

A BILL

entitled

DISCLOSURE AND CRIMINAL REFORM ACT 2015

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WHEREAS it is expedient to introduce a new prosecution and defence disclosure regime to Bermuda by enacting the Disclosure and Criminal Reform Act 2015;

AND WHEREAS it is expedient to amend the Criminal Code Act 1907 to introduce a new case management regime to Bermuda's judiciary;

AND WHEREAS it is expedient to amend the Criminal Appeal Act 1952 in order to improve the criminal appeals process;

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AND WHEREAS it is expedient to amend the Court of Appeal Act 1964 in order to improve the effectiveness of the Court of Appeal Act 1964;

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of Bermuda, and by the authority of the same, as follows:

Citation

1 This Act may be cited as the Disclosure and Criminal Reform Act 2015.

Interpretation

2 In this Act, unless the context otherwise requires—

“accused person” means a person charged with an offence;

“conclusion of the case against the accused person” means that the accused person—

(a) has been acquitted; or

(b) has been convicted,

or that the prosecutor has decided not to proceed with the case against the accused person;

“court” means the court in which the accused person is to be tried;

“evidence in support of an alibi” means evidence tending to show that by reason of the presence of the accused person at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission;

“material” means material of all kinds, including but not limited to information and objects;

“Minister” means the Minister responsible for legal affairs;

“police” means the Bermuda Police Service;

“prosecutor” means a person who commences criminal proceedings on behalf of the Crown;

“relevant unused material” means any unused material that might reasonably be considered capable of—

(a) undermining the case for the prosecution against the accused person; or

(b) assisting the case of the accused person; and

“unused material” means material that the prosecutor does not intend to use as evidence in the trial of the accused person.

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Duty of prosecutor to disclose case

3 (1) The prosecutor shall serve on the accused person, in matters that are triable either way or triable on indictment only—

- (a) a written summary of the prosecution case;
- (b) a written copy of the charges that are to be pursued against the accused person at trial;
- (c) a written copy of the evidence on which the prosecutor intends to rely at trial; and
- (d) such other particulars or material as may be required under regulations and which reasonably relate to disclosure by the prosecution.

(2) Paragraphs (b) to (d) of subsection (1) shall also apply to summary offence matters.

(3) The prosecutor shall write to the accused person and the court notifying them when he has complied with his duty under this section.

(4) This section is without prejudice to the right of the prosecutor to—

- (a) amend the way in which he puts his case, provided that, unless the court directs otherwise, he first serves an amended written summary of the prosecution case on the accused person;
- (b) seek leave of the court to pursue fresh charges, provided that the prosecutor first serves a copy of the fresh charges on the accused person; or
- (c) rely on additional evidence at trial, provided that the prosecutor first serves a copy of the additional evidence on the accused person.

Initial duty of prosecutor to disclose unused material

4 (1) The prosecutor shall, in matters that are triable either way or triable on indictment only—

- (a) disclose to the accused person any relevant unused material in the possession of the police or prosecutor which has not previously been disclosed to the accused person; or
- (b) give to the accused person a written statement that there is no material of a description mentioned in paragraph (a).

(2) The prosecutor shall write to the accused person and the court notifying them when he has complied with his duty under this section.

Duty of accused person to give a defence statement

5 (1) Provided the prosecutor has—

- (a) complied with his obligations under section 3(1); and

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(b) complied with his obligations under section 4(1),

an accused person, where he intends to give evidence at trial, shall serve a defence statement on the prosecutor and the court within 28 days after the first arraignment.

(2) A defence statement is a written statement—

- (a) setting out the nature of the accused person's defence, including any particular defences on which he intends to rely;
- (b) indicating the matters of fact on which he takes issue with the prosecution;
- (c) setting out, in the case of each such matter, why he takes issue with the prosecution;
- (d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose; and
- (e) containing such other particulars or material as may be required under regulations and which reasonably relate to disclosure by the defence.

(3) A defence statement that discloses an alibi defence shall give particulars of the alibi defence, including—

- (a) the name, address and date of birth of any witness the accused person intends to call to give evidence in support of the alibi, or as many of those details as are known to the accused person when the statement is given;
- (b) any information in the accused person's possession which might be of material assistance in identifying or finding any such witness in whose case any of the details mentioned in paragraph (a) are not known to the accused person when the statement is given,

and for the purposes of this section, to assist an unrepresented accused person in determining if he has an alibi defence, the Chief Justice may prescribe guidance notes indicating what amounts to an alibi defence in law.

