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Criminal Procedure Bill 2021

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Abstract

The Criminal Procedure Bill 2021 provides for the introduction of preliminary trial hearings as a means to reduce interruption and delay in criminal trials. These hearings deal with certain matters, such as the admissibility of evidence, prior to the trial's commencement. The Bill also addresses the provision of specified documentation to juries to assist them with their deliberations, and makes a small number of other amendments to criminal legislation.

The Bill contains 18 sections in four Parts. Part 2 provides for preliminary trial hearings, Part 3 for provision of information to juries and Part 4 for amendments to certain Acts relating to criminal procedure.

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Legal Disclaimer

Introduction

The principal purpose of the Criminal Procedure Bill 2021 (the Bill) is to provide for the introduction of preliminary trial hearings, also known as 'pre-trial' hearings for trial on indictment. They are provided for in Part 2 of the Bill. The principal purpose of these hearings is to deal with certain matters before the beginning of the trial so as to ensure that the parties are ready to proceed on the day of the trial, and to minimise interruptions to the unitary nature of the trial. There have been repeated calls for the introduction of such hearings,[1] and they have a number of potential benefits. Many of these benefits are related to the possible reduction in delays in criminal trials due to the use of pre-trial hearings. Pre-trial hearings are also of particular benefit in the prosecution of white-collar crime[2] and in the protection of vulnerable witnesses.

Part 3 related to the provision of information to juries. This section arises from a recommendation of the Law Reform Commission in its 2013 Report on Jury Service, to the effect that section 57 of the *Criminal Justice (Theft and Fraud Offences) Act 2001,* which concerns the provision of specified documentation to juries, should be extended to all trials on indictment.

Part 4 provides for certain amendments to existing criminal procedure legislation: the *Criminal Procedure Act 1967*, the *Criminal Justice Act 1984* and the *Criminal Procedure Act 2010.*

Background

In April 2014, the Government approved and published the *General Scheme of a Criminal Procedure Bill* (the General Scheme). The primary aim of the Bill as outlined by then Minister for Justice and Equality, Alan Shatter TD was:

> 'to provide greater efficiency and fairness in the trial process and to reduce delays in the criminal system generally… this legislation will enhance the ability of the courts to improve the efficiency and fairness of the trial process, particularly in complex cases. It is designed to ensure that judges have the utmost discretion to ensure the integrity and fairness of the system.'[3]

The 2014 General Scheme provided, among other things, for the introduction of:

- preliminary trial hearings in indictable[4] cases;
- declarations of constructive acquittal;

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[1] See the list of reports on page 14 of the Digest.

[2] Murdoch and Hunt's Encyclopedia of Irish Law defines white collar crime as "a label for crimes which are committed for financial gain, invariably by professionals working in the financial services sector. The *Criminal Justice Act 2011* introduced a number of measures which are specifically aimed at addressing offences related to banking, investment of funds, company law offences, money-laundering, fraud, bribery and corruption."

[3] *Minister Shatter publishes General Scheme of a Criminal Procedure Bill*, 3 April, 2014

[4] Indictable offences are serious charges which can or must be tried before a judge and jury in the Circuit Court or the Central Criminal Court. However, not all indictable offences are tried before a jury.

- the electronic transmission of warrants;
- the more efficient use of video link hearings; and
- the provision of certain information to juries.

As part of the pre-legislative scrutiny process, the Joint Committee on Justice, Defence and Equality (the Committee) was requested to review and consider the General Scheme of a Criminal Procedure Bill. The Committee invited submissions in respect of the General Scheme in late April 2014, receiving one submission from the Rape Crisis Network Ireland. The Committee did not hold any stakeholder meetings in respect of the General Scheme. The Committee's response to the Minister for Justice and Equality can be accessed here.

The General Scheme was revised in April 2015 in light of pre-legislative scrutiny and pubic consultation and a Revised Scheme of the Bill was published in June 2015.

In 2020, certain elements of the Revised Scheme were been identified as requiring urgent progression in the context of the Covid-19 pandemic[5] and were then provided for in the *Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020*.[6] Sections 23 to 25 of the 2020 Act made provision for the use of video link technology in criminal proceedings in order to provide for remote pre-trial and sentencing hearings. It is important to note in this respect that the Act does not provide for remote criminal trials. The Miscellaneous Provisions Act 2020 provides for wider use of video links between persons in custody and the courts which were formerly permitted in limited circumstances under sections 33 and 34 of the *Prisons Act 2007*. Notably, the Act also applies to pre-trial hearings concerning persons not in custody so that any accused person can attend by video link for certain applications where the court so directs.

In January, 2021, the Criminal Procedure Bill was published.

[5] Written answers, Tuesday, 21 July 2020.

[6] Bill Digest, *Civil and Criminal Law (Miscellaneous Provisions) Bill 2020*, July 2020; L&RS Note, *Remote Court Hearings*, July 2020.

Table of Provisions

Table 1: Summary of principal provisions of the Bill

1.	Short title and commencement	States that the Act may be cited as the Criminal Procedure Act 2021 and sets out the Bill's commencement provision.
2.	Definitions	Provides the following definitions: "accused", in respect of an offence, means the person charged with the offence; "Act of 1967" means the *Criminal Procedure Act 1967*; "Act of 1984" means the *Criminal Justice Act 1984*; "Act of 2010" means the *Criminal Procedure Act 2010*; "enactment" has the same meaning as it has in the Interpretation Act 2005; "Minister" means the Minister for Justice; "order", in relation to a court, means a decision that the court is empowered to make under or pursuant to an enactment or the common law, or otherwise; "the prosecution", in relation to an offence, means (a) the Director of Public Prosecutions, (b) a person prosecuting the offence at the suit of the Director of Public Prosecutions, or (c) a person authorised by law to prosecute the offence.
3.	Interpretation (Part 2)	Provides that in Part 2 of the Bill: "Act of 1962" means the Criminal Justice (Legal Aid) Act 1962;

		"Act of 1992" means the Criminal Evidence Act 1992; "preliminary trial hearing" shall be construed in accordance with *section 6(1)*; "relevant offence" shall be construed in accordance with *section 5*; "relevant order" means an order as to the admissibility of evidence, including an order under or pursuant to section 16 of the Act of 1992; "trial court" shall be construed in accordance with *section 6(1)*. In Part 2 of the Bill, unless the context otherwise requires (a) a reference to a person being sent forward for trial includes, where appropriate, a reference to such a person being sent or being sent forward for trial to, or charged before, a Special Criminal Court, and (b) a reference to a trial of an accused in respect of an offence shall include a reference to a retrial of an accused in respect of an offence.
4.	Application (Part 2)	Provides that part 2 of the Bill applies in respect of proceedings for an offence where (a) an accused has been or is sent forward for trial in respect of the offence (whether before, on or after the coming into operation of this section), and (b) the trial has not yet commenced.
5.	Relevant offence for purposes of Part	Defines what is meant by a 'relevant offence' in relation to preliminary trial hearings. A relevant offence is one which carries a maximum sentence of ten years or more, or one which has been specified by the Minister for Justice in an Order. The section also sets out the matters the Minister shall take into account in deciding whether

		to make something a 'relevant offence'.
6.	Preliminary trial hearing	Provides for the holding of preliminary trial hearings. *Section 6(1***)** provides a general power for a court to hold a preliminary hearing, of its own motion, for any indictable offence, where the court is satisfied that it would be in the interests of justice and conducive to the expeditious or efficient conduct of the proceedings, regardless of whether the prosecution or the defence is requesting one. *6(2)* provides that, for a relevant offence as defined in section 5, the court must agree to hold at least one preliminary hearing, if either the prosecution or the defence requests it. *6(3)* provides that 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). *6(4)* sets out how the court should determine the timing of a preliminary hearing, and the factors it should take into account in doing so, including the interests of justice, disruption to the jury or witnesses in the trial, and protecting the interests of the victim. *6(5)* The trial court may direct that the preliminary trial hearing concerned be held as close in time to the date for which the trial is set down for hearing as the court considers appropriate and just in the circumstances *6(6)* provides that if the court thinks it is appropriate, the accused person can be arraigned at a preliminary hearing.

