

Crimes (Criminal Trials) Bill

EXPLANATORY MEMORANDUM

PART 1—PRELIMINARY

- Clause 1 sets out the purpose of the Bill.
- Clause 2 provides for the commencement of the provisions of the Bill.
- Clause 3 contains definitions of terms used in the Bill.

PART 2—PRESENTMENT TO BE FILED

- Clause 4 inserts new requirements concerning when a presentment must be filed by the prosecution. In all cases except sexual offence cases the presentment must be filed prior to the first directions hearing (which is dealt with in clause 5).

For sexual offence cases, the presentment must be filed 28 days prior to the trial, which is the same time as when the prosecution is required to serve its opening summary of its case against the accused. Currently, sexual offence cases are subject to more limited time frames than other cases: the trial must commence before the jury within three months of the committal. In all other cases the trial must commence within 12 months of the committal. The shortened time frames in sexual offence cases mean that a directions hearing may not be conducted prior to the trial.

This clause does not alter the law concerning the amendment of presentments once they have been filed, and the ability of the prosecutor to make and file fresh presentments in appropriate circumstances.

PART 3—PRE-TRIAL PROCEDURE

- Clause 5 provides that a directions hearing may be conducted if it is requested by the parties or required by the court. The clause deals with matters that may be addressed at the first and subsequent directions hearings.

The first directions hearing formalises the current practice which requires the accused to appear before the court at a fixed date following committal for trial, or after being directly presented for trial, to indicate his or her plea. Sub-clause (4) specifies the matters that may be addressed at the first directions hearing. The matters which the court can require information about at the first directions hearing are matters that will assist the court with case management.

Sub-clause (5) sets out the matters that may be addressed at any subsequent directions hearing. The subsequent directions hearing may be conducted immediately following the first directions hearing. The powers under sub-clause (5) are designed to enable the court to manage cases as effectively as possible, and to resolve as many issues prior to the trial as possible. The provision gives the court flexibility to cater to individual case requirements. Sub-clause (5)(h) enables the court to dispense with or vary requirements under the Bill where it is in the interests of justice to do so. For example, where an accused is not represented, the court may order that the disclosure required under the Bill may be effected orally.

Clause 6 sets out the form, and time frame, of prosecution disclosure that is required in standard trials. It is intended to apply where there is no post-committal conference, or where the court has not otherwise specifically directed the parties about alternative time frames and forms of pre-trial disclosure.

Sub-clause (2) sets out the matters that should be included in the summary of the prosecution opening. The summary should be a brief document outlining the prosecution case in sufficient detail for the defence to be able to respond and reveal which issues will be in dispute and which will not be in dispute at the trial. If the court considers that the summary of the prosecution opening does not adequately outline the issues, the court may order that the parties attend a directions hearing under section 5 and do any of the matters referred to in that section.

Sub-clause (3) details the matters that the prosecutor may seek to have admitted as evidence without further proof. The purpose of this provision is to ensure that where the physical appearance of a witness in court is not necessary, the witness will not be required to attend court. It gives the prosecution sufficient

discretion to ensure that if it is appropriate for the witness to attend to give evidence, even to prove formal matters, it is not prevented from exercising that discretion. However, if that is not necessary, then the provision means that witnesses will be informed significantly prior to the trial that they are not required to attend court.

Clause 7 sets out the form, and time frame, of defence disclosure that is required in standard trials. The defence must respond to the matters outlined in the summary of the prosecution opening and in the notice of pre-trial admissions. If the defence disputes any of the matters set out in the prosecution disclosure documents the defence must not only indicate that it disputes the matter, but also the reason why it disputes the matter. It is intended that the defence address those issues in a manner that ensures that it is clear to both parties and the court which issues will be in dispute in the trial.

Clause 8 provides that both the prosecution and the defence must restrict their openings to the matters outlined in their opening summaries as required under clauses 6 and 7, or such other matters disclosed pursuant to an order made at a directions hearing under clause 5, or to the matters disclosed and recorded at the post-committal conference. Because of the nature of the information recorded at the post-committal conference, it is not possible for that to be presented to the jury verbatim. Nor will the parties be required to present their openings to the jury using the same wording as the written summaries.

