bound by the parameters of current legislative provisions to address trial delays and inefficiency, many working groups have called for statutory changes to provide for preliminary trial hearings. These recommendations date as far back as 2003 in the following Reports:

• Report of the Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences (2020), also known as the O Malley Report.[39]

• The Review of Structures and Strategies to Prevent, Investigate and Penalise Economic Crime and Corruption (2020), also known as the Hamilton Report[40]

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[36] Ibid pg 110

[37] Civil Liability and Courts Act 2004 Section 18 http://www.irishstatutebook.ie/eli/2004/act/31/enacted/en/html

[38] House of the Oireachtas Library and Research Service's Criminal Procedure Bill 2021 - Bill Digest https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2021/2021-03-01_bill-digest-criminal-procedure-bill-2021_en.pdf

[39] Report of the Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences (2020), https://www.lawlibrary.ie/media/lawlibrary/media/O-Malley-Report.pdf

[40] The Review of Structures and Strategies to Prevent, Investigate and Penalise Economic Crime and Corruption (2020)http://www.justice.ie/en/JELR/Hamiliton_Review_Group_Report.pdf/Files/Hamiliton_Review_Group_Report.pdf

• The Expert Group on Article 13 of the European Convention on Human Rights (2013), also known as the McDermott Report

• Department of Justice, Report of the Working Group on Efficiency Measures in the Criminal Justice System – Circuit and District Courts (2012)

• Rape Crisis Network Ireland, Position Paper Reducing Delays before and during Trial: Case Management and Pre-Trial Hearings (2011)

• Final Report, Balance in the Criminal Law Review Group (2007)

• Law Reform Commission, Report on Prosecution Appeals and Pre-trial Hearings (2006)

• The Criminal Jurisdiction of the Courts, Working Group on the Jurisdiction of the Courts (2003), also known as the Fennelly Report.[41]

The most recent publication, the O'Malley Report, highlighted the significant impact preliminary hearings could have:

> *[…]One of the defining characteristics of the common-law adversarial trial process is that trials are meant to be compressed rather than episodic. Once a trial begins, it should proceed to a conclusion without interruption. That, at least, was the traditional ideal. However, in most common-law countries today, criminal trials for serious offences are often preceded by one or more preliminary hearings that are designed to promote efficiency and economy of time in the conduct of the trial itself. Decisions taken at a preliminary trial hearing may be quite significant, especially if they include rulings on the admissibility of evidence or, in the case of a sexual offence, on an application to question a victim about her or his sexual experience. Preliminary trial hearings to deal with matters that do not fall to be determined by the tribunal of fact, the jury in a criminal trial, can certainly promote efficiency as well as being in ease of witnesses and persons called upon to act as jurors*.[42]

It also acknowledged that:

> *They cannot be guaranteed to streamline the trial process to the extent of eliminating from the trial all matters that might conceivably have been addressed at an earlier stage. The accused person's right to a fair trial remains paramount, and the rights of victims and witnesses must always be respected as well. Hence, there will inevitably*

[41] The Criminal Jurisdiction of the Courts, Working Group on the Jurisdiction of the Courts (2003) https://web.archive.org/web/20160303231753/http:/www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/92E26C802274604280257888003CFD32/$FILE/WGJC%20Report.pdf

[42] Report of the Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences (2020),pg 56 https://www.lawlibrary.ie/media/lawlibrary/media/O-Malley-Report.pdf

> *be cases where the trial judge will be called upon to decide on some matter that would ordinarily come within the ambit of a preliminary hearing. If all parties approach preliminary trial hearings in the right spirit, they should go a considerable distance towards abbreviating criminal trials and making the trial experience less stressful for vulnerable witnesses*.[43]

The Superior Courts have also noted the potential benefit of a pre-trial procedure. In *Eamon Cruise v Judge Frank O'Donnell*, the Supreme Court stated that:

