

# **The Law Society of Northern Ireland**

## **Introduction**

The Law Society of Northern Ireland (the Society) is a professional body established by Royal Charter and invested with statutory functions primarily under the Solicitors (NI) Order 1976 as amended. The functions of the Society are to regulate responsibly and in the public interest the solicitor's profession in Northern Ireland and to represent solicitors' interests.

The Society represents over 2,600 solicitors working in some 570 firms, based in over 74 geographical locations throughout Northern Ireland and practitioners working in the public sector and in business. Members of the Society thus represent private clients in legal matters, government and third sector organisations. This makes the Society well placed to comment on policy and law reform proposals across a range of topics.

Since its establishment, the Society has played a positive and proactive role in helping to shape the legal system in Northern Ireland. In a devolved context, in which local politicians have responsibility for the development of justice policy and law reform, this role is as important as ever.

The solicitor's profession, which operates as the interface between the justice system and the general public, is uniquely placed to comment on the particular circumstances of the Northern Irish justice system and is well placed to assess the practical out workings of policy proposals.

**September 2014**

## **Executive Summary**

- Importance of a through cost-benefit analysis of processes and procedures within the Justice system in delivering real efficiencies;
- Supportive of development of a single jurisdiction in County Court and Magistrates Courts but the Bill must ensure access to justice is a prime consideration alongside efficiency;
- Courts' process must serve the interests of victims, witnesses and defendants rather than the ease of administrators;
- Caution about dismissing the worth of oral evidence at committals- rules on vulnerable witnesses could be reformed whilst preserving this process as a filter to weed out cases which should not proceed to trial;
- Prosecutorial fines as with other discretionary disposals, have a place within the justice system but their use must be appropriately confined and monitored;
- The Society is broadly supportive of case management duties, but these must serve the interests of justice as their primary aim, with expeditious proceedings subordinate to that. This will appropriately target the duty if these considerations apply consistently in the Bill;
- Solicitors already advise clients of the appropriateness of early guilty pleas as part of their professional obligations. The Society states that any statutory duty to provide advice on the discount scheme for early guilty pleas should rest with the PPS in the first instance;
- The solicitor then would have to comply with a duty to explain the effect of this to their client. This preserves the independence of the defence in the mind of their clients;
- The Society considers the role of the Lay Magistrate as a measured restraint on the prosecutorial power of the state and we do not favour vesting the power to issue summons solely in the hands of the PPS;
- The Society considers that important checks and balances should be placed on prosecutorial powers within the justice system and this will be served by the amendments suggested within this response;

## **Introductory Remarks**

- 1.1 The Society welcomes the Committee's invitation to make comments in respect of the draft Justice Bill. The Committee will be aware that it is the Society's view that a fair and efficient justice system is secured by an evidence-based approach to policy which looks at the system as a whole. We are aware of the significant work undertaken by the Committee in respect of vulnerable witnesses within the justice system and are supportive of these efforts. We will comment on a number of provisions within this Bill, with suggestions in terms of amendments which we feel would help improve the Bill and the system as a whole.

## **Part 1: Single Jurisdiction for County Courts and Magistrates Courts Business**

- 2.1 The Society does not disagree in principle with the move to establish a single jurisdiction for County Courts and Magistrates Courts in Part 1 of the Draft Bill. In addition, the Society reposes confidence in the Lord Chief Justice (LCJ) to ensure the fair and efficient operation of the courts system in Northern Ireland. The LCJ is ideally placed to represent the views of the Bench and other stakeholders within the Justice system.
- 3.1 It will be important to ensure that a robust set of guidelines is introduced to ensure that the assignment of business takes into account the needs of witnesses, victims and defendants in terms of ensuring a fair process. For example, although flexibility is welcome, it is important that access to justice is promoted through avoiding unnecessarily long journeys for participants in the court process where possible.
- 4.1 The Society is of the view that the Department should set out the balance between ensuring adequate provision of court divisions to preserve access to justice and developing flexible and efficient boundaries on the face of the Bill. This test could be comfortably included within a revised clause 2 of the Bill. In addition, the Society takes the view that the Bill should include scope for a re-appraisal and re-drawing of the administrative boundaries in light of practical experience against this test.
- 5.1 Such amendments would ensure that the LCJ will be able to assign court business within a framework which is both adequate and flexible, with provision for feedback mechanisms if the established arrangements are not functioning as intended. The Society is aware of the background of court

closures and consolidation and we think that such a test would concentrate minds on balancing fairness and efficiency as a central focus of 'faster, fairer' justice.