(4) If, before the conclusion of the case against the accused person, there are any changes to the accused person's defence with respect to the facts and matters set out in the defence statement, the accused person shall serve a written statement on the prosecutor and the court setting out those changes as soon as is reasonably practicable or within such time as the court may order (an updated defence statement).

(5) A defence statement and updated defence statement shall be signed by the accused person (and by his legal counsel where he is represented by legal counsel).

(6) Where a defence statement or updated defence statement is signed by the accused person's legal representative, it will be deemed to have been signed on the instructions of the accused person unless the contrary is proved.

(7) For the avoidance of doubt, nothing in this section shall be construed as to compel an accused person to—

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- (a) give evidence at trial where he does not wish to give evidence at trial;
- (b) serve a defence statement on the prosecutor where he does not wish to give evidence at trial.

(8) Where an accused person does not wish to give evidence at trial he shall serve upon the prosecutor, within 28 days after the first arraignment hearing, written notice signed by the accused person of his intention not to give evidence at trial.

Continuing duty of prosecutor to disclose unused material

6 (1) This section applies at all times—

- (a) after the prosecutor has complied with his initial duty of disclosure under section 4(1); and
- (b) before the conclusion of the case against the accused person.

(2) The prosecutor shall keep under review the question whether at any given time, and, in particular, following service of a defence statement or an updated defence statement, there is relevant unused material which has not been disclosed to the accused person.

(3) The prosecutor shall disclose any such relevant unused material to the accused person as soon as is reasonably practicable or within such time as the court may order.

Duty of prosecutor to disclose: further provisions

7 For the purposes of this Act, the prosecutor discloses relevant unused material by supplying a copy of the relevant unused material to the accused person and his barrister and attorney (or to the accused person where he is not represented by a barrister and attorney) or, where this is not reasonably practicable, allowing the accused person a reasonable opportunity to inspect the relevant unused material or taking steps to ensure that he is allowed to do so.

Public interest

8 (1) Relevant unused material shall not be disclosed to the accused person and his barrister and attorney (or the accused person only where he is not represented by a barrister and attorney) if, on an application by the prosecutor, the court rules that it is not in the public interest to disclose it and orders accordingly.

(2) Unless the court orders otherwise, the prosecutor shall give the accused person prior notice of an application under subsection (1), although he need not give the accused person any information about the relevant unused material that is the subject of the application.

(3) The accused person may—

- (a) make representations to the court prior to its ruling on an application under subsection (1); and
- (b) apply to the court for a review of its ruling on an application under subsection (1).

(4) Where the court makes an order under subsection (1), until the conclusion of the case against the accused person it shall keep under review the question whether at any given time it is still not in the public interest to disclose relevant unused material affected by its order.

(5) If, after making an order under subsection (1), the court at any time concludes that it is in the public interest to disclose relevant unused material, it shall order the prosecution to disclose that material.

(6) The court, when—

- (a) considering an application under subsection (1); or
- (b) reviewing a ruling under subsection (1),

may at its discretion hear from any person claiming a proprietary right or interest in the relevant unused material that is the subject matter of the application.

Faults in disclosure by the prosecutor

9 (1) If, on the application of the accused person, or of its own motion, and after giving the prosecutor the opportunity to be heard, the court is satisfied that the prosecutor has failed to disclose relevant unused material as required by sections 5 and 7, the court may order the prosecutor to disclose the relevant unused material within such time as the court thinks fit.

(2) Subject to subsection (3), the failure by the prosecutor to—

- (a) disclose relevant unused material as required by sections 5 and 7; or
- (b) comply with an order made under subsection (1),

do not on their own constitute grounds for staying the proceedings for abuse of process.

(3) Subsection (2) does not prevent the court from staying proceedings where the prosecutor's failure to disclose relevant unused material, amounts to the accused being denied a fair trial.

Faults in disclosure by the accused person

10 (1) If, on the application of the prosecutor, or of the court's own motion, and after giving the accused person the opportunity to be heard, the court is satisfied that the accused person has failed to serve a defence statement or an updated defence statement as required by section 5, the court may order the accused person to do so within such time as the court thinks fit.

