PROOF

CRIMINAL PROCEDURE AMENDMENT (SUMMARY PROCEEDINGS CASE MANAGEMENT) BILL 2011

24 November 2011 Page: 1

Bill introduced on motion by Mr Greg Smith.

Agreement in Principle

Mr GREG SMITH (Epping—Attorney General, and Minister for Justice) [10.04 a.m.]: I move:

That this bill be now agreed to in principle.

The Government is pleased to introduce the Criminal Procedure Amendment (Summary Proceedings Case Management) Bill 2011. One of the Government's goals is to improve community confidence in the justice system, and one way of doing that is to improve the efficiency of the court system. Some cases are beset by problems of delay and unnecessary costs. The bill aims to reduce those problems in summary criminal proceedings in the Supreme Court and in the Land and Environment Court.

In 2009 case management reforms were enacted in respect of a different type of proceedings—proceedings for indictable criminal offences. The aim was to halt the trend towards increasingly lengthy criminal trials, especially jury trials, by giving courts the capacity to manage more effectively the way trials are run. We did not oppose the passage of the Criminal Procedure Amendment (Case Management) Act 2009, which brought in those reforms. The 2009 reforms were based on the work of the Trial Efficiency Working Group, which comprised members of the judiciary and senior representatives of the legal profession—from both sides of criminal practice—and various government and non-government bodies. The working group was chaired by the Chief Judge at Common Law, Justice McClellan.

The bill will extend the 2009 reforms—beyond proceedings for indictable offences—to apply also to summary criminal matters in the higher courts, including sentencing proceedings. Problems of unnecessary delay and expense have been identified in some of these proceedings, especially in more complex matters. Apart from the financial implications, unnecessary delay and complexity in proceedings also imposes hardship on defendants and witnesses and can adversely affect the public's perception of the justice system. Some of the increase in the length of hearings can be attributed to scientific and technological advancements that have led to increasingly complex expert evidence. But some hearings take far longer than they should, not because of some unavoidable complexity in the evidence but because the parties have failed to narrow down the issues in dispute at a sufficiently early stage. This can result in inefficiency, including the presentation of evidence with little or no probative value, and difficulties in managing the hearing. That results in unnecessary costs and places a needless burden on the justice system and on the parties.

It is essential that the issues be identified before the hearing to allow it to proceed efficiently. The issues in dispute can be narrowed where each party is encouraged or required to disclose aspects of its case to the other before the hearing and to indicate, for example, which facts they agree on. The bill creates several mechanisms by which this can occur. The bill mirrors the 2009 reforms, with some adjustments to tailor it to the context of summary proceedings.

It provides for several different levels of case management. I turn now to the substantive items in the bill. Clauses 247D to 247F provide for the first level of case management. This involves a mandatory exchange of notices between the prosecutor and the defendant before the hearing. Prosecutors are already under an obligation at common law to disclose their case to the defence.

This bill clearly sets out that obligation, although it does not replace the common law. Among other things, the prosecutor's notice will include a statement of facts and copies of any documents and reports the prosecution proposes to adduce at the hearing. The defence is required to respond in a limited fashion only by stating the name of the defendant's lawyer and advising whether the defence proposes to consent to dispensing with the rules of evidence. The court has the discretion to determine the time frames within which these notices must be given. Many criminal matters are straightforward, such that no further case management will be needed beyond this initial exchange of notices. In many cases, intensive case management or preliminary disclosure could be an unnecessary burden. However, some proceedings will benefit from more intensive case management, due to the complexity of the relevant issues, the volume of evidence involved or for other reasons that are apparent to the court.

The next level of case management that will be available to the court takes the form of preliminary hearings and conferences. Clause 247G enables the court to order the prosecutor and the defendant to attend one or more preliminary hearings. At these hearings, the court will be able to make preliminary findings or give directions that are appropriate for the efficient management and conduct of the proceedings. This could include, for example, objections to the form of the charge, advance rulings on certain questions of law, and rulings on evidentiary questions. If a preliminary hearing is held and certain matters are not raised or are dealt with at that preliminary hearing, the leave of the court will be required before those matters can be raised in the principal proceedings.

This aims to prevent the re-ventilation of matters that have already been dealt with and to encourage the parties to focus their minds, at an early stage, on the issues in dispute. Clause 247H gives the court the power to order that the prosecutor and the defendant's legal representative attend a preliminary conference for the purpose of reaching agreement about the evidence that will be admitted. After a preliminary conference, the prosecutor and the defendant's legal representative will file a preliminary conference form indicating the areas of agreement and disagreement. If the form records an agreement that certain evidence is not in dispute, a party cannot later object to the admission of that evidence unless the court grants leave.

At present, in some complex cases where the issues are not narrowed down, the case must proceed as if every point is in dispute. This results in the prosecution spending public resources and wasting time preparing to run aspects of the case that are ultimately not in dispute. Witnesses may be called where their evidence is not really in question and put to unnecessary inconvenience. All this may make the hearing longer and more complex than it needs to be, and there is unnecessary cost and delay for everyone involved. To deal with this problem, the bill provides, at the highest level of case management, for the court to order additional preliminary disclosure where the court is of the opinion that it is in the interests of the administration of justice to do so. Such orders may be appropriate, for example, in more complex matters.

This court-ordered preliminary disclosure requires the prosecution and the defence to exchange information with a view to narrowing down which aspects of a case the court will need to determine and which aspects are not in dispute. What must be disclosed when the court orders this higher level of preliminary disclosure? Under clause 247J, the preliminary disclosure requirements for the prosecutor include the matters they were required to disclose at the initial exchange of notices, which may need to be updated, any material they have that is adverse to the defendant's credibility, and a list identifying the evidence of the prosecution witnesses.