		6(7) sets out a list of case-management matters that the court can assess and make orders in relation to, at a preliminary hearing. These include whether everyone is ready to proceed, whether any particular practical measures or facilities are needed etc. 6(8) sets out the types of order or decision of the court that can be made at a preliminary hearing. Many of these orders would currently be made during the trial, but in the absence of the jury. They are being brought forward to be dealt with at the preliminary stage to the greatest extent possible. The orders include whether a group of defendants is to be tried together or separately, whether questioning in relation to prior sexual history is to be permitted, whether a victim's counselling notes are permitted to be examined, and many others, including any order relating to the conduct of the trial of the offence as appears necessary to the court to ensure due process and the interests of justice. The section also permits the court to make a 'relevant order', which is an order relating to the admissibility of evidence. *6(9)* allows the court to make orders which it considers appropriate and in the interests of justice in relation to the conduct of the preliminary hearing itself, including in relation to accepting written submissions from the parties. *6(10)* provides that it does not have to be the same judge for a preliminary hearing as for the trial, and that if there is more than one preliminary

		hearing there is no need for the same judge to preside over all of them. However *6(11)* provides a power for the court to direct that it must be the same judge, where the court considers this is in the interests of justice, and *6(12)* goes on to specify that where the preliminary hearing deals with admissibility of evidence, it must be the same judge for that hearing as presides at the trial. *6(13)* provides that the requirement under 6(12) shall not apply where the judge is unavailable or the court considers there is another good reason. *6(14)* provides that a ruling of the court at a preliminary hearing is binding and generally cannot be appealed until the trial has concluded. It also provides that where the court considers it appropriate, the ruling shall have effect as though it had been made during the trial. *6(15)* provides that the court can set aside a ruling made at a preliminary hearing, either of its own motion or on application from the prosecution or the defence, if the court is satisfied that is in the interests of justice, but *6(16)* only allows an application from the accused or the prosecution, to vary an order in accordance with 6(15), where there has been a material change in the circumstances relevant to the original order since it was made. *6(17)* provides that a party who wishes to seek an order under subsection 6(8), shall inform the court of this at the first available opportunity.

		6(18) provides that nothing in section 6 affects the existing right of a person to appeal a criminal conviction. *6(19)* is a saver to make it clear that nothing in section 6 affects the existing power of a court to do all of these things otherwise than at a preliminary hearing. *6(20)* provides that the court conducting the preliminary hearing has all the powers it would have during the trial. *6(21)* provides that a legal aid certificate covering the person's trial also covers any associated preliminary trial hearings.
7.	Appeal of certain orders made at preliminary trial hearing	Provides for appeals in limited circumstances, arising from a decision at a preliminary hearing to exclude compelling evidence, that, if it were admitted, could possibly lead to a finding of guilty, but is so significant that if it were excluded, the exclusion would likely lead to an acquittal. The section sets out the process for such an appeal, and provides for the accused to be legally represented at the appeal as necessary, and provided with legal aid where appropriate.
8.	Trial not to proceed pending appeal under section 7	Provides that where the trial court makes an order at a preliminary hearing excluding evidence from the trial, and this order is appealed under section 7, the trial shall not proceed until the section 7 appeal is determined or withdrawn.
9.	Power to exclude public	Provides for the power to exclude the public from a preliminary trial hearing. *Bona fide* members of the Press are not to be excluded. This section is

		without prejudice to the rights of parents, relatives, friends or support workers of a party to remain if this is provided for by other legislative provisions.
10.	Hearings not to be published or broadcast	Provides that preliminary trial hearings, and appeals under section 7, are not to be published or broadcast before the conclusion of the trial. Some limited exceptions are provided for.
11.	Rules of court	Provides that the rules of court may make provision to give further and better effect to Part 2 of the Bill.
12.	Provision of information to juries	Provides for the provision of information to juries. The section apples to any offence being tried on indictment other than an offence to which an enumerated list of legislative provisions apply. Sub-section (2) states that copies of any of an enumerated list of documents or materials shall be given to the jury, including any document admitted in evidence in the trial, transcripts and charts, graphs etc. produced during the trial, and any other document that in the opinion of the trial judge would be of assistance to the jury in its deliberations
13.	Amendment of section 4A of Act of 1967	Proposes to amend section 4A(5) of the *Criminal Procedure Act 1967* by making a small technical amendment to section 4 of the Criminal Procedure Act 1967 to clarify that under section 4A, the Book of Evidence may be served on the accused or their legal representative (as is already provided in section 4B, which directly follows that section).
14.	Amendment of section 4E of Act of 1967	Proposes to amend section 4E of the *Criminal Procedure Act 1967* to take

		account of preliminary trial hearings. Specifically, this section provides that where there has been a decision at a preliminary trial hearing to exclude evidence, the defence cannot bring an application for charges to be dismissed on the basis of this exclusion until any appeal by the prosecution of the decision to exclude the evidence has been dealt with by the court, and that where an appeal has been brought under this section after a preliminary hearing, the trial shall not proceed until the appeal has been determined.
15.	Amendment of section 4Q of Act of 1967	Proposes to amend section 4Q(2)(b) of the *Criminal Procedure Act 1967* to remove an unnecessary cross-reference
16.	Amendment of section 21 of Act of 1984	Proposes to amend section 21 of the *Criminal Justice Act 1984*. This is the provision dealing with admission of evidence by written statement. Currently, the court may admit evidence in the form of a written statement, unless either the prosecution or the defence objects. This amendment would allow the court to require the party objecting to the evidence being admitted in written form to give their reasons for doing so, and permit the court, having taken those reasons into account, to proceed to direct that the evidence be admitted, provided that this is not contrary to the interests of justice.
17.	Amendment of section 23 of Act of 2010	Proposes to amend section 23 of the *Criminal Procedure Act 2010*. Section 23 allows the prosecution to appeal an acquittal, where it has come about because of the exclusion of certain compelling prosecution evidence from being admitted at trial.

		This section amends section 23 in two ways. Firstly, to take account of the existence of preliminary trial hearings, and secondly to provide that where there is a difference between evidence in the 'book of evidence' as it exists before the trial begins, and the actual evidence adduced during the trial, that the evidence as actually adduced is the version to be considered when deciding the threshold for these appeals.
18.	Amendment of section 34 of Act of 2010	Proposes to amend section 34 of the *Criminal Procedure Act 2010* to extend the notice which must be given before calling an expert witness to testify, either at a trial or a preliminary hearing, to 28 days, from the current period of 10 days, in order to allow the other party to prepare for their testimony. The section also provides that a court can allow an expert witness to testify without the required notice where it is satisfied that the notice was not possible, or that it is in the interests of justice to allow the notice period to be waived.

Source text: Criminal Procedure Bill 2021

Pre-trial hearings

Overview and context

Preliminary, or 'pre-trial' hearings may be viewed as part of the case management of a trial.[7] Case management may take a variety of forms, ranging from a basic statement of readiness for trial, through to a preparatory hearing with attendant appeal mechanisms. However, the Irish courts lack a tradition of pre-trial procedures[8] and issues relating to the admissibility of evidence or other aspects of the proceedings are typically addressed during the course of the trial itself.

Problems in relation to the evidence, for example, are generally dealt with ad hoc during the examination of witnesses or, if the need arises, by way of a *voir dire*, or 'trial within a trial', outside the presence of the jury.[9] The *voir dire* may involve arguments on important points of law relating to the admissibility of evidence such as an alleged confession, or the validity of search warrants.[10] This process can be comparatively lengthy and disruptive, contributing to delays and interfering with the unitary nature of the trial.

It is possible that, with more frequent use of pre-trial hearings, all contentious matters concerning the process of the trial and the evidence to be admitted would be settled before starting the process in front of the jury and reducing the likelihood of unnecessary interruptions of the trial for additional legal argument.

The Bill provides for preliminary trial hearings to be held for trials on indictment. Section 6 of the Bill proposes that the trial judge may, of its own motion or upon the application of the prosecution or the accused, hold one or more preliminary hearings. Section 7 provides that orders made during the preliminary hearing may be appealed.

There are certain arguments that are frequently made in support of preliminary trial hearings. These arguments will be considered in more detail below. The potential benefits of pre-trial hearings include

- a reduction in delays (for example, by reducing the number of adjournments sought and the amount of legal argument in the absence of the jury);

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[7] 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: *Civil Liability and Courts Act 2004,* section 18(1) "Where, in a personal injuries action, the court considers it appropriate, it shall direct that a hearing be held before the trial of the action for the purposes of determining what matters relating to the action are in dispute."

[8] Dr Liz Heffernan, *Evidence in Criminal Trials* (Bloomsbury, 2020)

[9] Ibid.

[10] Typical issues argued in the absence of the jury are as follows: the probative versus the prejudicial value of evidence; relevance of evidence; receivability of evidence (if it is tainted in origin); the hearsay rule; documentary evidence presented without its author; illegally obtained evidence such as searches and confessions; unconstitutionally obtained evidence and 'causal nexus' requirements - there must be a causal connection between the infringement of the right and the obtaining of evidence.

- the provision of greater clarity in relation to issues relevant at trial (for example, the admissibility of certain evidence);
- greater protection for vulnerable victims of crime;
- the provision of a more effective system to prosecute white collar crime;
- shorter and more cost effective trials (the potential for earlier pleas);[11] and
- instill greater public confidence in the criminal justice system.