In exceptional circumstances a party may be permitted to include in his or her opening matters that were not disclosed, and in such exceptional circumstances, the relevant party would not be subject to any sanction for failure to comply with its obligations under the Bill. If a party's legal practitioner changes prior to trial, that alone will not be sufficient to constitute an exceptional circumstance. A change of legal practitioner, together with other factors, such as fresh evidence, may be sufficient to satisfy that requirement.

If a party intends to substantially depart from the matters it disclosed in the summary of its opening, the court may require that party to reveal the details of the proposed departure.

Clause 9 imposes an obligation on the defence to reveal specified details of any expert witness and the expert's evidence, where the defence intends to call the expert as a witness. The prosecution is already under a duty to provide the defence with the statement of any prosecution expert witness.

Clause 10 sets out the requirements for disclosing questions of law in standard cases prior to trial. The party who wishes to raise a legal issue for resolution prior to trial must inform the other party and the court at least 14 days prior to trial. The provision enables the parties to agree to deal with the matter entirely by written submissions. However, to utilise this procedure, the parties will be required to raise the issue at least 14 days prior to trial. If the parties have raised a matter at least 14 days before the trial, but cannot agree to deal with the matter by written submissions at least 10 days before the trial is due to commence, then they must inform the court that this is the case and a directions hearing will be conducted.

If a party becomes aware of a legal issue which requires resolution later than 14 days prior to trial, the party who wishes to raise the issue should, as soon as it becomes aware of the issue, apply to the court for a directions hearing.

Clause 11 sets out the grounds upon which a party may apply to have the evidence of a witness taken prior to trial. In most cases the defence will have had an opportunity to cross-examine a witness at the committal proceeding. If that opportunity has not been available, the defence may wish to cross-examine the witness in the absence of the jury. However, it is not appropriate for this to occur in all cases. Parties will not automatically be permitted to examine witnesses who were not examined at the committal proceeding, even where the magistrate refused to grant leave to examine the witness at that stage. A preliminary examination will only be permitted where there is a serious risk of an unfair trial if the defence is not given the opportunity to examine the witness in the absence of the jury.

This provision is intended to replace the use of the *Basha* enquiry (*Basha v R* (1989) 39 A Crim R 357).

PART 4—TRIAL

Clause 12 provides that the trial judge need not be the same judge as the judge who constituted the court at a directions hearing. The rulings made by a judge at a directions hearing will be binding upon the trial judge unless the trial judge considers that it is not in the interests of justice for the ruling to be binding at the trial.

Clause 13 makes it mandatory for the defence to present to the jury either its response to the prosecution opening, or the matters that the defence disclosed were in dispute at the post-committal conference.

This clause does not alter the current right of the defence to open its case at the close of the prosecution case. If the defence chooses to open at the close of the prosecution case, that opening is in addition to their response to the prosecution opening at the beginning of the trial.

Clause 14 provides that the judge may address the jury after the defence response, or at any other time it considers appropriate on the issues in the trial or the relevance of any matters outlined in paragraph (b), or both. This provision also permits the judge to address the jury on questions of law prior to the closing addresses of the parties.

Clause 15 This Bill does not prevent a party from introducing evidence at trial that was not disclosed prior to the trial. However, clause 15 provides that where a party intends to substantially depart from the matters disclosed, the party must seek the leave of the court to do so.

This provision also permits the trial judge to have regard to the matters disclosed by the defence under the Bill in determining whether or not to allow the prosecution to reopen its case. The provision does not limit the existing power of the court to allow the prosecution to reopen its case.

Clause 16 gives the trial judge or, with the leave of the court, a party, the power to make any comment to the jury, which the trial judge considers appropriate, about a party's departure from the case disclosed under the Bill, or a party's failure to comply with a requirement of the Bill. The comment must be relevant and must not be likely to produce a miscarriage of justice.

