DIRECTOR OF PUBLIC PROSECUTIONS AMENDMENT (DISCLOSURES) BILL 2011

Bill received from the Legislative Council and introduced.

Agreement in Principle

Mr GREG SMITH (Epping—Attorney General, and Minister for Justice) [5.43 p.m.]: I move:

That this bill be now agreed to in principle.

As the Director of Public Prosecutions Amendment (Disclosures) Bill 2011 was introduced in the other place on this day as a courtesy to the House I will give a truncated agreement in principle speech. The purpose of the bill is to amend the Director of Public Prosecutions Act 1986 to clarify the obligations of police officers in relation to disclosing material to the Director of Public Prosecutions where that material is subject to a claim of privilege, public interest immunity or statutory immunity. This amendment is urgently needed to address a decision of the Court of Criminal Appeal, handed down last week, which has thrown into doubt the disclosure practices currently operating between the NSW Police Force and the Director of Public Prosecutions.

Section 15A of the Director of Public Prosecutions Act 1986 presently provides that police officers investigating alleged indictable offences have a duty to disclose to the Director of Public Prosecutions all relevant information, documents or other things obtained during an investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person. Material subject to a claim of privilege or immunity is often highly sensitive. In some cases the information may relate to covert police operations and could include the identity of informer witnesses or undercover police officers. Police may make a claim of public interest immunity when they are of the view that the disclosure of material may jeopardise an investigation or endanger the life of a witness.

For many years it has been the practice in this State that in order to comply with requirements pursuant to section 15A in relation to material that is the subject of a claim of privilege or immunity, police have advised the Director of Public Prosecutions of the existence of this material but have not been required to produce it to the Director of Public Prosecutions. The Police Disclosure Certificate prescribed by the Director of Public Prosecutions Regulation 2010, which police are obliged to serve on the Director of Public Prosecutions as part of their disclosure obligations, is drafted in accordance with this practice. As I have said, the legislative amendment is needed following the decision of the Court of Criminal Appeal in the matter of *The Queen v Richard Lipton* handed down last week. In that matter the Court of Criminal Appeal said that in order to comply with their duty of disclosure, police are obliged to produce all relevant material to the Director of Public Prosecutions even where that material is subject to a claim of public interest immunity. This clearly differs from the present

practice, where police are obliged only to advise the Director of Public Prosecutions of the existence of such material.

In order to comply with the obligation outlined by the court there would need to be a significant change in the current practices of both police and the Director of Public Prosecutions. For example, police would be obliged to disclose sensitive material to the Director of Public Prosecutions as a matter of course. Further, it would likely add to the workload of the Office of the Director of Public Prosecutions as all sensitive material held by police in relation to prosecutions by the Director of Public Prosecutions would need to be examined and an assessment made as to its relevance. Under current practices the Office of the Director of Public Prosecutions does not have to engage in this process. I am advised by the Director of Public Prosecutions that if this change in practice is required, it would impact on a number of pending prosecutions, and would likely result in matters having to be adjourned while the Director of Public Prosecutions implemented the new procedures. It is for this reason that urgent legislative amendment is necessary to preserve the currently existing disclosure practices of both New South Wales police and the Office of the Director of Public Prosecutions.

I now turn to the main detail of the bill. Clause 1 of the bill amends section 15A of the Director of Public Prosecutions Act to provide that where police are in possession of relevant material that is the subject of a claim of privilege, public interest immunity or statutory immunity the police are not obliged to disclose that material to the Director of Public Prosecutions. Rather, the police are obliged to inform the Director of Public Prosecutions that such material has been obtained. Clause 1 also provides that these amendments will lapse on 1 January 2013. It is the intention that these amendments will suspend the decision in *The Queen v Richard Lipton* and allow existing practices to continue for a transitional period. This will provide the Director of Public Prosecutions and police with time in which existing disclosure practices can be reviewed and adjusted. Clause 2 of the bill contains savings and transitional provisions that ensure the legislation has retrospective effect to ensure the integrity of all prosecutions presently on foot and those that took place before the bill came into effect.

As I have said, the bill simply brings the legislation into line with the practices that have been in operation in this State for many years. The transitional provisions will ensure that things done by the prosecution as if these amendments had been in place will be taken to have been validly done. Police rely on the Crown Solicitor for advice on immunity questions. A particular group in the Office of the Crown Solicitor does that work but the Office of the Director of Public Prosecutions has no equivalent group. Whilst those in the Office of the Director of Public Prosecutions may have a general knowledge of public interest immunity questions and other privileges, it would take considerable time for them to work up to the ability and knowledge of those in the Office of the Crown Solicitor. Nor would it be appropriate for the Office of the Crown Solicitor to be making decisions on relevance, and matters of that sort, when it does not have the conduct of a case or other material produced in preparation for trial. I commend the bill to the House.

The ASSISTANT-SPEAKER (Mr Andrew Fraser): Before I call the next speaker I draw the attention of members to the presence in the public gallery of Mr Peter Annis-Brown, Executive Officer, Northern Inland Academy of Sport, and athletes Alex McKenzie, Sam Ellerton and Hannah Clarke. Welcome to the Parliament of New South Wales and congratulations on your sporting achievements. Well done.