> *We live in an era of case management, when a serious attempt is being made to deal with all litigation, civil or criminal, in an efficient manner. The most superficial consideration of efficiency will lead to the conclusion that it is considerably more efficient to deal with matters, which must by their nature be dealt with without a jury in any event, before the jury is sworn and taken away from their ordinary occasions rather than afterwards. I accord the fullest possible respect to Chief Justice Ó Dálaigh's statement about the essential unity and continuity of a criminal trial and entirely agree with it. Disposing of evidential issues before the jury is sworn will assist and emphasise, rather from detracting from, that unity and continuity*.'[44]

Arguments against the introduction of preliminary hearings primarily focus on the additional supporting measures required to realise their full potential, and whether there is a more suitable alternative. The Bar Council has expressed concern that preliminary hearings will not be effective in reducing delay if there is an inadequate number of judges and the current process for disclosure of evidence is flawed.[45] Arguably, this can be viewed as a recommendation for the appointment of additional judges and reform of the discovery process, rather than a specific argument against the introduction of preliminary hearings.

The Criminal Procedure Bill 2021

Responding to the calls for the introduction of preliminary hearings, the Irish Government approved and published the General Scheme of a Criminal Procedure Bill in April 2014. As part of the pre-legislative scrutiny process, the Joint Committee on Justice, Defence and Equality reviewed and considered the General Scheme of a Criminal Procedure Bill. The

[43] Ibid, pg 62

[44] *Eamon Cruise v Judge Frank O'Donnell and DPP* [2007] IESC 67, [2008] 3 IR 230

[45] Bar Council response as cited by the House of the Oireachtas's Criminal Procedure Bill 2021 Bill Digest: https://www.lawlibrary.ie/media/lawlibrary/media/Submission-to-the-O-Malley-Review-Group-FINAL_Issued.pdf

General Scheme was revised in April 2015, in light of the pre-legislative scrutiny and a Revised Scheme of the Bill was published in June 2015.[46]

It was not until the start of this year, that the Criminal Procedure Bill 2021 was introduced.[47] It has just completed its fifth stage in Dail Eireann. Its provisions have been developed in consultation with the Courts Service and the Director of Public Prosecutions to enable them to work in practice.

Introducing the legislation, Minister for Justice and Equality, Helen McEntee TD, noted the stressful effect of delays on victims stating:

> *Delays to the start of a trial and multiple adjournments have huge negative impacts. The trial process can be an incredibly stressful experience, and victims may have prepared themselves mentally for the trial to start on the designated day.*
>
> *When a trial is postponed at the last minute, or potentially interrupted multiple times for legal argument, this can make the victim's experience all the more difficult. This legislation will importantly reduce the impact of numerous delays on victims of serious sexual offences*.[48]

The Bill provides for the holding of preliminary trials for trials on indictment of a relevant offence. A relevant offence is defined as one which carries a maximum sentence of ten years or more (including life sentences), or one which has been specified by the Minister for Justice in an Order.[49] The main provisions of the Bill include the following:

- The court can order a preliminary trial hearing for any indictable offence where the court is satisfied that it would be in the interests of justice and is beneficial to the expeditious and efficient conduct of the proceedings.
- If an accused is charged with a relevant offence, the court must agree to hold at least one preliminary hearing, if either the prosecution or the defence requests one.
- A preliminary hearing can take place at any time up to the swearing in of the jury, or the start of the trial if the case is before the Special Criminal Court.[50]

[46] Revised General Scheme of a Criminal Procedure Bill http://www.justice.ie/en/JELR/Criminal%20Procedure%20Bill%20Revised%20General%20Scheme.pdf/Files/Criminal%20Procedure%20Bill%20Revised%20General%20Scheme.pdf

[47] Criminal Procedure Bill 2021 https://data.oireachtas.ie/ie/oireachtas/bill/2021/8/eng/initiated/b0821d.pdf

[48] Department of Justice Press Release 21 January 2021: https://www.gov.ie/en/press-release/c0c6a-practical-reforms-to-overhaul-the-operation-of-criminal-trials-published-by-minister-mcentee/