(2) If, on the application of the prosecutor, or of its own motion, and after giving the accused person the opportunity to be heard, the court is satisfied that the accused person—

- (a) has purported to serve a defence statement or an updated defence statement; but
- (b) that such statement fails to satisfy the requirements of section 5,

the court may order the accused person to serve a defence statement or updated defence statement that does satisfy those requirements within such time as the court thinks fit.

(3) If, on the application of the prosecutor, or of the court's own motion, and after giving the accused person the opportunity to be heard, the court is satisfied that the accused person failed to comply with section 5(3), he shall not be permitted to adduce evidence in support of an alibi.

(4) This subsection applies where, on the application of the prosecutor, or of its own motion, and after giving the accused person the opportunity to be heard, the court is satisfied that the accused person has—

- (a) put forward a defence at trial having failed to serve a defence statement;
- (b) put forward a defence at trial which is different from the defence set out in his defence statement;
- (c) put forward a defence at trial which is different from the defence set out in an updated defence statement;
- (d) set out inconsistent defences in his defence statement; or
- (e) set out inconsistent defences in an updated defence statement.

(5) Where subsection (4) applies—

- (a) the court may, where the accused person has served a defence statement, direct that the jury be given a copy of all or part of his defence statement;
- (b) the court may, where the accused person has served an updated defence statement, direct that the jury be given a copy of all or part of that updated statement;
- (c) the court or, with leave of the court, any other party, may make such comment as appears appropriate;
- (d) the court may direct the jury that they can draw such inferences as appear proper in deciding whether the accused person is guilty of the offence charged, but the accused person shall not be convicted of an offence solely on the basis of any such inference; and
- (e) the court may draw such inferences as appear proper in deciding the facts for the purposes of sentencing.

(6) When deciding what, if anything, to do under subsection (4), the court shall have regard in any instance—

- (a) where the accused person has failed to serve a defence statement or an updated defence statement, to whether there is any justification for such failure;
- (b) where the accused person puts forward a defence at trial which is different from the defence set out in his defence statement, updated defence statement, or both—

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- (i) to the extent of the differences in the defences; and
- (ii) to whether there is any justification for it.

(7) For the purposes of this section, the accused person puts forward a defence at trial that is different from the case set out in his defence statement where he—

- (a) puts forward a defence at trial which was not mentioned in his defence statement;
- (b) puts forward a defence at trial which is different from any defence set out in his defence statement;
- (c) takes issue with the prosecution on a matter of fact which was not raised in his defence statement;
- (d) takes issue with the prosecution on a matter of fact which was raised in his defence statement, but for a reason which was not;
- (e) adduces evidence in support of an alibi without having given evidence in support of the alibi in his defence statement; or
- (f) calls a witness to give evidence in support of an alibi without having complied with the requirements of section 5(3) as regards the witness in his defence statement.

Directions

11 On the application of the prosecutor or the accused person, or of its own motion, the court may give directions to secure compliance by the parties with their disclosure obligations under this Act.

Confidentiality

12 Any unused material disclosed to the accused person under this Act may not be used or disclosed for any purpose other than that of the proceedings in relation to which it is disclosed, save that it may be used or disclosed—

- (a) for the purpose of any appeal or advice on appeal against a decision of the court or jury in those proceedings;
- (b) to the extent that it has been displayed or communicated in open court to the public other than in proceedings for contempt of court under section 13; and
- (c) with leave of the court, for the purpose and to the extent specified by the court.

Contempt

13 (1) It is a contempt for a person knowingly to use or disclose unused material disclosed to an accused person under this Act for a purpose other than one permitted by section 12.

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(2) A person who is guilty of such a contempt in relation to material disclosed in proceedings in the magistrates' court shall be liable to imprisonment for a specified period not exceeding 6 months or a fine not exceeding \$10,000 or both.

(3) A person who is guilty of such a contempt in relation to material disclosed in proceedings in the Supreme Court shall be liable to imprisonment for a specified period not exceeding two years or an unlimited fine or both.

(4) If—

- (a) a person is guilty of contempt under this section; and
- (b) the material concerned is in his possession,

the court finding him guilty may order that the material shall be forfeited and dealt with in such manner as it thinks fit.

Regulations

14 (1) The Minister may make regulations relating to the matters referred to in subsections 3(1)(d) and 5(2)(e).

