Agreement in Principle

Mr BARRY COLLIER (Miranda—Parliamentary Secretary) [11.24 a.m.]: I move:

That this bill be now agreed to in principle.

The Government is pleased to introduce the Criminal Procedure Amendment (Case Management) Bill 2009, which will make significant changes to the way criminal trials are run in the higher courts of New South Wales. Recent figures from the Productivity Commission indicate that New South Wales criminal courts lead the nation in the timely completion of criminal matters. However, there are indications that criminal trial durations in the State have been trending upwards in the last 10 years. This general upward trend in New South Wales is not of itself a cause for concern. The duration of criminal trials has increased drastically in all Australian jurisdictions in recent decades. Gone are the days when a murder trial could be conducted in under a week. For the most part, there are good reasons for this. Advances in technology have resulted in forensic evidence that is greater in both volume and complexity than in years gone by, and the rapid adoption of electronic communication in the last 20 years has resulted in an exponential increase in the amount of electronic evidence that is adduced in criminal trials.

However, not all causes of increased trial durations can be said merely to reflect scientific progress, and steps should be taken to provide mechanisms to minimise unnecessary delays in trials, whatever their cause. Further, steps should be taken to manage the impact of the volume of technical evidence on the duration of criminal trials, as this volume is only likely to increase with further advances in technology. With these issues in mind, the Government formed the Trial Efficiency Working Group, made up of members of the judiciary and senior representatives of the legal profession from both sides of criminal practice, and government and non-government bodies, to consider the causes of delay in criminal trials and to propose possible solutions. This bill seeks to implement those recommendations of the working group that require legislative change, and is the result of discussion and agreement between the Chief Judge at Common Law of the Supreme Court of New South Wales, the Chief Judge of the District Court, the Director of Public Prosecutions, and the Senior Public Defender on the best way to give effect to those recommendations.

The bill replaces part 3, division 3 of the Criminal Procedure Act 1986, which contains provisions relating to pre-trial disclosure in complex trials, with new provisions that provide for multiple tiers of case management. The first level is the mandatory exchange of notices between the prosecution and defence prior to the commencement of the trial. These notices will comprise non-sensitive information about each party's case, and in most matters no further case management will be required beyond the exchange of notices. The amendments recognise that the majority of criminal trials do not require substantial case management. Most trials are straightforward affairs and it is not the intention of the Government to impose unnecessary red tape on comparatively simple cases. Rather, the focus is on those criminal trials that would benefit from pre-trial case management, due to the complexity of the relevant issues, the volume of evidence involved, or for other reasons that are apparent to the courts.

In less straightforward matters the court will be able to order intermediate levels of case management, in the form of pre-trial hearings and pre-trial conferences. The purpose of the hearings and conferences will be to determine issues such as the admissibility of evidence prior to the empanelment of the jury. At the highest level of case management courts will be able to order pre-trial disclosure, requiring the defence to give a more detailed response to the initial prosecution notice. This response will not require the defence to disclose its case, although the defence will be required to identify those parts of the prosecution case as outlined in the initial prosecution notice that are in dispute, and the prosecution evidence that will be the subject of an objection, among other things.

Courts may refuse to admit evidence where it was not disclosed to the other party in accordance with the requirements for pre-trial disclosure. Similarly, courts may refuse to admit evidence from an expert witness where a copy of a report by the expert witness was not provided to the other party in accordance with the pre-trial disclosure requirements. Where a court allows the admission of such evidence, and doing so would prejudice the case of the other party, the court may grant an adjournment to the affected party. A court is currently able to order a similar form of pre-trial disclosure under section 136 of the Criminal Procedure Act where, having regard to the likely length of the trial, the nature of the evidence to be adduced at the trial, or the legal issues likely to arise at the trial, the court is satisfied that the trial will be complex.

In practice, however, the provisions were very rarely invoked, particularly in the District Court, and the working group formed the view that the test for identifying complex criminal trials was unnecessarily restricting the application of section 136. A key distinction of the new pre-trial disclosure provisions will be that a court will be able to order them in any case where it would be in the interests of the administration of justice to do so, rather than applying the existing complex criminal trial test. The higher tiers of case management do not merely represent escalating responses to failures by one or both of the parties to comply with the lower tiers, although it is open to the courts to utilise them in this fashion. Where it becomes immediately apparent to the court that a case would benefit from pre-trial disclosure, it will be able to make relevant orders without first needing to

conduct pre-trial hearings or conferences.

In addition to these pre-trial measures, courts will be given a general power to manage the trial on or after its commencement. 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 trial. This will include making orders for disclosure that were made or could have been made prior to the commencement of the trial under the proposed amendments. Unexpected and unnecessary delays can arise during the course of a trial, whether due to the nature of the evidence involved, the conduct of the parties, or other factors. This power will allow a judge to deal with these situations regardless of whether pre-trial case management was ordered in that case.

The aim of the bill is to increase the efficiency of the trial process and it does so 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 itself. This will also assist members of the judiciary in undertaking their role in the trial by allowing them to be informed early in the trial process of the relevant issues. For these efficiencies to be achieved it will need the profession to embrace the changes and fully utilise the procedures that have been made available. In this regard, the Attorney General has been greatly assisted by the Trial Efficiency Working Group, which has assisted in identifying what can usefully be introduced and used by the profession and the judiciary.