[49]Criminal Procedure Bill 2021, Section 4

[50] Criminal Procedure Bill 2021,Section 6 (3)

- An accused may be arraigned at a preliminary trial hearing if it is in the interests of justice to do so.
- The court can assess various case management matters and make orders or rulings to ensure the just, expeditious and efficient conduct of the trial, including; the availability of witnesses; whether any particular practical measures or technology may be needed; the extent to which the trial is ready to proceed, including any long-standing issues with regard to disclosure of evidence; and how long the trial is likely to be.
- It is not necessary for the same judge who presides over a preliminary trial hearing to preside over any subsequent hearings or the trial of the offence except in exceptional circumstances.
- Orders made during a preliminary hearing will be binding and may not generally be appealed until the conclusion of the trial. An application may be made to vary an order only if there has been a material change in circumstances since the order was made. The only appeals permitted between a preliminary trial hearing and the trial of the offence relate to significant decisions excluding evidence as inadmissible. If such a decision results in the case against the accused being very significantly weakened, then it is in not in the court's interest for the trial to have to proceed to a conclusion before the related appeal can be determined.

At a preliminary trial hearing, the court can make also orders in respect of section 3 of the Criminal Law (Rape) Act 1981[51] and section 21 of the Criminal Justice (Victims of Crime) Act 2017[52]. Section 6 (17) of the Bill places an obligation on the prosecution and the defence to inform the trial of any orders they intend to seek at the first available opportunity. This provision proved contentious for a number of Deputies during the committee stage of the Bill, who tabled a number of amendments, for example:

> *The amendment is fairly clear. It provides for the removal from the Bill of the line that includes section 21 of the Criminal Justice (Victims of Crime) Act 2017. That section provides for the past sexual history or private life of a victim to be assessed. That should not be a requirement and should not be included in the Bill.*

The Minister for Justice and Equality responded to explain the rationale for the inclusion of the provision as follows:

> *It is really important that a decision can be made on that particular section in the preliminary trial hearing as to whether a victim can or cannot be questioned on his or*

[51] Section 3 of the 1981 Act significantly restricts the scope of the right of a defendant to question the complainant as regards her previous sexual history, or otherwise to introduce evidence in relation to it. http://www.irishstatutebook.ie/eli/1981/act/10/enacted/en/print#sec3

[52] Section 21 can restrict the scope of questioning in respect of a victim's private life http://www.irishstatutebook.ie/eli/2017/act/28/enacted/en/html

> *her private life for the two reasons outlined. It does not prevent a matter from potentially being addressed later in a trial, for example, if new evidence arises or there is a reason a defence may seek to raise questions under section 21 of the Criminal Justice (Victims of Crime) Act. Removing the provision, as the amendment proposes, would mean a decision on whether to include this type of questioning could not be taken at the preliminary trial hearings. The reason we are introducing this provision is to remove this type of decision from the subsequent trial where it might cause a delay. That is not to say the matter cannot be addressed in the trial. It is important that this question can be asked and a judge can decide whether it is appropriate in the preliminary trial hearing. I suggest, therefore, that we keep this provision.*[53]

Ultimately no amendments were passed in respect of these provisions.

In general, preliminary trial hearings will be conducted in public. However, there is a power for the judge to exclude the public from any portion of, or all of the hearing where that is necessary. The judge can also prohibit the publishing or broadcasting of certain details until the trial is complete. This may be necessary to protect the accused person's right to a fair trial, as the jury will not yet have been sworn in and matters could be discussed at the hearing which may not be presented to the jury, for example, evidence that is later ruled inadmissible.[54]

[53] Select Committee on Justice debate - Tuesday, 2 Mar 2021 https://www.oireachtas.ie/en/debates/debate/select_committee_on_justice/2021-03-02/2/

[54] Criminal Procedure Bill 2021, Section 10