The introduction of pre-trial hearings has been called for in a number of reports and reviews, starting with the Fennelly Report in 2003. These reports include:

- Report of the Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences (2020)
- The Review of Structures and Strategies to Prevent, Investigate and Penalise Economic Crime and Corruption (the Hamilton Report) (2020)
- The Expert Group on Article 13 of the European Convention on Human Rights (the McDermott Report) (2013)
- 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 (the Fennelly Report) (2003).

Arguments against the introduction of pre-trial hearings primarily focus on either the additional supporting measures that ought to be put in place to allow the potential benefits of pre-trial hearing to be fully realised, or whether there may be a better alternative. There is little commentary arguing that the introduction of pre-trial hearings would be an unambiguously or substantially negative development.

[11] Pre-trial hearings could lead to guilty pleas before criminal trials begin, say barristers, *Irish Times*, 25 January, 2021

Delay in criminal trials

A primary purpose of the Bill is the reduction in delay in criminal trials and improving the overall efficacy of system of criminal procedure.[12] Delay in criminal trials has been an ongoing problem for a number of years. In a 2019 interview with the *Bar Review*, the Director of Public Prosecutions, Claire Loftus, noted that, in her opinion, "a pre-trial hearing process would have a significant impact" on persistent issue of delay in criminal trials.[13]

The Courts Service 2019 Annual Report indicates that the timeframe for criminal trials in 2019 are as follows:

- **High Court – Central Criminal Court**
  Murder and rape trials (Central Criminal Court) The time from the first listing of a case before the Central Criminal Court on return for trial from the District Court, to the trial date 2019 – 14 months
- **Special Criminal Court**
  The time from when a charge sheet is received to the trial date - 12 months
- **Court of Appeal – Criminal**
  The time from when an appeal is entered into the court list to the date of hearing Appeals - 20 weeks

The report noted that waiting times were kept under ongoing review with the Presidents of the Circuit Court and District Court. In the Circuit Court, "criminal business continued to be given priority to ensure the earliest trial date for those in custody, with separate sittings for crime in the majority of circuits." Waiting times for criminal cases vary, depending on whether the accused is on bail or in custody; on whether the plea is 'guilty' or 'not guilty'; on whether the trial is scheduled to last two days or two weeks.

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. Measures

[12] See e.g. *Efforts underway to address lengthy delays in criminal trials*, Irish Times, 28 April 2014; Preliminary criminal hearings 'most important' to improving courts efficiency, *Irish Legal News*, April 2019; 'Ireland, Article 13 and Article 6: still no effective remedy for excessive delay in proceedings', UK Human Rights Blog, May 2020.

[13] Delay-cutting merits of pre-trial hearings outlined by DPP, *Irish Times*, April 23, 2019; Ann-Marie Hardiman, 'As justice requires', *The Bar Review*, 2019, 24(2), 40-42

introduced to address this situation include the allocation of the additional judges (subject to the availability of courtrooms) and the listing of only one long trial at any one time.[14]

The problems with delay have become worse in 2020, due to the Covid-19 pandemic. A backlog of about half a year's worth of criminal jury trials – amounting to over 400 cases – built up during the period from March to August. The courts came back for the summer vacation a month early to help clear some of these cases.[15]

The European Court of Human Rights has repeatedly found that Ireland was in violation of their obligations under articles 6 and 13 of the European Convention on Human Rights. Article 6 guarantees that hearings must be provided "within a reasonable time" and Article 13 provides for the right to an effective remedy, which is fundamentally undermined where there is inordinate delay in the criminal process.[16] Between 2002 and 2018, the European Court of Human Rights decided approximately nine cases brought against Ireland regarding the adequacy of the remedies for court delays. In each case, the Court ruled that Irish law does not provide effective remedies in respect of court delays, meaning that Ireland is in violation of its obligations under Article 13.

The Court delivered its definitive ruling on the remedies for delay under Irish law in 2010, in a case called *McFarlane v Ireland*.[17] In that case, the State argued that effective remedies for court delays were provided through the possibility of taking actions for damages for constitutional rights and for damages under section 3(2) of the *European Convention on Human Rights Act 2003,* and the ability to apply for an order for prohibition and an early hearing dates in a criminal trial. The European Court of Human Rights held that none of these remedies could be considered to discharge the State's obligations under Article 13.

A Draft General Scheme of a European Convention on Human Rights (Compensation for delays in court proceedings) Bill was published in 2018 to provide for statutory compensation for breach of the right to a hearing within a reasonable time in the determination of civil rights and obligations or of any criminal charge under Article 6 of the European Convention on Human Rights. On 3 October 2018, the Minister for Justice referred the General Scheme of the Bill to the Oireachtas Joint Committee on Justice and Equality to consider in terms of pre-legislative scrutiny. As part of its scrutiny of the Draft Heads of the General Scheme, the Committee heard evidence from witnesses in public session on the 16th of January 2019.[18]

The Bill is currently being finalised by the Department of Justice. The lack of progress by Ireland has been reported by the Committee of Ministers of the Council of Europe. It has also been referred to in the EU's European Semester process. Ireland reported to the Committee of Ministers in June 2002 that we are not in a position to report progress at this time but that this will be possible by December 2020.

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[14] Courts Service 2019 Annual Report, p. 104.

[15] 'Defendants able to sue over trial delays under new law', *Irish Times*, 8 September 2020.

[16] The right to a fair trial is also provided for by Article 38 of Bunreacht na hÉireann.

[17] *McFarlane v Ireland* (Application no. 31333/06, European Court of Human Rights, 10 September 2010).

[18] The official transcript of the Committee hearing can be found here.

The European Commission's 2020 Rule of Law Report - Country Chapter on the rule of law situation in Ireland[19] noted

> A compensation scheme for cases of excessive length of court proceedings is still lacking. Legislation establishing a compensation scheme to award damages in the event of protracted court proceedings is required by a European Court of Human Rights ('ECtHR') judgment 42 but remains to be tabled in Parliament. […] The execution of the ECtHR judgement [*McFarlane v Ireland*] is under enhanced supervision by the Council of Europe's Committee of Ministers.[20]

In light of established ongoing problems with delays in criminal trials, which have worsened during the Covid-19 pandemic, and the forthcoming legislation relating to compensation for delays, there is an apparent need to implement measures, such as pre-trial hearings, that may somewhat alleviate the existing problems in this area.

Pre-trial hearings: a positive development?

The introduction of pre-trial hearings has been viewed positively by key stakeholders and commentators.[21]

In a 2019 interview with the *Bar Review*, the Director of Public Prosecutions, Claire Loftus, put forward a strong argument in favour of the introduction of statutory pre-trial hearings. These arguments include improved overall efficiency, reduction in delays, benefits for vulnerable witnesses and victims, and improvements in the experiences of members of the jury:

> The benefits of dealing with admissibility before the commencement of the trial: if there could be pre-trial rulings on the admissibility of evidence, this would make the process much more efficient; "Court time would be used less, and issues would crystallise sooner".
>
> Disclosure:[22] the Director noted that the volume of disclosure in criminal cases is continually increasing, partly because of the growth of social media. There are also issues in relation to material and records held by third parties. If all parties had to engage sooner through an active pre-trial process, the defence could set out what further disclosure material they feel is relevant. The overall efficacy of the system would thus be improved.
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> Vulnerable victims who have suffered trauma often have had their lives extensively documented as a result of this trauma. It can be very difficult to ascertain after many years the full extent of access to such services. In such cases the DPP's disclosure obligations

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[19] European Commission, 2020 Rule of Law Report - Country Chapter on the rule of law situation in Ireland,[19] Brussels 30.9.2020 SWD(2020) 306 final

[20] Last Resolution by the Committee of Ministers of the Council of Europe, CM/Del/Dec(2019)1362/H46-13, 3-5 December 2019.

[21] See above the list of reports recommending the introduction of pre-trial hearings, p. 14 of Bill Digest.

[22] Disclosure refers to the stage of the pre-trial process when each party is required to disclose to the other party the documents that are relevant to the issues in dispute. It normally takes place after each party has set out its position in their statement of case.

> are more onerous and greater sensitivity must be shown when seeking informed consent to the release of such information. A pre-trial process would: "provide greater certainty for the victim and witnesses, who are often left waiting for days or even weeks while legal argument goes on. It would be a much less traumatic process".