(2) Regulations made under this section are subject to the negative resolution procedure.

Rules

15 (1) Except for matters referred to in section 14, the Chief Justice may make any rules under section 540 of the Criminal Code Act 1907 for carrying into effect this Act, and without prejudice to the generality of the foregoing, such rules may relate to—

- (a) proceedings to deal with contempt of court under section 13;
- (b) any application made under sections 8, 9 and 10;
- (c) any directions sought or made under section 11; and
- (d) subject to subsection (2), the periods of time within which the disclosure obligations contained in sections 4 to 6 are to be carried out.

(2) Where any periods of time are not prescribed by such rules, the court may make such orders with respect to those periods as it sees fit.

Guidelines and judicial protocols

16 (1) The Minister may issue guidelines, not inconsistent with this or any other enactment, concerning the disclosure of information in criminal proceedings.

(2) The Chief Justice may issue judicial protocols, not inconsistent with this or any other enactment, concerning the control and management of unused material in criminal proceedings.

(3) A failure by a person to comply with any provision of guidelines or judicial protocols issued under this section shall not in itself render him liable in any criminal or civil proceedings.

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(4) In all criminal or civil proceedings any guidelines or judicial protocols issued under this section shall be admissible in evidence.

(5) If it appears to a court or tribunal conducting criminal or civil proceedings that—

(a) any provision of guidelines or judicial protocols issued under this section;
or

(b) any failure mentioned in subsection (3),

is relevant to any question arising in the proceedings, the provision or failure shall be taken into account in deciding the question.

(6) Guidelines or judicial protocols issued under this section, including any revisions made thereto, shall not be subject to section 6 of the Statutory Instruments Act 1977.

Repeals

17 Section 31 of the Evidence Act 1905 (Notice of alibi) is repealed.

AMENDMENTS TO THE CRIMINAL CODE ACT 1907

Amends the Criminal Code Act 1907

18 The Criminal Code Act 1907 is amended by—

(a) inserting next after section 543 the following—

“Purpose of a case management hearing

543A (1) The purpose of a case management hearing is to assist the court to actively manage criminal cases in accordance with its overriding objective to do justice.

(2) Subject to this Part, a case management hearing will—

(a) consider those matters that would be better decided before the start of criminal proceedings and other similar matters;

(b) make arrangements for decisions on those matters; and

(c) deal with any other matters which may be conveniently or appropriately dealt with at the case management hearing.

Timing of case management hearing

543B (1) In this Part, a hearing is a case management hearing where it is held in any of the scenarios contained in subsections (2), (3) and (4).

(2) The first scenario is that—

(a) it relates to a trial—

- (i) which is to be tried summarily; and
 - (ii) at which the accused person has pleaded not guilty; and
- (b) it takes place before the start of the trial.
- (3) The second scenario is that it relates to a trial on indictment and it takes place—
 - (a) after the accused person has been sent for trial for the offence; and
 - (b) before the start of the trial.
- (4) The third scenario is that it—
 - (a) relates to a trial on indictment to be held in pursuance of a bill of indictment preferred under the authority of section 485(2)(c) (bill preferred by direction or with consent of a judge); and
 - (b) takes place after the bill of indictment has been preferred and before the start of the trial.
- (5) In this Part, “start of the trial” means—
 - (a) in a summary trial, when the court begins—
 - (i) to hear evidence from the prosecution at the trial; or
 - (ii) to consider whether to exercise its power under section 33(2) of the Mental Health Act 1968 (power to make hospital order without convicting the accused person); and
 - (b) in a trial on indictment, when a jury is sworn to consider the issue of guilt or fitness to plead or, if the court accepts a plea of guilty before the time when a jury is sworn, when that plea is accepted.

Holding a case management hearing

543C (1) In any trial on indictment, the Supreme Court shall hold a case management hearing with the prosecutor and the accused person or barrister and attorney for the accused person, which is to be presided over by a judge of that court.

- (2) In any summary trial, a case management hearing may be held—
 - (a) on an application by a party to the case; or
 - (b) of the magistrate’s own motion.
- (3) This section does not preclude multiple case management hearings in respect of any trial.