## **Part 2: Abolition of Oral Evidence at Committal Proceedings**

- 6.1 The Society notes that the Department has proceeded with the proposal to abolish the provision for oral evidence at preliminary investigations and mixed committals. Under Sections 7 and 8 of the Bill, all committal proceedings are to proceed on the papers only.
- 7.1 There are two broad justifications supplied by the Department for this change. The first is that the impact on vulnerable witnesses of examination at committal proceedings is disproportionate to the usefulness of those proceedings. Secondly, it is suggested that speeding up the movement to a full hearing removes a layer of bureaucracy and will produce a more efficient system of criminal justice.
- 8.1 The Society understands the concern expressed by the Department and the Justice Committee in respect of vulnerable witnesses. We note however that special rules already exist to ensure that vulnerable witnesses are not unduly subjected to the stress of having to give evidence. For example, there are existing provisions to ensure that in cases involving alleged sexual offences, no cross-examination takes place at the PE stage. We feel that these court rules could be revisited and developed whilst retaining the benefits of oral evidence in committal proceedings.
- 9.1 Secondly, we do not support the assertion that committal proceedings necessarily slow down the process of justice. Such proceedings offer an opportunity for both the defence and the prosecution to assess the credibility of witnesses.
- 10.1 An early determination of the strength of a case can produce earlier guilty pleas and the withdrawal of charges where there is insufficient evidence to proceed on one or more counts. The earlier in the process such determinations can be arrived at, the higher the cost savings in the longer term by avoiding a lengthier trial.
- 11.1 The Society accordingly believes that the current clauses are flawed and that the Bill should have focused on a duty to balance the needs of vulnerable witnesses with the requirement to ensure efficient committals. It should not be

assumed that simply removing a step in the process of justice will necessarily lead to cost savings.

- 12.1 A thorough cost-benefit examination is required to arrive at that judgment and this supports the view of the Society that a fundamental review of the justice system is required to identify how to maximise efficiency and access to justice. Such an approach would avoid short-term policymaking, taking a longer-term view and prioritising an evidence base.

### **Part 3: Prosecutorial Fines**

- 13.1 The Society does not object in principle to the appropriate use of discretionary disposals as a means of expediting the process of justice for less serious offences. We note that clause 17 of the Bill makes provision for the use of prosecutorial fines in summary or either way offences. Similarly, clause 17 (2) of the Bill provides that a prosecutorial fine may attach where a number of summary offences have been committed as part of the same circumstances.
- 14.1 The Society does however consider that strong accountability mechanisms should be put in place to ensure that these penalties are not used excessively or inappropriately. These are quasi-judicial powers being vested in the PPS and it is important to stress that our justice system works on the basis of a number of checks and balances placed on the prosecutorial power of the State.
- 15.1 In addition, there needs to be an awareness of equality issues arising under Section 75 of the Northern Ireland Act 1998. Given that these penalties do not attach to an offender's record, access to them should be fair and equal to avoid injustice. There may be some issues for example in relation to sections of the community building relationships with the criminal justice system and care should be taken to ensure that no inequalities arise from the issue of prosecutorial fines.
- 16.1 The Society takes the view that these issues can be resolved through published guidelines regulating the use of prosecutorial fines along with a commitment to review their uptake across the system. It would be preferable if the Bill required a review mechanism and identified criteria which could be used to assess the use of these disposals. Examples of relevant factors include the history of the offender, the impact on victims and possibility of diversionary approaches.

- 17.1 Recent evidence has suggested that there has been an inappropriate use of discretionary disposals in dealing with offences at a level of seriousness beyond their intended remit. Accordingly, it is important that the perception is not created that these disposals will be used as a means of producing more favourable statistics. Such a perception would damage the confidence of victims of crime in the justice system, a key focus of this Bill. This is an example of a set of circumstances in which a “just outcome” may require greater time and resources to achieve.
- 18.1 This risk of inappropriate use is increased in circumstances of multiple offences and the PPS should develop a transparent and tiered approach to the application of prosecutorial fines and other discretionary disposals. The fact that such offences subject to these disposals are not disclosed through standard criminal record checks renders the need to guarantee their appropriate use more important.
- 19.1 The Society is concerned that there is no limitation on the face of the Bill to the number of prosecutorial fines that may be issued to a single offender. The over-use of prosecutorial fines for repeat offenders may undermine their credibility as a tool in the armoury of the PPS. Although the legislation leaves much to the discretion of the PPS, some clear guidelines need to be forthcoming to confine the use of prosecutorial fines to appropriate circumstances.
- 20.1 For example, although the Bill provides for enhanced fines for those defaulting on payment, it does not specify any limitation on receipt of prosecutorial fines for those with outstanding arrears. It is important that these disposals retain credibility and deterrence. This is an area which could be looked at either through amending the Bill or in terms of guidelines following implementation.