The provision identifies the types of comments that must not be made, and in that regard, draws on the existing law. Apart from the types of comments which must not be made (except in specified circumstances as outlined in sub-clause (3)), the judge is entitled to make any comment that he or she considers appropriate, so long as it conforms with sub-clause (2).

Inferences of guilt must not be drawn as a result of a departure by the accused, referred to in clause 15(1), except where such an inference can be drawn from a lie told by an accused under the existing law. Generally, only the credit of the accused's case will be diminished if an accused tells a lie. However, where a lie is deliberately told about a material issue because the accused perceives the truth to be inconsistent with innocence, the lie may be considered to have been made because of the accused's consciousness of guilt. In those circumstances, the judge may comment to the jury that, if it is satisfied about those factors, an inference of guilt may be drawn (*Edwards v R* (1993) 178 CLR 193 and cases following). In certain circumstances, a departure from the matters disclosed in accordance with the Bill, may amount to a lie.

Sub-clause (3)(b) concerns the failure to make any disclosure at all. It again draws on the existing law. It does not extend the existing law concerning inferences for a failure by the accused to comply with a requirement of, or order under, the Bill. The provision is designed to ensure that the legislation does not restrict the types of comments that the judge could make under the existing law. (*Weissensteiner v R* (1993) 178 CLR 217; *Jones v Dunkel* (1958–1959) 101 CLR 298 and cases following).

- Clause 17 requires the defence to state at the close of the prosecution case the names of the witnesses it will be calling to give evidence (excluding the accused).
- Clause 18 sets out some of the powers that the trial judge may exercise to control cross-examination during the trial. It is not an exhaustive statement of the trial judge's powers.
- Clause 19 sets out some of the materials which the trial judge may permit to be provided to the jury to assist its understanding of the issues in the case. Some of the material listed may include vexatious or inadmissible material. As such, the provision enables the

judge to permit the relevant document to be given to the jury in any form. That is, vexatious, inadmissible, or otherwise inappropriate parts of a document may be excised from the document, or the document may be otherwise altered as the judge considers appropriate.

This provision does not alter the character of the material submitted to the jury from that prior to the commencement of this section. It does not elevate the material to evidence if such material was not considered evidence prior to the commencement of the Bill.

- Clause 20 provides that evidence may be given in the alternative ways described in the clause where the judge considers it appropriate to do so.
- Clause 21 makes anything done pursuant to a directions hearing at an earlier trial applicable at any retrial of the accused unless in the opinion of the court to do so would not be in the interests of justice.

PART 5—GENERAL

- Clause 22 enables the court to extend or abridge the time frames under the Bill in appropriate circumstances.
- Clause 23 provides that if a party becomes aware that the time for which a jury is required has changed, that party must inform the sheriff as soon as possible.
- Clause 24 The court may make any order it thinks appropriate with respect to costs in certain circumstances, provided it gives the party against whom the order is to be made the opportunity to be heard. The court may specify by whom, to whom and to what extent the costs are to be paid. The court or a party may apply for costs.

Sub-clause (5) is designed to ensure that an indemnity certificate will only be granted to a party where the party has complied with its obligations under the Bill, even if the discontinuance or adjournment did not occur because of the party's failure to comply with its obligations under the Bill.

- Clause 25 provides that where a legal practitioner has caused costs to be incurred improperly by his or her client, including in certain defined circumstances, the court may make various orders with respect to costs unless a reasonable explanation is given by the legal practitioner.
- Clause 26 provides that costs may be paid either to the opposing party, or if the opposing party has not suffered a loss, to the Consolidated Fund.
- Clause 27 provides that a legal practitioner, who has been briefed or otherwise agreed to appear for an accused, must inform the court of his or her intention to appear in a trial at least 7 days before the day on which the trial is due to commence. Leave of the court must be granted to relinquish a brief or withdraw from an agreement to appear for an accused after that date, and if the relinquishment or withdrawal is unreasonable, as outlined, costs may be awarded against the legal practitioner.
- Clause 28 provides that if a legal practitioner fails to comply with the requirements of the Bill, a complaint may be made about the legal practitioner to the Legal Practice Board or the Legal Ombudsman.
- Clause 29 provides that a judge who made a ruling at an earlier trial or directions hearing is not prevented from being the trial judge at a subsequent related trial simply because the ruling is likely to be contentious in the later trial.
- Clause 30 deems that documents will be duly served on the defence when they have been served by registered post at the accused's legal practitioner's business address.
- This provision does not prevent service being effected by pre-paid post or document exchange. However, documents are only deemed served when they have been served by registered post.
- Clause 31 enables the Director of Public Prosecutions to brief a person to exercise any function or power of the prosecutor under the Bill.
- Clause 32 clarifies that certain other legislative provisions that are concerned with criminal trial processes are not affected by this Bill.