Ms. Loftus concluded by noting, "I've been saying since I was appointed that [pre-trial hearings are] the most important thing, in my view, that would help the system work more efficiently".[23]

In 2007 the Balance in the Criminal Law Review Group published its final report Balance in the Criminal Law Review Group. In relation to pre-trial issues, the Report made two important recommendations: that defence expert evidence should be disclosed in advance of trial and, notably, that all admissibility issues should be determined before a jury was sworn in, but on the first scheduled day of the trial, to avoid "running the case twice".[24]

The *Report of the Working Group on the Jurisdiction of the Courts: The Criminal Jurisdiction of the Courts*,[25] also known as the Fennelly Report, contains an extensive examination of the pre-trial procedures in operation in the United Kingdom and Australia. The Report concluded that the introduction of pre-trial hearings could reduce the number of trials within trials, in particular on issues of admissibility of evidence. The Report recommended the introduction of a 'preliminary hearing' for cases presented on indictment. The Report also recommended that the preliminary hearing should take place within two weeks of the arraignment in order to facilitate the early identification of issues, and also to prevent pleas currently made on arraignment being deferred to the later hearing. The Report recommended that the preliminary hearing should ideally be before the trial judge, but accepted that this might not always be possible.

Judicial and academic commentary on pre-trial hearings

Certain academic commentators writing on criminal law and procedure have expressed support for the enactment of statutory provision for pre-trial hearings, including Dr Liz Heffernan[26] and Thomas O'Malley.[27]

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[23] 'Delay-cutting merits of pre-trial hearings outlined by DPP', *Irish Times*, April 23, 2019.

[24] Final Report, Balance in the Criminal Law Review Group. "We consider that the present arrangement whereby a jury is sworn in before any admissibility issue is determined is illogical and inconvenient on a number of levels and only explicable by historical considerations which no longer apply. It involves the jury waiting in the jury room for long periods, or being sent away, and increases the chance of jurors becoming unavailable during a long trial.", p. 174

[25] Working Group on Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts*, Stationery Office, May 2003 (also known as the Fennelly Report).

[26] "The constitutional imperative of a trial in due course of law coupled with the increasing complexity and cost of litigation have cast doubt on the wisdom of this approach. There is growing support for the use of pre-trial hearings as a more effective means of resolving at least some admissibility issues in advance of trial…A proposal for the enactment of provision for pre-trial hearings was included in the general heads of Criminal Procedure Bill in 2015 but was not progressed. Steps should be taken to revive this initiative or explore other options for developing pre-trial arrangements that might assist courts in dealing with this complex area of evidence and practice." Dr Liz Heffernan, *Evidence in Criminal Trials* (Bloomsbury, 2020) at [10.108].

[27] "There is much to be said therefore for a more formalised system of pre-trial hearings at which matters of this nature could be addressed before the trial proper begins. Such a hearing would save any jury which

The Superior Courts have also commented on the desirability of a pre-trial procedure during which the admissibility of evidence, and other related matters, would be decided upon. The Court of Criminal Appeal in *The People (DPP) v McCann* stated that:

> "Consideration should be given to the introduction of a system whereby contests on the admissibility of evidence - when clearly foreseen by prosecution and defence - could be resolved at the outset of the trial so that, as far as practicable, a jury may hear all the relevant and admissible evidence in a coherent and uninterrupted progression and without the need for the jury to withdraw to their room, or otherwise absent themselves from the courtroom, for protracted periods of time."[28]

The Supreme Court in *Eamon Cruise v Judge Frank O'Donnell* [29] noted 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. In other jurisdictions where pre-trial motions to suppress evidence and similar procedural devices are well established, the fundamental nature of a jury trial is not considered to be trenched upon […] It is clear that in neither [the USA nor the UK] does the making of significant rulings at pre-trial hearings constitute a radical departure from the essential nature of jury trial."

Law Reform Commission Reports

In 2002, the Law Reform Commission published their Consultation Paper on Prosecution Appeals in Cases brought on Indictment. The Commission noted that pre-trial hearings could provide a valuable way of improving the quality of trial rulings. The topic was then considered in more detail in the Commission's 2006 Report on Prosecution Appeals and Pre-trial Hearings. [30] The report considered in detail the benefits and disadvantages of pre-trial hearings in indictable cases. The Commission decided not to make a recommendation for the introduction of pre-trial hearings as, at the time of drafting the report, "support of their introduction is inconclusive" and that Pre-Trial

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was eventually sworn from the inconvenience of being sent away while the matter was being addressed at a trial within a trial. It would also save a good deal of time and expense associated with judicial-review proceedings." Thomas O'Malley, *The Criminal Process* (Round Hall, 2009).

[28] *People (DPP) v McCann* [1998] 4 IR 397.

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

[30] Law Reform Commission, 'Report on Prosecution Appeals and Pre-trial Hearings' , 2006.

Questionnaires should be introduced first, with a view to evaluating its success,[31] and then assessing the desirability of mandatory pre-trial hearings based on the outcome of this process.

In their 2017 Report on Consolidation and Reform of Aspects of the Law of Evidence[32] the Commission noted that the *Criminal Evidence Act 1992,* which allows documentary evidence compiled in the ordinary course of business to be admitted in criminal proceedings, does not provide for a pre-trial procedure to deal with challenges to the admissibility of documents under its provisions. The Commission noted that a number of submissions have commented that, in a trial on indictment, this gives rise to the problem of the jury being sent away while a, sometimes lengthy, *voir dire*, takes place. Reference was made to one case in which the jury was sent away for 2 weeks while the prosecution sought to prove that the admissibility conditions in the 1992 Act had been satisfied. It was argued that provision should be made for the court to direct that arguments be heard on the admissibility of documents at a pre-trial stage in order to minimise the disruption to the flow of evidence in front of the jury.

Arguments against preliminary trial hearings

Arguments against the introduction of pre-trial hearings primarily focus on either the additional supporting measures that ought to be put in place to allow the potential benefits of pre-trial hearing to be fully realized, or whether there may be a better alternative. There is little commentary arguing that the introduction of pre-trial hearings would be an unambiguously or substantially negative development.

Negative comments concerning the potential introduction of a statutory pre-trial hearing procedure include:

- it may result in further delays in the trial process; the "danger of running the case twice";[33]
- it may result in an increase in the costs associated with the trial;
- that a pre-trial questionnaire may be more efficient (and more appropriate for the regional Courts);
- pre-trial hearings won't be effective in reducing delay if there are an inadequate number of judges;[34]
- the current process for disclosure is flawed and will negate any benefits associated with pre-trial hearings.[35]

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[31] Ibid., p. 80.

[32] Law Reform Commission, 'Report on Consolidation and Reform of Aspects of the Law of Evidence', 2017, p. 74.

[33] Final Report, Balance in the Criminal Law Review Group, p. 175

[34] It must be noted that these arguments were made in the context of pre-trial hearings being beneficial for vulnerable witnesses. However, the arguments were also presented as being generally applicable to pre-trial hearings in general. Submission on behalf of the Council of The Bar of Ireland to the Review Group on the Protection of Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences, July 2019.

[35] Ibid.

The Law Reform Commission in its 2006 *Report on Prosecution Appeals and Pre-Trial Hearings* expressed concern about the potential for further delays in criminal trials as a result of appeals from pre-trial hearings and suggested that '*only rulings that involve a substantial point of law should be subject to appeal*.' Section 7 of the Criminal Procedure Bill 2021 provides for appeals of certain orders made at preliminary trial hearings. Sub-sections (1) and (2) states that where, at a preliminary hearing, the trial judge makes an order excluding evidence, the prosecution may appeal the order on a question of law. The erroneously excluded evidence must be reliable, of significant probative value and, if considered with other relevant evidence to be adduced, the court would likely lead to a finding of guilt.

The desirability of pre-trial questionnaires (recommended as a first step in reform of pre-trial procedure by the 2006 Law Reform Commission Report) is somewhat doubtful. In late 2012, a pilot trials were introduced featuring a form of pre-trial hearing in a less thorough nature than that provided for in the Bill (introduced in the Dublin Circuit Criminal Court) and a pre-trial questionnaire (for criminal matters heard in the South Eastern Circuit Court). These trials were not positively received by practitioners,[36] primarily because they did not address issues such as admissibility of evidence and were "merely a checklist of provisions needed". This means that the pre-trial procedures were time consuming but ineffective. The proposed powers in the General Scheme of the Criminal Procedure Bill were viewed more favourably at the time than the less robust procedures trialled.

In 2019, the Bar Council of Ireland, in their submission to the Review Group on the Protection of Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences, noted that pre-trial hearings alone are not sufficient to alleviate delay. Two significant point that are made are that there must be additional judges appointed to hear cases and there must also be overhaul of the disclosure process. It was also noted that there were certain practicalities relating to the holding of pre-trial hearings that needed to be resolved. It was concluded that primary purposes for the introduction of pre-trial hearings, reduced delays and improved efficacy of the system of criminal procedure, will not be achieved without these additional measures.