#### **Part 8: Duty of Solicitor to Advise Client about Early Guilty Plea (Clauses 77-78)**

- 21.1 The Society notes that the original draft of clause 78 of the Draft Bill required the Society to make Regulations concerning the provision of advice about the effect of early guilty pleas on sentencing. This follows the preceding section requiring a court to advise of the discount in sentence that would have been available had a client entered a guilty plea at an earlier stage of proceedings.
- 22.1 The Society notes the decision of the Department to withdraw clause 78 (3) requiring the Society to make regulations to give effect to this duty. We agree

with the observations made by the Attorney General that such a burden would be unnecessary in light of the existing clause setting a clear duty and penalty for non-compliance.

- 23.1 We would begin by stating that solicitors are under a professional obligation to provide their clients with the best possible legal advice in line with their circumstances. This duty encompasses advising the client of the benefits of early guilty pleas in cases where the strength of the prosecution evidence suggests little prospect of a successful defence.
- 24.1 The ability to provide appropriate advice in this context is connected to adequate disclosure by the PPS and can vary in line with different cases. The role of the defence solicitor is to represent clients fairly and impartially and to safeguard the presumption of innocence in the justice system by testing the evidence of the prosecution. As a result, the core area of reform which will produce appropriate guilty pleas at an earlier stage is to ensure greater front-loading of evidence in criminal cases.
- 25.1 It is notable that in Scotland the procedural reforms to the system of encouraging appropriate early guilty pleas focused on disclosure from the prosecution service. It was accepted in that context that defence solicitors require this information to make a decision over whether it is appropriate to advise a client to enter a guilty plea.
- 26.1 Accordingly, the Society does not believe that creating a mandatory duty to advise of the impact of early guilty pleas will increase their frequency, as solicitors already provide this advice at appropriate stages. On the contrary, this clause has the potential to impact on the solicitor-client relationship for little return in terms of efficiencies.
- 27.1 For example, we have strong reservations about creating a perception that defence solicitors are acting as agents for the prosecution. The perception that pressure is being applied to clients by defence solicitors to plead guilty irrespective of the circumstances should be avoided. This is because vulnerable clients who may be innocent could plead guilty, particularly in cases with lesser penalties. Blurring these boundaries does not serve the interests of a fair and efficient justice system.
- 28.1 In order to avoid this perception and to maintain the spirit of our adversarial justice system with independent pillars, the Society recommends that the Bill is amended to place a duty on the PPS to notify the client of the discount scheme for earlier guilty pleas as part of their duties in relation to summonses and charging procedures and disclosure. This ensures that solicitors advise in depth about this when it is appropriate for their clients and will discuss the

contents of the PPS letter with their clients. This allows solicitors to put this information into context for their clients and will increase the confidence of defendants in the fairness and transparency of the criminal justice system.

- 29.1 Crucially, no change to the penalty for non-compliance by defence solicitors would be required by this change so it does not disrupt the intent of the legislation. The Society considers it will be extremely rare for this penalty to be used in any case.

### **Part 8: Case Management Provisions (Clauses 79-80)**

- 30.1 The Society is not opposed in principle to statutory case management provisions. The profession agrees that an efficient justice system will seek to eradicate unnecessary causes of delay and that it is the duty of practitioners, the PPS and the Department to address these issues.
- 31.1 There are two broad aspects to a properly functioning justice system. The first is the delivery of robust and fair justice and the second is reasonable promptness of proceedings. The first of these takes precedence as the interests of justice varies with different circumstances. Whilst justice and swiftness of disposal often work in harmony, in some instances justice requires prolonged proceedings. Accordingly, the drafting of any case management duties is of crucial importance. A strong but flexible duty must be implemented to serve the purposes of the Bill.
- 32.1 The Society notes that the Bill introduces a broad power to make Regulations in this area and Clause 79 grants the Department the right to impose a general duty on appropriate persons to reach a “just outcome” as swiftly as possible. The phrase “just outcome” recognises that a duty to expedite proceedings should not be at the expense of the interests of justice. The Society prefers the term “serve the interests of justice” as this recognises that participants in the justice system should apply their minds to this at each stage of the process, rather than unduly focusing on arriving at any particular outcome.
- 33.1 However, the Society believes that the Bill should identify the interests of justice as the paramount consideration. Accordingly, any Regulations made under this provision should prioritise the interests of justice above swiftness of disposal. The duty to ensure efficient disposal should then follow as a secondary duty to achieve justice in the individual case. Such an approach



does not impair the duty to manage cases efficiently whilst remembering the fundamental principle that the interests of justice must be served.