Powers exercisable at a case management hearing

543D (1) A judge has the following powers at a case management hearing—

- (a) assisting the parties to identify the witnesses to be heard, taking into account the witnesses' needs and circumstances;
 - (b) encouraging the parties to make admissions and reach agreements;
 - (c) encouraging the parties to consider any other matters that would promote a fair and efficient trial;
 - (d) establishing schedules and imposing deadlines on the parties;
 - (e) hearing guilty pleas and imposing sentences; and
 - (f) assisting the parties to identify the issues that are to be dealt with before the start of the trial.
- (2) A judge may also adjudicate any issues that can be decided at a case management hearing, including those related to—
- (a) the disclosure of evidence;
 - (b) the admissibility of evidence;
 - (c) expert witnesses;
 - (d) the severance of counts;
 - (e) the separation of trials on one or more counts when there is more than one accused person; and
 - (f) any other question of evidence or law relating to the case concerned.
- (3) A ruling may be made under this section—
- (a) on an application by a party to the case; or
 - (b) of the judge's own motion.
- (4) Subject to subsection (5), a ruling made under this section has binding effect from the time it is made until the case against the accused person or, if there is more than one, against each of them is disposed of; and the case against an accused person is disposed of if—
- (a) he is acquitted or convicted;
 - (b) the jury is discharged for failing to reach a verdict; or
 - (c) the prosecutor decides not to proceed with the case against him.
- (5) A judge may discharge or vary (or further vary) a ruling made under this section only if it appears to him that it is in the interests of justice to do so; and a judge may act under this subsection—
- (a) on an application by a party to the case; or
 - (b) of the judge's own motion.

(6) No application may be made under subsection (5)(a) unless there has been a material change of circumstances since the ruling was made or, if a previous application has been made, since the application (or last application) was made.

(7) The judge referred to in subsection (5) need not be the judge who made the ruling or, if it has been varied, the judge (or any of the judges) who varied it.

(8) This section is without prejudice to any other power exercisable by, or duty imposed on, a judge or the court contained in any other enactment.

Appointment of a case management judge

543E (1) In respect of any trial on indictment, the Chief Justice may appoint a judge of the Supreme Court to serve as the trial's case management judge if he is of the opinion that such appointment would be necessary for the proper administration of justice.

(2) The power in subsections (1) may be exercised—

- (a) on an application by a party to the case; or
- (b) of the Chief Justice's own motion.

(3) An application under subsection (2)(a) may be made any time after the indictment is preferred.

(4) The appointment of a judge as case management judge does not preclude him from serving as the judge who hears the evidence at trial.

Role of case management judge

543F The case management judge shall assist in promoting a fair and efficient trial, including by ensuring that the evidence is presented at trial, to the extent possible, without interruption.

Powers of case management judge

543G (1) In performing his duties before the start of the trial, the case management judge shall—

- (a) preside over any case management hearings held under section 543C;
- (b) exercise powers to make rulings under section 543D; and
- (c) decide any issues on their merits under section 543J.

(2) In a trial on indictment, the case management judge shall also have power to hear and decide any application pursuant to section 15(1) of Second Schedule to the Bermuda Constitution Order 1968 which directly relates to the trial.

Information relevant to be part of the court record

543H (1) When the case management judge is of the opinion that the measures to promote a fair and efficient trial that can be taken before the start of the trial (including adjudicating the issues that can be decided), he shall ensure that the court record includes information that, in his opinion, may be relevant at the stage of the presentation of the evidence at trial, including—

- (a) the names of the witnesses to be heard that have been identified by the parties;
- (b) any admissions made and agreements reached by the parties;
- (c) the estimated time required to conclude the trial;
- (d) any orders and decisions; and
- (e) any issues identified by the parties that are to be dealt with at the stage of the presentation of the evidence on the merits.

(2) This section does not apply to a case management judge who also hears the evidence at trial.

Trial continuous

543I Even if the judge who hears the evidence on trial is not the same as the case management judge, the trial of an accused person shall proceed continuously, subject to adjournment or postponement by the court.

Issues referred to the case management judge

543J (1) During the presentation of the evidence at trial, the case management judge shall adjudicate any issue referred to him by the judge hearing the evidence.

(2) For the purposes of adjudicating an issue, the case management judge may exercise the powers of a trial judge.

Restrictions on reporting

543K (1) Except as provided by this section no report of matters falling within subsection (2) may be published in Bermuda.