> "The Council supports the concept of pre-trial hearings to deal with certain applications before the trial before the jury begins. Such pre-trial hearings should be able to deal with certain legal issues so that trials are not subject to unnecessary voir dires (trial within a trial on legal issues) during the course of the trial before the jury empanelled to hear the case.
>
> However, the workings of such pre-trial applications need to ensure that there is an avoidance of duplication of judicial resources. These are practical matters about the modalities and structure of such pre-trial hearings that need to be resolved.
>
> Concurrent with any proposal to introduce pre-trial hearings is the pressing need to ensure that greater judicial resources are provided for the hearing of criminal cases in general and, in particular sexual assault cases."

[36] Efforts underway to address lengthy delays in criminal trials, *Irish Times*, 28 April 2014.

It was additionally noted that the current discovery process needs to be reformed if pre-trial hearings are to reduce delays:

> "For the pre-trial hearing process to have any chance of being useful it must be ensured that such pre-trial hearings do not add another layer of complexity and result in further delay and obstruction of trials. To work, they must be used to litigate legal issues so that the net factual issues are then ready to be litigated at the trial itself before the Jury.
>
> That would mean that the disclosure process needs to be completed prior to the pretrial hearings so that the parties can address the legal issues concerned. The Council is sceptical as to whether this is achievable in the present context where much disclosure is made on the eve of the trial and where the financial resources to ensure it is dealt with at an earlier stage simply do not appear to be available.
>
> The Council is concerned that the disclosure process, with the complexities inherent in that process, is now causing difficulty for such trials due to a lack of financial resources, personnel and expertise in how to handle such issues when they arise. Unless this is addressed, the addition of pre-trial hearings will not assist the system in any meaningful manner. (emphasis added)

The argument of the Bar Council can be viewed as a concurrent recommendation for the appointment of additional judges and reform of the discovery process, rather than an argument against the introduction of pre-trial hearings. Also, this is not the first occasion in which a shortage of judges has been blamed for delay in criminal trials.[37]

Arguments that additional reform is necessary if the benefits of pre-trial hearings are to be fully enjoyed do not necessarily militate against the fact that pre-trial hearings are ultimately a desirable system to be provided for. However, they are important to note in the context of future reform of legal procedure. In particular, the Bar Council's comments regarding the lack of a sufficient number of judges to hear cases has been made many times in various fora, and is an important factor to consider when reducing delay in criminal trials.

White-collar crime

Pre-trial hearings would be particularly beneficial in the prosecution of white-collar crime. One concern often expressed in respect of white-collar crime prosecution is the potential length and complexity of white-collar crime trials.[38] It is envisaged that the introduction of statutory pre-trial

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[37] See e.g. *Efforts underway to address lengthy delays in criminal trials*, Irish Times, 28 April 2014

[38] Claire Cummins BL, 'White-Collar Crime and the Programme for Government 2020', *Commercial Law Practitioner* 2020 153. See also Sinéad McGrath B.L. Navigating the Documentary Minefield and the

hearings in white-collar crime cases, where a judge can issue binding directions as to the progress of the case and make binding rulings on legal issues, would be beneficial in complex white-collar crime cases, where a court has to decide on the admissibility of large amounts of technical and documentary evidence.[39] It is anticipated that pre-trial hearings will allow much of these questions to be settled in advance of the trial.

Some examples illustrating the potential length and complexity of white-collar crime trials are

- *DPP v. Bowe, McAteer, Casey and Fitzpatrick*, which ran for 82 days in the Dublin Circuit Criminal Court, and featured 70 witnesses on the Book of Evidence, 545 Exhibits opened to the Jury, and Jury Deliberations in excess of 61 Hours; and
- *DPP v David Drumm*, which ran for 87 days in the Dublin Circuit Criminal Court, and featured 91 Witnesses on the Book of Evidence, 709 Exhibits opened to the Jury and Jury Deliberations in excess of 10 Hours.[40]

In 2020, the Review of Structures and Strategies to Prevent, Investigate and Penalise Economic Crime and Corruption (the Hamilton Report) called for the introduction of pre-trial hearings to facilitate the timely and efficient prosecution of economic crime and corruption cases.

> "By and large legislation in the area of economic crime is of recent origin and up-to-date but there are some serious gaps, notably in relation to the delay in enacting updated legislation concerning standards in public office and the continuing failure to legislate in the area of pre-trial criminal procedure as recommended by the Fennelly Report as long ago as 2003."
>
> "The Review Group recommends that the publication and enactment of the Criminal Procedure Bill be expedited. There has been significant delay in the progress made with this Bill since the publication of the General Scheme of the Bill in 2014. One of the recommendations of the Fennelly report published in 2003, is the establishment of a preliminary pre-trial hearing procedure in criminal trials. Among numerous other cost-saving measures, this Bill includes provisions on pre-trial hearings which would be vital in ensuring the efficient and timely progress of criminal trials in complex economic crime and corruption cases." (emphasis added)

Admission of Documentary Evidence in White-Collar Criminal Trials, 19th Annual National Prosecutors' Conference, 3 November 2018.

[39] The Department of Justice has stated, in its *White Paper on Crime Discussion Document No 3 'Organised and White Collar Crime'* (October 2010): 'Pre-trial hearings would facilitate a more rapid and efficient progress of trials. It would not be necessary to send the jury out of court for what can be lengthy periods while a procedural issue such as the admissibility of evidence is dealt with. In some cases, the early determination of such issues at a pre-trial hearing would shorten proceedings, either because the prosecution would be forced to abandon the case, or the accused might decide to enter a guilty plea. Pre-trial hearings would also help to make the trials more coherent and comprehensible to the jury.'

[40] Sinéad McGrath B.L. Navigating the Documentary Minefield and the Admission of Documentary Evidence in White-Collar Criminal Trials, 19th Annual National Prosecutors' Conference, 3 November 2018.

In 2017, the Bill, and the associated introduction of pre-trial procedures, was referenced as part of the Government's 'White-collar crime package', which is a suite of regulatory, corporate governance and law enforcement measures aimed at enhancing Ireland's ability to combat corporate, economic and regulatory crime. This included a commitment to "review and strengthen anti-corruption and anti-fraud structures in criminal justice enforcement".

In December, 2020 the Minister for Justice, Helen McEntee TD released a statement[41] referencing the publication of the Hamilton Report, and committing the Minister to lead "a new cross-government plan to tackle economic crime and corruption", and citing the Bill and the introduction of pre-trial hearings as part of this plan. The Criminal Procedure Bill was included as part of this plan.

Vulnerable witnesses

The introduction of pre-trial hearings is also viewed as an effective way to help protect vulnerable witnesses.[42] In May 2012, Rape Crisis Network Ireland (RCNI) produced a Policy Paper on Case Management and Pre-Trial Hearings in the Criminal Courts. The report was strongly critical of the significant prosecutorial delays often experienced in the prosecution of rape cases. It was recommended that

> "to help reduce these delays, and therefore the additional stress and trauma they cause to victims, RCNI proposes an organised system of case management and pre-trial hearings in order to prevent as far as possible late, unnecessary and avoidable adjournments and postponements which result in cases having to be sent back through the listing system, as this recycling process can add substantially to the overall delay before a case is heard."

In 2018 the Minister for Justice established a working group, chaired by Tom O'Malley BL, which was established to review and report upon the protections available for vulnerable witnesses in the investigation and prosecution of sexual offences.

In August 2020, the working group published the Report on the Review of Protections for Vulnerable Witnesses in the Investigations and Prosecution of Sexual Offences. Chapter 5 of this report deals with pre-trial hearings. The Report was very supportive of the introduction of pre-trial hearings, and had a positive view of the pre-trial hearing procedure set out in the General Scheme of the Criminal Procedure Bill. It was recommended that "the necessary legislation [should be implemented] as soon as possible."[43]

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[41] Minister McEntee to lead government plan to tackle white collar crime, December 2020.

[42] See e.g. Caroline Biggs SC, Dr Miriam Delahunt BL, 'Prosecutorial challenges – vulnerable witnesses', *The Bar Review*, 2017; Irish Criminal Law Journal; Caroline Counihan. 'Rape Crisis Network Ireland Perspectives on Sexual Violence and the Criminal Justice System' *Irish Criminal Law Journal* 2013

[43] Report on the Review of Protections for Vulnerable Witnesses in the Investigations and Prosecution of Sexual Offences, p. 63.

