



CRIMINAL PROCEDURE AND INVESTIGATIONS BILL 2015

EXPLANATORY NOTES

These notes are circulated for the information of Members with the approval of the Member in charge of the Bill, the Hon. Juan Watterson BA (Hons), ACA, MHK

INTRODUCTION

- 1.** These explanatory notes relate to the Criminal Procedure and Investigations Bill 2015. They have been prepared by the Department of Home Affairs in order to assist readers of the Bill. They do not form part of the Bill and have not been endorsed by the House of Keys.
- 2.** The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill.

SUMMARY AND BACKGROUND

- 3.** Should the Bill be passed by the branches, and receive Royal Assent, it is proposed its provisions would be brought in individually, or together, by Appointed Day Order. The Bill will not be brought into operation in its entirety until the regulations mentioned in clause 15 and the codes of practice mentioned in clauses 20 and 21 have been prepared, consulted upon and, in the case of the codes of practice, approved by Tynwald.
- 4.** In the light of the financial situation faced by the Island all areas of the public sector have found it necessary to evaluate their functions to see if they can either be performed more efficiently and cost effectively or dispensed with if the functions are no longer considered essential. However, the evaluation process has also encouraged consideration of whether public services that are essential can, in any event, be performed or delivered in different ways.
- 5.** This Bill relates specifically to procedures in relation to criminal justice. Whilst the proposals in the Bill are not related to financial efficiencies, they are nevertheless brought forward as part of a much wider review and reform of processes and procedures in the criminal justice system. The Criminal Justice Strategy (GD 2012/0061), received by Tynwald at its sitting in December 2012, had a sub-theme of Joined up Justice: Better: Faster: Simpler: Cheaper. The main issue the Bill addresses concerns the proper disclosure of material in the hands of the prosecution, or which the prosecution has inspected, that is not included in the bundle of evidence to be used by the prosecution against a person accused of an offence. This is known as "unused material", and such material has, in effect, been disclosed to the defence in whole or in part by common law practice and precedent.
- 6.** The main purpose of the Bill is to perform justice better by placing the handling and disclosure of unused material within a statutory framework. It sets out the obligations of the prosecution and the defence in respect of the disclosure of relevant unused material, the submission of the defence case and the disclosure of any further unused material in the light of that case. Other provisions deal with timeframes within which the obligations of the respective parties are to be fulfilled, consequences for failure to

do so and codes of practice governing the role of the police in conducting investigations and the interview of witnesses.

7. The Bill was subject to consultation between 16th June and 29th July 2014. The Department recognised the consultation would primarily be of interest only to those directly involved in the criminal justice system and considered the ten responses to the consultation submitted by email or letter. The responses were taken into consideration when the Bill was being redrafted following the consultation period.

8. EUROPEAN CONVENTION ON HUMAN RIGHTS

Section 16 of the Human Rights Act 2001 requires the Member moving the Bill to make a statement about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). In the opinion of the Member moving the Bill, the provisions of the Criminal Procedure and Investigations Bill 2015 are compatible with the Convention rights.

9. FINANCIAL EFFECTS OF THE BILL

In the view of the mover of the Bill, it is not expected to result in significant financial implications. Furthermore, the mover does not expect there to be any personnel implications.

NOTES ON CLAUSES

PART 1 – INTRODUCTORY

10. **Clause 1** provides that the short title of the Act will be the Criminal Procedure and Investigations Act 2015.
11. **Clause 2** provides that the Act will come into operation by Appointed Day Order. The provisions of the Act may be brought in all together or at different times and subject to such transitional arrangements as are appropriate.
12. **Clause 3** contains an expiry provision in respect of section 26. Clause 26 amends section 17(3) of the Summary Jurisdiction Act 1989 and therefore will expire on the day after the amendment is promulgated.

PART 2 – DISCLOSURE

13. **Clause 4** applies the provisions in this Part to any person who is subject to a criminal trial into an alleged offence in two sets of circumstances. The provisions will not apply where the criminal investigation began before the commencement of the section.

Subsection (2) concerns a person who has pleaded not guilty and is to undergo a criminal trial in relation to a summary offence.

Subsection (3) applies in where the accused person indicates under section 15A or his or her advocate indicates under section 15B of the Summary Jurisdiction Act 1989 that he or she would plead not guilty or is taken to so indicate. This subsection also applies where a person is committed for trial under section 6 of that Act for an offence triable on information only.

14. **Clause 5** sets out the initial duty of the prosecutor to disclose any information it has not already disclosed to the accused, which might reasonably be considered capable of undermining the prosecution case or assisting the case for the accused. Effectively this material is known as “unused material” or “prosecution unused material”. If there is no such material the prosecution must give the accused a written statement to that effect. The obligations within this clause must be acted upon by the prosecution within the period set out in regulations made under clause 15.