The matters that must be included in the defendant's notice are set out in clause 247K. The defence will be required to identify those parts of the prosecution case, as outlined in the initial prosecution notice, that are in dispute. The defence notice must also set out any objections to the admissibility of the prosecutor's evidence, s well as any issues the defence proposes to raise in relation to the corroboration of the prosecutor's surveillance evidence, the accuracy of transcripts, the chain of custody of exhibits, the authenticity or accuracy of documentary evidence or exhibits, the form of the initiating process, the severability of charges or the separation of hearings for different charges. The defence notice must also include a copy of any expert report prepared by any expert witness for the defence.

Preliminary disclosure orders cannot be made in respect of unrepresented defendants, since the defence's response to an order for disclosure may limit the issues the defence may later raise. The contents of the defence response may necessitate a further response by the prosecution, including whether the prosecution intends to dispute the admissibility of the defendant's evidence. Clause 247U makes clear that there is no need to disclose matters that have already been disclosed. In order to create an incentive for the parties to focus carefully on the issues in dispute, various mechanisms will be available to the court to confine the parties to the issues raised at the stage of preliminary disclosure.

First, clause 247M allows the court to dispense with the prosecutor's obligation to formally prove a fact that is alleged in their initial notice, where preliminary disclosure was ordered and the defence did not dispute that matter. Further, the court may order that evidence cannot be led to contradict or qualify the relevant fact alleged by the prosecutor. This aims to encourage the proper compliance by both the prosecution and defence with the disclosure provisions of the Act. Second, clause 247M also deals with the situation where the prosecution discloses its evidence to the defendant and the defendant does not contest the admissibility of that evidence at the stage of preliminary disclosure. In those circumstances, the court may allow the prosecutor to adduce that evidence without complying with certain requirements of the Evidence Act 1995, including, for example, the rules about cross-examination, hearsay, and opinion.

Third, clause 247N enables the court to refuse to admit evidence where it has earlier made an order for preliminary disclosure and where a party did not provide the evidence at that stage. For the defendant, this will only apply to expert evidence that was not provided to the other party in accordance with an order for preliminary disclosure, and only where the prosecutor has complied with its obligation of disclosure. These powers underpin the effectiveness of the enhanced disclosure regime and will help to ensure that the focus of the hearing itself is on the issues and evidence that are really in dispute. I note that clause 247M also permits the court to allow the evidence of two or more witnesses to be adduced as a summary if this will not be misleading or confusing and will not result in unfair prejudice to a party. This may be useful, for example, where multiple investigators have conducted surveillance over some

weeks.

The higher tiers of case management are available regardless of whether one or both of the parties has failed to comply with the lower tiers, although it is open to the courts to use the provisions in this fashion. Where it becomes apparent that a case would benefit from preliminary disclosure, the court can make relevant orders without first needing to conduct preliminary hearings or conferences. In addition to these preliminary measures, clause 247V gives courts a general power to manage the hearing. The power will allow the court to make such orders, determinations and findings, or give directions or rulings as it thinks appropriate for the efficient management and conduct of the hearing. This includes ordering any of the parties to make disclosures that could have been required under the proposed division before the commencement of the trial or sentencing hearing.

Clause 247X creates a number of miscellaneous provisions, including clarifying that the Act is not intended to limit any common law disclosure requirements, or the requirements of other legislation, rules of court, and prosecution guidelines. Even where the court orders preliminary disclosure under clause 247I, the common law or other sources may require a higher level of disclosure than that prescribed in this legislation. It is not the intention of the bill to limit the operation of such requirements. The bill only prevails over such requirements where it is impossible, or impracticable, to comply with both. Clause 247W provides that all orders made during the course of proceedings will be binding on a judge who later hears the proceedings, unless it would not be in the interests of justice for the order to be binding.

I turn now to impacts on defendant's right. The improvements in the efficiency of the court system should not come at the expense of unfairness to defendants. The extent to which this bill impacts on defendants is limited in several ways. First, the pre-hearing disclosure provisions are not designed to be applied in every case. They are designed so that the courts can employ them where appropriate. A court may consider these provisions appropriate, for example, in the more complex cases, or cases that could lead to a lengthy hearing.

Secondly, even if prehearing disclosure is ordered, the defendant retains control of whether to agree with the prosecutor on any aspect of its case. The defendant may still choose to object to all matters in the prosecution's notice and retains the right to require the prosecutor to prove all aspects of the case. Finally, the consequences that flow from a failure by the defence to identify an issue at prehearing disclosure will only apply where the court decides in its discretion that this should be the case. The court would be unlikely to confine the defence to its position as at preliminary disclosure if it considered this to be unjust to a defendant.

In conclusion, this bill aims to reduce unnecessary delay and costs in the preparation for, and conduct of, hearing and sentencing proceedings in summary matters in the higher courts. I know that members opposite are interested to ensure that unnecessary delays and costs are not incurred, because this State does not have a lot of money to spend on lengthy cases. I m advised that more than 6,000 criminal cases are on the books at the moment. This is a separate section; it deals with summary matters.

The bill will reduce delay and costs by introducing a number of mechanisms that will give those involved the means to identify and resolve issues at the beginning of a matter rather than during the trial or sentencing proceedings. This will also assist judges to manage the proceedings by increasing their capacity to be informed of the relevant issues at an early

stage. Used properly, the provisions of this bill provide an opportunity to reduce hardship to parties and to witnesses, to prevent unnecessary costs and to allow parties and the court to spend their time and money on what really matters—that is, on those issues that are genuinely in dispute. The bill represents the Government's commitment to a form of justice in which the real issues in dispute are determined without undue delay or expense. I commend the bill to the House.

Debate adjourned on motion by Mr Paul Lynch and set down as an order of the day for a future day.