Mr PAUL LYNCH (Liverpool) [5.49 p.m.]: I lead for the Opposition on the Director of Public Prosecutions Amendment (Disclosures) Bill 2011. The Opposition does not oppose the bill or the speed with which it has been dealt with in the other place and is being dealt with in here. The objects of the bill are said to be to amend the Director of Public Prosecutions Act 1986 to ensure that police officers investigating alleged indictable offences are not required to disclose to the Director of Public Prosecutions information documents or other things obtained during the investigation that are the subject of a bona fide claim of privilege, public interest immunity or statutory immunity. In such a case police officers will only have a duty to inform the Director of Public Prosecutions that they have obtained information, documents or other things of that kind.

I point out that on occasion the Opposition and I have complained about matters being dealt with with unnecessary haste and alacrity in this place. I specifically do not say that about this piece of legislation and the course that has been followed by the Government. There are two reasons: The first is that the need for this legislation has clearly arisen suddenly as a result of a Court of Criminal Appeal decision on 17 November in the case of Lipton, and the second is that the legislation is designed so that there is effectively a sunset clause, which will mean there is a 12-month period in which to give further consideration to it. I would apprehend further legislative change at the end of that time.

The core of the issue is the Court of Criminal Appeal decision that New South Wales police do not satisfy their obligations of disclosure to the Office of the Director of Public Prosecutions by simply indicating that there is material over which the police claim public interest immunity. Their obligation of disclosure arises under section 15A of the Director of Public Prosecutions Act 1986. The effect of the decision is that the police are now obliged to provide such material to the Office of the Director of Public Prosecutions, which then has to make an assessment as to whether or not the material is relevant and should be disclosed. The disclosure certificate that has been involved is thus, in relation to the Court of Criminal Appeal decision, regarded as inconsistent with the Director of Public Prosecutions Act and invalid in a material respect.

I must say I have considerable sympathy for the regime that the Court of Criminal Appeal has now imposed on the administration of justice and in the operation between the police and the Director of Public Prosecutions. I find the logic of what the court said quite attractive. The reality, however, is that that is not the way the system is operating presently and if the system in accordance with the court's ruling were to be imposed now potentially thousands of cases would have to be dealt with differently, and inevitably would at best be delayed, which is not

just extraordinarily inconvenient but adds to costs and frankly would render the administration of justice a bit of a shemozzle. Whilst I have some sympathy with what the Lipton decision has done, in practical terms it seems to me what is being proposed here is the only real way of dealing with the issue.

Of course, there is the additional saving aspect that because there is a sunset period and it is for only a limited time there is then an opportunity for the director's office, the Government and the police to consider what the Court of Criminal Appeal said and how that might be implemented in a more practical way. I note from the way the Attorney put the case earlier that that may well be what is going to happen. It seems as though there is a concession that perhaps there should be a move in the direction of the court's decision. In practical terms I think this is the only commonsense option available, and for that reason the Opposition supports the bill. We certainly do not oppose the haste in dealing with it.

Mr STUART AYRES (Penrith) [5.53 p.m.]: I will make a brief contribution to the Director of Public Prosecutions Amendment (Disclosures) Bill 2011. As the Attorney General indicated, there is a degree of urgency. The main purpose of the bill is to amend the Director of Public Prosecutions Act 1986 to make further provision for the duty of disclosure imposed on police officers investigating indictable offences. The amendments will ensure that police officers investigating alleged indictable offences are not required to disclose to the Director of Public Prosecutions information, documents and other things obtained during the investigation that are the subject of a bona fide claim of privilege, public interest immunity or statutory immunity. In such a case police officers only have a duty to inform the Director of Public Prosecutions that they have obtained information, documents or other things of that kind.

These amendments are being made because last Thursday the Court of Criminal Appeal handed down a decision in the matter of *Regina v. Richard Lipton* [2011] NSWCCA 247. In that matter the Court of Criminal Appeal considered the duties of disclosure both of police and the Director of Public Prosecutions. The court held that the duty of the Director of Public Prosecutions to disclose all relevant material obliges the director to form a view about whether sensitive material is relevant to an issue in the case. Mere advice that the police hold this material without the director knowing what it entails is insufficient for the director to form a view about the relevance of the material.

The court further held that section 15A of the Director of Public Prosecutions Act obliges the police to disclose, in the sense of produce, to the director the sensitive material so that this determination can be made. That decision requires police to disclose material which is subject to a claim of immunity in a different way from the practice that has been in place between the police and the director for many years. The Director of Public Prosecutions has requested amendments to avoid delaying the prosecution of current matters and to provide him with time to review disclosure practices.

The Lipton decision has the potential to affect many cases currently being prosecuted by the

Director of Public Prosecutions. A review would have to be undertaken by the director to determine what cases are affected and then an inspection made by the Director of Public Prosecutions case officers of the documents held by police. It must also be remembered that the prosecution disclosure obligation is ongoing. That means that this decision would affect not only cases coming up for trial but also cases that are waiting for sentence or are on appeal. The purpose of these amendments is to temporarily suspend the effect of the decision in the Lipton case to provide the police and the Director of Public Prosecutions with the opportunity to review disclosure practices and agree on a revised disclosure practice. They are some of the reasons for the urgency attached to the bill. I will deal with other matters in reply.