Subsection (2) defines this material and includes material that may not be in the prosecution's possession but where that material has been inspected by the prosecution. Subsections (3) and (4) provide that unused material must be made available by the prosecutor so it may be inspected by the accused (and/or the legal representative of the accused) and sets out how information that has not been recorded may be made available to, or be inspected by, the accused. Other subsections deal with circumstances where material must not be disclosed either for public interest (public interest immunity or PII) reasons or because such disclosure is prohibited under the Interception of Communications Act 1988.

- 15. Clause 6** applies where the prosecutor has complied, or purported to comply, with his or her obligations under clause 5. Subsection (1) requires the accused to give a statement of case to the court, the prosecutor and any other involved party where the prosecution has also supplied the accused with documents containing evidence of the case to be made against the accused. Subsection (2) sets out what constitutes a defence statement. Subsections (3) and (4) are about alibis and the last two subsections provide for regulations that may be made concerning detail in relation to the defence statement.
- 16. Clause 7** requires the defence to keep the disclosure of the case it intends to rely on at trial up to date and give that updated information to the prosecutor and to the court or inform the other parties that there are no changes to the defence statement. This must be done within the period set out in clause 15.
- 17. Clause 8** requires the defence to inform the court and the prosecution of its intention to call witnesses and to give details of those witnesses. If the witness details change because a previously notified witness is no longer required by the defence or a new witness is to be added to the list of those the defence intends to call, then the defence must notify the court and the prosecutor accordingly.
- 18. Clause 9** requires the defence to notify the court and the prosecution of any expert witness they intend to use.
- 19. Clause 10** provides that where an accused's advocate purports to give a defence statement or a statement that he or she has no changes to make to a defence statement previously given, the statement must be signed by the accused and is to be taken as having the authority of the accused. Subsection (2) provides for the court to warn the accused that inferences may be drawn if the accused fails to comply fully with clauses 6, 7 or 8.
- 20. Clause 11** places the prosecution under a continuing obligation to keep the material in its possession under review with a view to disclosure in a timely fashion. This means that even though the prosecution will have complied with the disclosure requirements imposed on it under clause 5, the duty of the prosecution to keep the material in its possession under review continues throughout the criminal justice process. If at any time it is aware of any further material that might reasonably be considered capable of undermining its case or assisting the defence case it is required to disclose that material. Subsection (5) indicates that the prosecution's continuing obligations in relation to disclosure are invoked where the accused gives a defence statement under clauses 6 or 7, and the prosecution must fulfil its obligations within the time period set out by virtue of clause 15.

Subsections (8) and (9) preclude disclosure where it is prohibited by section 1 of the Interception of Communications Act 1988 or where, on the application of the prosecution, the court concludes it is not in the public interest to disclose material.

- 21. Clause 12** applies where the accused has given a defence statement under clauses 6 or 7 and the prosecution has complied/purported to comply, or failed to comply, with the continuing obligation to disclose unused material to the defence established under

clause 11. Subsection (2) provides that if the defence believes, or has reasonable cause to believe, the prosecution has further relevant material it may apply to the court for an order requiring the prosecution to disclose it. Subsections (3) and (4) provide further definition or clarification of relevant prosecution unused material. Subsections (5) and (6) preclude disclosure as per subsections (8) and (9) of clause 11.