Provision of information to juries

Part 3 of the Bill relates to the provision of specified documentation to juries to assist them with their deliberations. This section arises from a recommendation of the Law Reform Commission in its 2013 Report on Jury Service, to the effect that section 57 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*, which concerns the provision of specified documentation to juries,[44] should be extended to all trials on indictment. The Commission's Report examined the challenges posed for juries by increasingly lengthy and complex trials. It noted that previous reviews conducted in Ireland and in other jurisdictions concluded that:

> "juror comprehension of complex information could be significantly improved by providing aids such as glossaries and written summaries, and using visual aids to present the information."[45]

Noting that the *Criminal Justice (Theft and Fraud Offences) Act 2001* and the *Competition Act 2002*[46] provided for certain documentary evidence to be given to the jury (for example any document admitted in evidence, the transcript of opening and closing speeches of counsel, any charts, diagrams, graphic, schedules or agreed summaries of evidence produced at trial and the transcript of the judges charge to the jury) the Commission recommended that these provisions be extended to all trials on indictment. In making its recommendation the Commission acknowledged the need for further analysis of the extent to which the provision of documentation to juries in lengthy and complex trials proves effective in practice.

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[44] Section 57(1) of the 2001 Act provides that in a trial on indictment of an offence under the 2001 Act itself, the trial judge may order that copies of any or all of the following documents shall be given to the jury in any form that the judge considers appropriate: (1) any document admitted in evidence at the trial, (2) the transcript of the opening speeches of counsel, (3) any charts, diagrams, graphics, schedules or agreed summaries of evidence produced at the trial, (4) the transcript of the whole or any part of the evidence given at the trial, (5) the transcript of the closing speeches of counsel, (6) the transcript of the trial judge's charge to the jury, and (7) any other document that in the opinion of the trial judge would be of assistance to the jury in its deliberations including, where appropriate, an affidavit by an accountant summarising, in a form which is likely to be comprehended by the jury, any transactions by the accused or other persons which are relevant to the offence.

[45] Law Reform Commission, Report on Jury Service,

[46] Section 10 of the 2002 Act states:

"the trial judge may order that copies of any or all of the following documents shall be given to the jury in any form that the judge considers appropriate:

(a) any document admitted in evidence at the trial,

(b) the transcript of the opening speeches of counsel,

(c) any charts, diagrams, graphics, schedules or agreed summaries of evidence produced at the trial,

(d) the transcript of the whole or any part of the evidence given at the trial,

(e) the transcript of the closing speeches of counsel,

(f) the transcript of the trial judge's charge to the jury."

Section 12 of the Bill seeks to implement this recommendation. It provides that in any trial on indictment a trial judge has discretion to order that any or all of the following documents be provided to the jury:

> (a) any document admitted in evidence at the trial;
>
> (b) where such transcripts or audio recordings are available:
>
> > (i) the transcript of the opening speeches of counsel or an audio recording of such speeches;
> >
> > (ii) the transcript of the whole or any part of the evidence given at the trial or an audio recording of such evidence;
> >
> > (iii) the transcript of the closing speeches of counsel or an audio recording of such speeches;
> >
> > (iv) the transcript of the trial judge's charge to the jury or an audio recording of such charge;
>
> (c) any charts, diagrams, graphics, schedules or summaries of evidence produced at the trial;
>
> (d) any other document that in the opinion of the trial judge would be of assistance to the jury in its deliberations including, where appropriate, an affidavit by an accountant or other suitably qualified person summarising, in a form which is likely to be comprehended by the jury, any transactions by the accused or other persons which are relevant to the offence.

The provision will apply to any offence being tried on indictment other than an offence to which certain stated provisions apply, including section 57 of the *Criminal Justice (Theft and Fraud Offences) Act 2001* and section 10 of the *Competition Act 2002*.

The effectiveness of transcripts

A 2018 report by the Scottish Government, Methods of conveying information to jurors: evidence review provided a comparative review of the use of information to identify methods by which juror recall and understanding of evidence and directions might be enhanced, and to evaluate both the empirical evidence (i.e. the academic literature) relating to these methods' effectiveness and the extent to which they have been adopted in other jurisdictions. The report was not strongly supportive of the use of transcripts, noting that

> "There is only a limited body of evidence on the effectiveness of trial transcripts and it is not especially convincing. One relatively realistic mock jury study found that a trial transcript was helpful in assisting jurors to remember the evidence led in the trial, but that jurors' own notes did so equally well. The reason for this may be that a full transcript –especially one provided in paper copy –is difficult to navigate. This difficulty will be much greater in the context of a real trial, which will be considerably longer than any simulation. Producing a full

> transcript quickly after the conclusion of the trial, so as not to delay jury deliberations, also poses considerable challenges."[47]

It must be noted that this refers to the provision of full transcripts of the trial, and is not necessarily reflective of the efficacy of the provision of select transcripts, as proposed in section 12 of the Bill. The production of transcripts of select parts of the trial may possibly be helpful to juries, and would not be overwhelming or difficult to navigate in the way that full transcripts might be. However, as one of the primary aims of the Bill is the reduction of delays in criminal trials, some consideration may be given to the extent to which the production of transcripts might delay proceedings.

On the topic of written directions, a UK Ministry of Justice Research report entitled Are Juries Fair?,[48] considered the provision of a written summary of the judge's directions on the law given to jurors at the time of the judge's oral instructions improved juror comprehension of the law.[49] On this topic, the Law Reform Commission refrained from making any specific recommendations, though they did make reference to studies that showed positive outcomes when such directions are used. The Commission ultimately suggested that provision be made for empirical research into various matters including juror comprehension

[47] Methods of conveying information to jurors: evidence review, April 2018.

[48] Dr Cheryl Thomas, Are Juries Fair?, UK Ministry of Justice Research Series 1/10 (2010).

[49] "When jurors had written directions, 60% of those who said the directions were extremely easy to understand correctly identified both legal questions; when jurors only received oral directions only 34% of those who said the directions were extremely easy to understand correctly identified both legal questions."

Principal provisions

Part 1 of the Bill provides for short title, commencement and definitions, as set out in the table of provisions.

Part 2 – Preliminary Trial Hearings

Part 2 of the Bill provides for preliminary trial hearings, which is the primary purpose of the Bill.

Sections 3, 4 and 5 provide for the interpretation and application of Part 2 of the Bill.

Section 3 provides for the definition of certain terms for the purposes of this part, as set out in the table of provisions. The section also provides that, where appropriate, the reference to a person being sent forward for trial includes those being sent for trial to, or charged before, the Special Criminal Court, and reference to the trial of an offence includes retrials.

Section 4 provides that Part 2 applies to trials on indictment and will apply to matters where the trial has not yet commenced.

Section 5 defines a 'relevant office' for the purposes of preliminary hearings. This is an offence which carries a potential penalty of

i. imprisonment for life,
ii. a maximum term of imprisonment of 10 years of more, or
iii. is an offence which has been specified as a relevant offence by the Minister for Justice in an order.

The procedure for the making of such an order are set out in sub-sections (2) to (4). The purposes for which the Minister may make such an order are:

i. facilitating the just, expeditious and efficient conduct of the trial, and in particular the avoidance of delays,
ii. preventing the disruption to juries and witnesses that would arise if no preliminary hearing was to be held, or
iii. reducing the impact on the victims of such indictable offences

In making such an order, the Minister must take into account:

i. the nature of the offence,
ii. any relevant complexities that may arise in the prosecution of such an offence.

Section 6 provides for the general power of a court to hold a preliminary hearing. The trial court may hold one or more preliminary hearings if the court is satisfied that such a hearing:

i. would be conducive to the expeditious and efficient conduct of the proceedings, and
ii. is not contrary to the interests of justice.

If an accused is charged with a relevant offence, a preliminary hearing must be held if such a hearing is requested by either the prosecution or defence, and such a hearing has not yet been

held in the matter. A preliminary trial hearing may be held at any time before the jury is sworn in or, in the case of matters before the Special Criminal Court, before the trial commences.

When determining the timing of a preliminary hearing, the trial court must ensure that the timing

is likely to

i. facilitate the expeditious and efficient conduct of the proceedings,
ii. result in the least disruption to the jury and witnesses; and
iii. best protect the interests of the victim

The court must also have regard to the interests of justice and the course of action that is likely to achieve the purposes of the Bill. The trial court may direct that the preliminary hearing be held as close in time to the trial date as are appropriate in the circumstances. If the court thinks it appropriate, the accused can be arraigned[50] at the preliminary hearing.

Section 6(7) provides that the trial court may, at a preliminary hearing, assess certain specified matters and make orders or rulings as it considers appropriate. The matters that may be assessed include

i. the availability of witnesses for the trial;
ii. whether any particular practical measures or technological equipment may be required for the conduct of the trial;
iii. the extent to which the trial is ready to proceed (including whether there are any outstanding issues relating to disclosure); and
iv. the likely length of the trial.