- 34.1 Clause 80 of the Draft Bill confers a regulation-making power on the Department covering the management and conduct of proceedings within the Crown Court and Magistrates' Courts. We believe that the Bill should be amended to include the phrase "serve the interests of justice" as we recommend for clause 79. Failing that, the term "just outcome" should at least be included in both clauses for clarity and consistency of purpose.
- 35.1 This will ensure that any Regulations are interpreted as dependent on their contribution to serving the interest of justice. As stated, the swift progression of proceedings often produces a just outcome, but there will be circumstances in which flexibility is required for the judiciary to do justice in particular cases. Legislation and Regulations which reflect this position will allow the stakeholders within the system to deliver on the duties imposed.
- 36.1 The Society believes that the regulation-making powers on case management should require an explicit duty to consult with the judiciary and the profession, who will be charged with implementing any changes. The Society believes that these key stakeholders should be included as more than merely as general consultees. Including such a duty in the Bill would encourage a collaborative approach to case management informed by practical experience and ensure a wide range of voices within the justice system are heard.
- 37.1 In addition, the Society notes that clause 87 of the Bill provides for Regulations made under the Bill's powers other than in the area of notifications to be subject to the negative resolution procedure. The Society believes that the Assembly should scrutinise and vote on these Regulations, given their importance to the administration of justice. Therefore, the Society suggests that clause 87 (1) of the Bill should be amended to make regulations made under clauses 79-80 subject to the affirmative resolution procedure.

### **Part 8: Public Prosecutor's Summons (Clause 81)**

- 38.1 The Society remains of the view we expressed during the consultation process that the issuing of summonses is most appropriately carried out as a judicial function. The role of the Lay Magistrate is to act as a measured restraint on the prosecutorial power of the PPS and a safeguard against arbitrariness in decision-making.

- 39.1 Under the current procedure, the Lay Magistrate determines at the point of application whether sufficient grounds exist for the granting of a summons. The removal of this function was not originally envisaged by the CJINI Report on Avoidable Delay. Moreover, the Court of Appeal in Northern Ireland has stated that the determination of whether summonses should be issued is a judicial function which cannot be delegated.<sup>1</sup>
- 40.1 The Society notes the Delay Action Team at the Criminal Justice Board conceded that the input of Lay Magistrates did not add a significant amount of time to the process. As a result, an important safeguard may be removed from the prosecutorial process without any significant improvement in case handling times.
- 41.1 The Society is concerned about the concentration of powers given to the PPS without adequate checks and balances built in to the system. The approach appears to be to increase the discretion of prosecutors without recognising the role of safeguards in protecting the system against charges of arbitrary decision-making. An efficient justice system is one which is robust against challenge. Furthermore, the Society is of the view that lay involvement in the judicial system provides an important link between the justice system and the wider community.
- 42.1 The Society supports the removal of this clause and a review of the causes of delay from the PPS prior to applications for summonses. The CJINI Report identified issues concerning the compilation and release of files between the PSNI and the PPS as a key factor of delay. Although we appreciate the PPS is an independent body, the Department should take a global view of the causes of delay in partnership with other organisations. As with summons reform, the assumption appears to be that stripping out a layer of process necessarily increases efficiency, without harming the interests of justice. It is the failure to take an overall, long-term approach which produces this assumption.
- 43.1 The Society has reservations about section 81(4) of the Draft Bill which provides that a Public Prosecutor may re-issue summonses which they determine have not been served. Given that time limits applied to the PPS are an important aspect of ensuring a disciplined and efficient system of prosecution, it is concerning that power for extension of these limits will reside with the PPS under the Bill.
- 44.1 The Society considers that the separation of prosecutorial and judicial functions maintains a system of checks and balances to ensure that each limb

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<sup>1</sup> *DPP v Long, Long and Johnston* (2008) NICA 15, para 17.

of the justice process operates fairly and accountably. This reform has the potential to create new anomalies. For example, it is not clear from the Bill how Form 1 applications to waive time limits applying to the prosecution will be processed. The removal of the Magistrate appears to leave this solely as a decision for the PPS giving rise to a potential conflict of interest. The Department should clarify how this is to be resolved in the event of the Bill proceeding in its current form. The Society would be supportive of and would consider any amendments which may remedy these defects.

### **Concluding Remarks**

- 45.1 The Society has outlined for the Committee our views on some of the key provisions within the Justice Bill. In particular, we have covered issues concerning the appropriate balance between prosecutorial and judicial functions, the independence of the legal profession and the need to take a global view of achieving efficiencies within the justice system. We have endeavoured to provide a constructive response which will help inform the Committee's scrutiny of the legislation.