- 22. Clause 13** provides that if the prosecutor acts or purports to act in accordance with sections 5 or 11(5) but fails to observe the time limits which exist by virtue of section 15, the failure to observe those time limits will not on its own constitute grounds for the court to stay proceedings for abuse of process. The power of the court to stay proceedings, however, will exist if the delay by the prosecutor is such that the accused is denied a fair trial.
- 23. Clause 14** sets out 2 cases. Subsection (2) is where the accused fails in various ways to comply with his or her obligations to provide a defence statement or an updated defence statement or to give notice under section 7(4). It applies where the accused complies, but does so outside of the prescribed time periods, sets inconsistent defences in his or her statement or at trial does any of the things mentioned in paragraph (f). The second case set out in subsection (3) concerns defence witnesses. Subsection (4) provides that the court or any other party may make such comment as seems appropriate and the court or the jury may draw such inferences as seem proper in determining guilt or innocence. Other subsections provide safeguards, define certain terms and clarify that a person cannot be convicted of an offence solely on the basis of an inference drawn under subsection (4).
- 24. Clause 15** is about the time limits or relevant periods within which the prosecutor/prosecution and the accused/defence must perform their duties under sections 5 to 9 and 11 of the Act. The Department may prescribe the time limits or periods in regulations, which must then be laid before Tynwald.
- 25. Clause 16** provides that where material has not been disclosed in the public interest the accused has another opportunity to ask the court to review the question of whether it is still not in the public interest to disclose certain material. This must be done before the accused is convicted, acquitted or the prosecution decides to abandon the case in question. Subsection (2) empowers the court to determine, after review, that material, or any part of the material, may be disclosed to the accused. Subsection (3) requires the prosecutor to be informed of the court's decision and to act accordingly. Subsection (4) makes provision for any other person who may claim to have an interest in the material to be heard.
- 26. Clause 17** makes provision about the confidentiality of documents or other objects that the defence may be given or allowed to inspect. Subsections (2) and (3) set out how the accused may use or disclose the object or information. Subsection (4) means that where the accused applies and gains an order from the court the accused may use or disclose for the purpose and to the extent specified by the court. Subsections (5), (6) and (7) are supplementary. Other subsections make it a contempt of court to act otherwise than in accordance with an order of the court and address the consequences or actions that may flow from that act of contempt.
- 27. Clause 18** provides for rules of court to be made about the practice and procedure to be followed in relation to the provisions in the Act.
- 28. Clause 19** makes provision in respect of other rules about disclosure. In particular, subsection (2) provides that where the accused indicates he or she will plead not guilty the rules of common law do not apply to things falling to be done after this Part comes into operation. Subsection (3) states that subsection (2) does not affect the rules of common law relating to the question of whether disclosure is in the public interest.

- 29. Clause 20** requires the Department to make a code of practice, which gives guidance to police and other persons in relation to the interviewing of persons mentioned in a defence statement or listed as a witness to be called in the defence of the accused.

PART 3 – CRIMINAL INVESTIGATIONS

- 30. Clause 21** requires the Department to make a code of practice giving guidance to the police on the conduct of criminal investigations. Subsection (1) empowers the code the Department prepares to include detail to secure that all reasonable steps are taken, and lines of inquiry pursued, to ensure proper recording during the investigation, that information is retained, that the information is revealed to the person involved in the prosecution of criminal proceedings arising out of the investigation and to the accused person. Subsection (2) provides for the code to require a specified police officer to be identified as responsible for carrying out the requirements within the code and subsection (3) enables the code to specify the form in which the information is to be recorded.

Other provisions are related and include applying the code to persons other than police officers who are charged with the duty of investigating offences and noting that a police officer who fails to comply with any provision of a code is liable to disciplinary proceedings.

- 31. Clause 22** gives examples of disclosure provisions that may be included in a code under clause 21. Examples include detail both about the handling of sensitive material and material that is not considered to be sensitive.
- 32. Clause 23** is supplementary and provides for the affirmative Tynwald procedure, the revision of codes made under clauses 20 or 21 and their admissibility in evidence in any civil or criminal proceedings.
- 33. Clause 24** deals with common law rules relating to criminal investigations and the disclosure of material by the person conducting an investigation to a person involved in the prosecution of criminal proceedings. The clause states that where a code of practice under clause 21 has come into operation the common law rules do not apply.

PART 4 – MISCELLANEOUS AND SUPPLEMENTARY

- 34. Clause 25** provides a specific power for the Court of General Gaol Delivery or a court of summary jurisdiction to make a wasted costs order against an advocate or other representative where subsection (3) applies. Wasted costs may be made on their own merits by the relevant court but particularly where otherwise the only alternative for a particular failure is to take no action or to stay proceedings or invite adverse inferences to be drawn.

Subsection (2) requires regulations to be made in respect of rights of appeal against a wasted costs order. Subsection (3) defines wasted costs in the context of the Bill as costs incurred by any party as a result of any improper, unreasonable or negligent behaviour or omission on the part of an advocate or any other person employed by or working on behalf of such an advocate or representative. Wasted costs may include costs arising as a result of such acts or omissions, which the court considers it unreasonable to expect the party incurring the costs to pay. Subsection (4) provides for rules of court to make provision for regulating matters relating to scales and assessment of costs.

- 35. Clause 26** amends section 17(3) of the Summary Jurisdiction Act 1989 so that a case committed to it by a court of summary jurisdiction for sentence is no longer required to be sent to the next sitting of the Court of General Gaol Delivery. This is achieved by repealing the word "next". A case committed for sentence may be heard at a sitting of the Court when all parties are ready to proceed to the sentencing hearing or process

and that may not necessarily be literally the next sitting of the Court of General Gaol Delivery but a subsequent sitting.