Section 6(8) sets out the types of order or decision of the court that can be made at a preliminary hearing.

Section 6(17) provides that a party who wishes to seek an order under subsection 6(8), shall inform the court of this at the first available opportunity.

The trial judge may make any orders that they deem appropriate, in the interests of justice, relating to the conduct of the preliminary trial hearing. It will not be necessary for the same judge who presided over a preliminary hearing to then preside over further preliminary hearings or the trial of the offence. However, where a preliminary hearing has been held, the court may direct that the same judge who presided over the preliminary hearing shall preside over the trial and any subsequent preliminary hearings. This will not apply if the presiding judge/s are not subsequently available, or there is another good reason as to why this provision would not apply.

Where an order is made at a preliminary trial hearing, that order shall have binding effect and will, if appropriate, have effect as though it was made in the course of the trial. Such an order may be appealed following the conclusion of the trial, and the order may be varied or discharged by the trial court. The prosecution or accused may only make an application to vary or discharge an

[50] Arraignment is the process at the beginning of a criminal trial whereby the prisoner is called to the bar by naming him, the indictment is read to him and he is asked whether he is guilty or not.

order unless there has been a material change in circumstances relevant to that order. Nothing in section 6 affects the accused's right to appeal against their conviction.

Section 6 is without prejudice to the trial court's power to deal with matters in sub-section (7) or make orders referred to in sub-section (8). Further, the trial court holding a preliminary trial hearing will enjoy the same powers that it would hold in conducting the trial.

A legal aid certificate covering the person's trial also covers any associated preliminary trial hearings.

Section 7 provides for appeals of certain orders made at preliminary trial hearings. Sub-sections (1) and (2) states that where, at a preliminary hearing, the trial judge makes an order excluding evidence, the prosecution may appeal the order on a question of law. The erroneously excluded evidence must be reliable, of significant probative value and, if considered with other relevant evidence to be adduced, the court would likely lead to a finding of guilt.

The appeal must be made within 28 days, or within a possible period of 56 days on application to the Supreme Court or Court of Appeal. If the accused fails to appear before these courts the relevant court may proceed to hear and determine the appeal in the accused's absence.

The Supreme Court or Court of Appeal may assign counsel to argue in support of the exclusion of evidence.

Sub-sections (7), (8) and (9) provide for legal aid in relation to an appeal under this section.

Section 8 provides that where the trial court makes an order at a preliminary hearing excluding evidence from the trial, and this order is appealed under section 7, the trial shall not proceed until the section 7 appeal is determined or withdrawn.

Section 9 provides for the power to exclude the public from a preliminary trial hearing. Generally, a preliminary hearing is to be heard in public but the trial judge may, in the interests of justice or due to the nature of the case, exclude the public, a portion of the public or particular persons from the court during the hearing. *Bona fide* members of the Press are not to be excluded. This section is without prejudice to the rights of parents, relatives, friends or support workers of a party to remain if this is provided for by other legislative provisions.[51]

Section 10 provides that preliminary trial hearings, and appeals under section 7, are not to be published or broadcast before the conclusion of the trial. The Bill's explanatory memorandum notes that this is included "in part to prevent possible contamination of the jury pool, where, for example inadmissible evidence might be discussed at such a hearing, before the jury is sworn in." Some limited exceptions are provided for.

Section 11 provides that the rules of court may make provision to give further and better effect to Part 2 of the Bill.

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[51] Section 20(4) of the *Criminal Justice Act 1951;* section 6 of the *Criminal Law (Rape) Act 1981*; section 8 of the *Criminal Justice (Female Genital Mutilation) Act 2012;* section 20 of the *Criminal Justice (Victims of Crime) Act 2017.*

Part 3 - Provision of Information to Juries

Section 12 provides for the provision of information to juries. The section apples to any offence being tried on indictment other than an offence to which an enumerated list of legislative provisions apply. These include

(a) section 1078C of the *Taxes Consolidation Act 1997;*

(b) section 57 of the *Criminal Justice (Theft and Fraud Offences) Act 2001;*

(c) section 10 of the *Competition Act 2002*;

(d) section 56 of the *Central Bank (Supervision and Enforcement) Act 2013*;

(e) section 882 of the *Companies Act 2014*.

Sub-section (2) states that copies of any of the following documents or materials shall be given to the jury in any form that the judge considers appropriate:

(a) any document admitted in evidence at the trial;

(b) where such transcripts or audio recordings are available:

(i) the transcript of the opening speeches of counsel or an audio recording of such speeches;

(ii) the transcript of the whole or any part of the evidence given at the trial or an audio recording of such evidence;

(iii) the transcript of the closing speeches of counsel or an audio recording of such speeches;

(iv) the transcript of the trial judge's charge to the jury or an audio recording of such charge;

(c) any charts, diagrams, graphics, schedules or summaries of evidence produced at the trial;

(d) any other document that in the opinion of the trial judge would be of assistance to the jury in its deliberations including, where appropriate, an affidavit by an accountant or other suitably qualified person summarising, in a form which is likely to be comprehended by the jury, any transactions by the accused or other persons which are relevant to the offence.

Sub-section (3) provides that, before the prosecution or accused make an application to the court to give such documents referred to in sub-section 2(d) to the jury, they must first provide a copy of the document to the other party in advance of the application. The trial judge must take into account representations made by the either party relating to this application.

Sub-section (4) provides that the accountant or qualified person who provided an affidavit for the purposes of sub-section 2(d) must attend as an expert witness at trial, and may be questioned in relation to their report.

Part 4 – Amendments to certain Acts relating to criminal procedure

Part 4 provides for minor amendments to three Acts:

- *Criminal Procedure Act 1967*
- *Criminal Justice Act 1984*
- *Criminal Procedure Act 2010*

Some provisions propose amendments that are intended to clarify certain legislative provisions and others are proposed to amend legislation to account for the provisions of the Bill.

Criminal Procedure Act 1967

Sections 13, 14 and 15 amend the *Criminal Procedure Act 1967* (the 1967 Act).

Section 13 proposes to amend section 4A(5) of the 1967 Act, which states

> "(5) The accused shall not be sent forward for trial under subsection (1) until the documents mentioned in section 4B(1) have been served on the accused." (emphasis added)

It is proposed to substitute "in accordance with that section" for "on the accused". This clarifies that under section 4A(5), the Book of Evidence[52] may be served on the accused or their legal representative. This is already provided for in section 4B(1), (as referred to in section 4A(5)) which states: "the prosecutor shall cause the documents specified in paragraph (b) to be served on the accused or his or her solicitor". (emphasis added)

Section 14 proposes to amend section 4E of the 1967 Act to make provision for preliminary trial hearings. Section 4E provides for application by the accused for the dismissal of a charge. Section 4E(1) states that

> "At any time after the accused is sent forward for trial, the accused may apply to the trial court to dismiss one or more of the charges against the accused."

It is proposed to amend the section by including "Subject to subsection (1A)" before "at any time" and inserting a new sub-section (1A), which provides

> "Where—
>
> (a) a court makes a relevant order within the meaning of Part 2 of the *Criminal Procedure Act 2021* at a preliminary trial hearing (within the meaning of that Part) to the effect that evidence shall not be admitted at trial, and

52 A book of evidence is the documents required to be given to an accused being sent forward for trial, namely, (i) a statement of the charges against the accused; (ii) a copy of any sworn information in writing upon which the proceedings were initiated; (iii) a list of the witnesses the prosecutor proposes to call at the trial; (iv) a statement of the evidence that is expected to be given by each of them; (v) a copy of any document containing information which it is proposed to give in evidence by virtue Criminal Evidence Act 1992 Pt.II; (vi) where appropriate, a copy of a certificate under Criminal Evidence Act 1992 s.6(1); (vii) a list of the exhibits (if any): Criminal Procedure Act 1967 s.4B(1)(b) as substituted by Criminal Procedure Act 2010 s.37(b). (*Murdoch and Hunt's Encyclopedia of Irish Law*)

(b) the order is appealed under *section 7* of that Act, the accused may not make an application under subsection (1) to dismiss a charge to which the order relates until that appeal is determined or withdrawn.".

The new sub-section will have the effect that where an order is made during a preliminary trial hearing to exclude evidence, and that order is appealed under section 7 of the Bill, the accused may not make an application under section 4E(1) to have the charge dismissed until the appeal under section 7 is determined or withdrawn.

Section 15 proposes to amend section 4Q(2)(b), which relates to the jurisdiction of the Circuit Court to remand an accused to an alternative circuit. The proposed change is a minor technical amendment which deletes the phrase "4B(3) or (5)" from the sub-section. The sub-section states:

> "If the accused is remanded under this section to a sitting of an alternative court … a reference in section 4B(3) or (5), 4E or 4P to the trial court shall be read as a reference to the alternative court to which the accused is remanded".