I will now briefly outline the more significant provisions of the bill. Schedule 1 [4] substitutes division 3 of part 3 of chapter 3 of the principal Act to set out a new scheme for the management of proceedings on indictment. Clauses 137 and 138 require the prosecutor, at a time to be specified by the judge at the first mention of the matter, to give the accused person notice of the prosecution case, and for the accused person to give a response to the prosecutor's notice. The court has been given the discretion to determine the time frames within which these notices must be given in order to provide them the flexibility to respond to the level of complexity of each matter. While the bill could have imposed specific time frames for compliance, this approach will allow judges the ability to impose a time frame, which accommodates the listing of a matter, thereby avoiding unnecessary delays.

The clauses also set out the matters that are to be included in the respective notices. Among other things, the prosecution notice will include a statement of facts, and copies of any documents and reports the prosecution proposes to adduce at trial. The defence response will include notice of any consents to be given under section 190 of the Evidence Act, and statements as to whether the accused intends to give a notice of alibi or a notice of intention to adduce evidence of substantial mental impairment. Clause 139 enables the court to order the prosecutor and the accused person to attend one or more pre-trial hearings. The court may make various orders and rulings during those hearings—for example, as to the admissibility of evidence or on questions of law that might arise at the trial—that will be binding on the trial judge unless, in the opinion of the trial judge, it would not be in the interests of justice for them to be binding. If a pre-trial hearing was held and certain matters were not raised at the hearing, the leave of the court will be required before those matters can be raised at the trial.

Clause 140 enables the court to order that the prosecutor and the accused person's legal representative attend a pre-trial conference for the purpose of reaching agreement regarding the evidence to be admitted at trial. This conference can be requested by the parties or be ordered on the court's own motion. After such a conference, the prosecutor and the accused person's legal representative will file a pre-trial conference form indicating the areas of agreement and disagreement, and departure from the agreements indicated in the form will not be permitted without the leave of the court, based on an interests of justice test. Clause 141 enables the court to order pre-trial disclosure on application of a party to the proceedings or on the court's own initiative if it is in the interests of the administration of justice to do so. Under clause 142 the pre-trial disclosure requirements for the prosecutor include the requirements imposed under clause 137, although the notice required under that section will need to be updated with any new material that has come to light since it was first provided.

In addition, the prosecution must provide the defence with any material in the prosecutor's possession that would be regarded as adverse to the credit or credibility of the accused person, and a list identifying the statements of those witnesses who are proposed to be called at the trial by the prosecution. The pre-trial disclosure requirements for the accused person are to provide a defence response in accordance with clause 143, including statements as to the facts alleged by the prosecution that the defence intends to dispute, and notice of certain matters that the defence intends to raise in relation to the evidence proposed to be adduced by the prosecution. This includes a broad requirement to give notice as to whether the admissibility of any proposed evidence disclosed by the prosecution will be disputed, and the basis for that objection.

Other requirements under clause 143 require the defence to give notice of more specific issues taken with material disclosed by the prosecution. In some circumstances there will be some overlap between the broad requirement to give notice regarding the disputed admissibility of prosecution evidence and the more specific requirements in clause 143. This is intentional. We have taken particular note of the issues that cause delays in criminal trials and we have taken steps to ensure that the parties in criminal proceedings will have to cast their minds to each of these issues. The contents of the defence response may necessitate a further response by the prosecution, including whether the prosecution intends to dispute the admissibility of evidence the defence

proposes to adduce.

Clause 145 enables the court to dispense with formal proof of certain matters in proceedings where the matters were not disputed in the course of pre-trial disclosure. Clause 145 (1) is of relevance to facts. The proposed section also enables the court to allow evidence of two or more witnesses to be adduced in the form of a summary in certain circumstances. Clause 146 enables the court to refuse to admit evidence that was not disclosed in accordance with the pre-trial disclosure requirements of the proposed division and to exclude expert evidence where a copy of the report of the evidence was not provided to the other party in accordance with those requirements. The court may also grant an adjournment if a party to proceedings seeks to adduce evidence not previously disclosed that would prejudice the case of the other party to the proceedings. The court cannot use its powers under the proposed section to prevent the accused person adducing evidence unless the prosecutor has complied with the pre-trial disclosure requirements.

Clause 149D provides that, with specified exceptions, the prosecutor is not required to disclose anything in a notice under the proposed division if it has already been included in the brief of evidence or otherwise provided or disclosed to the accused person. Similarly, the accused person is not required to include in a notice anything that has already been provided to the prosecutor. Clause 149E makes it clear that, on or after the commencement of the trial proceedings, the court may make orders, determinations or findings, or give directions or rulings for the efficient management and conduct of the trial, including ordering any of the parties to the proceedings to make disclosures that would have been required under the proposed division before the commencement of the trial.

Clause 149F creates a number of miscellaneous provisions, including clarification that the Act is not intended to limit any disclosure requirements currently imposed on the parties in a criminal trial by sources such as the common law, other legislation and rules of court, and the prosecution guidelines of the Office of the Director of Public Prosecutions. Even where the court orders disclosure under clause 141, 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 Act to limit the operation of such requirements. The Act will only prevail over such requirements where it is impossible, or impracticable, to comply with both.

Schedule 1 [3] substitutes section 130A of the principal Act to extend its application to all proceedings on indictment, not just sex offences. Further, all orders made during the course of a trial, not just pre-trial orders, will be binding on a subsequent trial judge. Currently section 130A of the principal Act provides that a pre-trial order made by a judge in certain sexual offence proceedings is generally binding on the trial judge in the proceedings unless it would not be in the interests of justice for the order to be binding. The impact of inefficient trials reaches beyond mere financial considerations. Unnecessary delays in criminal trials bring the jury trial system into disrepute, while placing intolerable burdens on juries, victims of crime, accused persons and witnesses. This bill represents the Government's commitment to minimise such delays. I have pleasure in commending the bill to the House.