Clause 33 contains the transitional provisions for this Bill. The Bill only applies—

- to those cases in which an accused person is committed for trial after the commencement of the Bill; or
- to those cases in which an accused person is presented for trial after the commencement of the Bill, where the accused was not committed for trial before that commencement on the offence or on an offence not materially different from the offence on which the accused is presented for trial.

The **Crimes (Criminal Trials) Act 1993** continues to apply to all those cases where this Bill does not apply.

The provision also enables the parties to a trial, to agree that this Bill, or parts of this Bill, apply even if the provisions of sub-clause (1) do not apply. The parties can also agree about the extent to which the **Crimes (Criminal Trials) Act 1993** ceases to apply. If the parties agree and make a joint application to the court, the court may make an order to give effect to the parties' agreement.

PART 6—AMENDMENT AND REPEAL OF CERTAIN ACTS

Clause 34 amends the **Crimes Act 1958** so that applications for extension of time limits for the commencement of a trial may be made orally, without any supporting documentation (unless required by the court).

Clause 35 enables evidence that is obtained at an earlier trial on the same or a related offence to be used in a subsequent trial in appropriate circumstances. This brings evidence obtained at an earlier trial in line with evidence obtained by a magistrate at a committal proceeding, or under the **Coroners Act 1985**.

Clause 36 provides that whether prosecution disclosure for summary hearings in the Magistrates' Court is made pursuant to section 37 of that Act, or pursuant to clause 1A of Schedule 2 to that Act, the defence must disclose to the informant within the appropriate time frame, any statement of an expert witness it intends to call at the hearing.

The provision also imposes on a magistrate committing a defendant for trial the obligation to warn that defendant of his or her responsibility to make application for legal aid.

Sub-clause (2)(b) sets out the procedure for a post-committal conference. Post-committal conferences will be conducted whenever they are requested by the parties, unless there are significant reasons justifying the magistrate exercising his or her discretion not to do so. The post-committal conference will normally be conducted immediately following the committal. The purposes of the conference are outlined in the provision. If a post-committal conference record is prepared, it will bind the parties in the same way as does disclosure of documents prepared under clauses 5, 6 and 7 of the Bill. It is therefore necessary that the record contains sufficient detail to define the issues in dispute in a trial and provide the court with sufficient information for case management. If the court is not satisfied with the Magistrate's disclosure record, it can order the parties to attend court for a directions hearing to further define the issues in dispute.

The provision also enables the Magistrate to make a recommendation to the court that a directions hearing is required. If a directions hearing is conducted under section 5(5), the case is being individually case managed. The circumstances in which a Magistrate would make that recommendation include where the issues in the matter are too complex for standard disclosure provisions, where the parties are unlikely to cooperate, or where the case is likely to take longer than 10 days.

Clause 37 amends the **Sentencing Act 1991** so that the extent to which an offender has complied with, or failed to comply with, his or her obligations under the Bill can be taken into account in sentencing. This provision is intended to ensure that where an offender has cooperated and complied with the Bill, it should be considered in his or her favour when being sentenced. Where an offender has failed to comply with his or her obligations, the judge may regard this as demonstrating a lack of remorse when sentencing the offender.

Clause 38 repeals the **Crimes (Criminal Trials) Act 1993**.