The proposed amendment will delete the unnecessary cross-reference in this sub-section.

Criminal Justice Act 1984

Section 16 proposes to amend section 21 of the *Criminal Justice Act 1984* (the 1984 Act). Section 21 deals with the admission of written statements as evidence. Sub-section (2) sets out the conditions to be satisfied, if applicable, before a written statement can be admitted as evidence. Sub-section (3) provides that certain conditions[53] in sub-section (2) "shall not apply if the parties agree at the hearing or the parties or their solicitors agree before the hearing that the statement shall be so tendered."

It is proposed to include a new sub-section (3A) after sub-section 3:

> "(3A) Where a party ('the first-mentioned party') serves a notice pursuant to paragraph (d) of subsection (2) objecting to a statement being tendered in evidence under this section, the court may, at the hearing of the matter, on the application of the party who served, pursuant to paragraph (c) of that subsection, the copy of the statement to which the notice relates—
>
> (a) require the first-mentioned party to provide an explanation to the court of the reasons for serving that notice, and

[53] These are sub-sections 2(c) and (d), which state:

(c) a copy of the statement is served, by or on behalf of the party proposing to tender it in evidence, on each of the other parties to the proceedings; and

(d) none of the other parties or their solicitors, within twenty-one days from the service of the copy of the statement, serves on the party so proposing a notice objecting to the statement being tendered in evidence under this section.

> (b) where the court is satisfied, having taken into account the explanation provided in accordance with paragraph (a), that it is not contrary to the interests of justice to do so, direct that the statement be so tendered.",

It is also proposed to amend subsection (5)(b), by the substitution of "give evidence, including for the purposes of cross-examination" for "give evidence". Subsection (5) states

> "(5) Notwithstanding that a written statement made by any person may be admissible as evidence by virtue of this section—
>
> (a) the party by whom or on whose behalf a copy of the statement was served may call that person to give evidence, and
>
> (b) the court may, of its own motion or on the application of any party to the proceedings, require that person to attend before the court and give evidence." (emphasis added)

This amendment would allow the court to require the party objecting to the evidence being admitted in written form to give their reasons for doing so, and permit the court, having taken those reasons into account, to proceed to direct that the evidence be admitted, provided that this is not contrary to the interests of justice.

Criminal Procedure Act 2010

Sections 17 and 18 of the Bill propose to amend the *Criminal Procedure Act 2010* (the 2010 Act).

Section 17 proposes to of the 2010 Act.. Section 17 of the Bill proposes to amend section 23 of the 2010 Act, which allows the Prosecution to appeal an acquittal where it has come about because of the exclusion of certain compelling prosecution evidence from being admitted at trial.

Section 23 of the Act permits the Prosecution to appeal to the Court of Appeal (in the case of the Central Criminal Court, the Court of Appeal or the Supreme Court) on a point of law against an acquittal, or a decision of the Court of Appeal (not to order a re-trial where the original conviction was quashed) where:

> (a) a ruling was made during the trial or appeal hearing which erroneously excluded compelling evidence, or
>
> (b) a direction was given to the jury to find the person not guilty where –
>
> (i) the direction was wrong in law, and
>
> (ii) the evidence adduced in the proceedings was evidence upon which a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned.

Section amends section 23 in two ways. First, to take account of the existence of preliminary trial hearings. Sub-section (3)(a) of the 2010 Act provides

> (3) An appeal referred to in this section shall lie only where - (a) a ruling was made by a court
>
> > (i) during the course of a trial referred to in subsection (1), or
> >
> > (ii) during the hearing of an appeal referred to in subsection (2), which erroneously excluded compelling evidence, […]

It is proposed to amend the section to include the following subparagraph after subparagraph (i):

> "(ia) during the course of a preliminary trial hearing within the meaning of the *Criminal Procedure Act 2021* which was not appealed under *section 7* of that Act, or".

Secondly, it is proposed to provide that where there is a difference between evidence in the 'book of evidence' as it exists before the trial begins, and the actual evidence adduced during the trial, that the evidence as actually adduced is the version to be considered when deciding the threshold for these appeals.

Subsection 14 of the 2010 Act provides the following definition of compelling evidence for the purpose of an appeal under this section as

> (14) In this section "compelling evidence", in relation to a person, means evidence which—
>
> > (a) is reliable,
> >
> > (b) is of significant probative value, and
> >
> > (c) is such that when taken together with all the other evidence adduced in the proceedings concerned, a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned.

It is proposed to replace sub-section 14 with the following

> "(14) In this section—
>
> 'compelling evidence', in relation to a person, means evidence
>
> which—
>
> (a) is reliable,
>
> (b) is of significant probative value, and
>
> (c) is such that, when taken together with—
>
> > (i) all the other evidence adduced in the proceedings concerned, and
> >
> > (ii) to the extent that such evidence has not been adduced, the relevant evidence proposed to be adduced in the proceedings,
>
> a jury might reasonably be satisfied beyond a reasonable doubt of the person's guilt in respect of the offence concerned;
>
> 'relevant evidence', in relation to a person, means the proposed
>
> evidence—

(a) contained in such of the following as have been served on the person or his or her solicitor pursuant to section 4B or 4C of the Act of 1967:

(i) the documents specified in section 4B(1)(b) of that Act;

(ii) exhibits listed in the list of exhibits referred to in section 4B(1) (b)(vii) of that Act;

(iii) the documents specified in section 4C(1) of that Act;

(iv) the exhibits referred to in the list of exhibits referred to in section 4C(1)(g) of that Act,

or

(b) given in a videorecording of an interview made under section 16(1) of the Act of 1992, in relation to which the accused has been notified and given an opportunity of seeing the videorecording in accordance with section 15(1) of that Act."

Section 18 proposes to amend section 34 of the 2010 Act. Section 34 relates to expert evidence adduced by the defence. It is proposed to extend the notice which must be given before calling an expert witness to testify, either at a trial or a preliminary hearing, to 28 days, from the current period of 10 days, in order to allow the other party to prepare for their testimony.

Sub-section (2) of section 34 the 2010 Act states:

(2) Where the defence intends to call an expert witness or adduce expert evidence, whether or not in response to such evidence presented by the prosecution, notice of the intention shall be given to the prosecution at least 10 days prior to the scheduled date of the start of the trial.

It is proposed to replace this sub-section with the following provision

"(2) Where the defence intends to call an expert witness or adduce expert evidence, whether or not in response to such evidence presented by the prosecution, notice of the intention shall be given to the prosecution at least 28 days prior to—

(a) the scheduled date of the start of the trial,

(b) the scheduled date of a preliminary trial hearing (within the meaning of *Part 2* of the *Criminal Procedure Act 2021*), where the defence intends to call the expert witness or adduce the expert evidence, as the case may be, at that hearing, or

(c) such earlier date as the court may direct.",

The section also provides that a court can allow an expert witness to testify without the required notice where it is satisfied that the notice was not possible, or that it is in the interests of justice to allow the notice period to be waived.

Sub-section (5) of the 2010 Act currently provides

> (5) The court shall grant leave under this section to call an expert witness or adduce expert evidence, on application by the defence, if it is satisfied that the expert evidence to be adduced satisfies the requirements of any enactment or rule of law relating to evidence and that—
>
> (a) subsections (2) and (3) have been complied with,
>
> (b) where notice was not given at least 10 days prior to the scheduled date of the start of the trial, it would not, in all the circumstances of the case, have been reasonably possible for the defence to have done so, or
>
> (c) where the prosecution has adduced expert evidence, a matter arose from that expert's testimony that was not reasonably possible for the defence to have anticipated and it would be in the interests of justice for that matter to be further examined in order to establish its relevance to the case.

It is proposed to substitute the following paragraphs for paragraph (b)

> "(b) where notice was not given within the period specified in paragraph
>
> (a), (b) or (c), as the case may be, of subsection (2)—
>
> (i) it would not, in all the circumstances of the case, have been
>
> reasonably possible for the defence to have done so, or
>
> (ii) it is otherwise necessary in the interests of justice that the expert
>
> witness give evidence or the expert evidence be adduced,
>
> or".

Financial implications of the Bill

While there is some potential for costs associated with running of preliminary trial hearings in themselves, and the provision of legal aid for accused persons who are participating, overall, any such increase in expenditure is not expected to be significant, since many of these matters would inevitably have arisen in any case during the course of the trial. The introduction of preliminary trial hearings in criminal proceedings is likely to lead to significant efficiencies in the conduct of criminal trials and there is considerable potential for cost savings in this area.

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