(2) The following matters fall within this subsection—

- (a) a ruling under section 543D;
- (b) proceedings on an application for a ruling under section 543D;
- (c) an order under section 543D that a ruling be discharged, varied or further varied; and
- (d) proceedings on an application under section 543D for a ruling to be discharged, varied or further varied.

(3) The judge dealing with any matter falling within subsection (2) may order that subsection (1) does not apply, or does not apply to a specified extent, to a report of the matter.

(4) Where there is only one accused person and he objects to the making of an order under subsection (3)—

- (a) the court may make the order if (and only if) satisfied after hearing the representations of the accused that it is in the interests of justice to do so; and
- (b) if the order is made, it shall not apply to the extent that a report deals with any such objection or representations.

(5) Where there are two or more accused persons and one or more of them objects to the making of an order under subsection (3)—

- (a) the court may make the order if (and only if) satisfied after hearing the representations of each of the accused that it is in the interests of justice to do so; and
- (b) if the order is made, it shall not apply to the extent that a report deals with any such objection or representations.

(6) Subsection (1) does not apply to the publication of a report of matters made at the conclusion of the trial of the accused person or of the last of the accused persons to be tried.

(7) Nothing in this section affects any prohibition or restriction imposed by virtue of any other enactment on the publication of a report of any matter.

Offences in connection with reporting

543L (1) If a report is published in contravention of section 543K each of the following persons is guilty of an offence—

- (a) in the case of a publication of a written report as part of a newspaper or periodical, any proprietor, editor or publisher of the newspaper or periodical;
- (b) in the case of a publication of a written report otherwise than as part of a newspaper or periodical, the person who publishes it;
- (c) in the case of the inclusion of a report in a broadcasting programme—
 - (i) any body corporate which is engaged in providing the service in which the programme is included; and
 - (ii) any person having functions in relation to the programme corresponding to those of an editor of a newspaper.

(2) A person guilty of an offence under this section is liable on summary conviction to a fine of an amount not exceeding \$5,000.

(3) Proceedings for an offence under this section shall not be instituted in Bermuda otherwise than by or with the consent of the Director of Public Prosecutions.”;

(b) deleting section 451;

(c) deleting and substituting section 488(2) as follows—

“(2) An objection to an indictment or to a count in an indictment, for a defect apparent on its face, shall be taken by motion to quash the indictment or count before the accused person enters a plea, and, after the accused person has entered a plea, only by leave of the court before which the proceedings take place.

(3) The court before which an objection is taken under this section may, if it considers it necessary, order the indictment or count to be amended to cure the defect.”;

(d) deleting section 489 and by substituting the following—

“Amendment of indictment

489 (1) An indictment may not be amended after it is presented, except by the prosecutor with the—

(a) leave of the court; or

(b) consent of the accused person.

(2) Nothing in this section shall affect the powers of the court under section 489A.

(3) For the purposes of this section, an amendment of an indictment includes the substitution of an indictment.

Orders for amendment of indictment, separate trial and postponement of trial

489A (1) Where, before trial, or at any stage of a trial, it appears to the court that the indictment is defective, the court shall make such order for the amendment of the indictment as the court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without causing injustice.

(2) Where an indictment is so amended, a note of the order for amendment shall be endorsed on the indictment, and the indictment shall be treated for the purposes of the trial and for the purposes of all proceedings in connection therewith as being in the amended form.

(3) Where, before trial, or at any stage of a trial, the court is of the opinion that an accused person may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the accused person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment.

(4) Where, before trial, or at any stage of a trial, the court is of opinion that the postponement of the trial of an accused person is expedient as a consequence of the exercise of any power of the court under this Act to amend an indictment or to order a separate trial of a count, the court shall make such order as to the postponement of the trial as appears necessary.

(5) Where an order of the court is made under this section for a separate trial or for the postponement of a trial—

- (a) if such an order is made during a trial the court may order that the jury are to be discharged from giving a verdict on the count or counts the trial of which is postponed or on the indictment, as the case may be; and
- (b) the procedure on the separate trial of a count shall be the same in all respects as if the count had been found in a separate indictment, and the procedure on the postponed trial shall be the same in all respects (if the jury has been discharged) as if the trial had not commenced; and
- (c) the court may make such order as to granting the accused person bail and as to the enlargement of recognizances and otherwise as the court thinks fit.

(6) The court may make an order under this section that takes effect either at a specified later date or on the occurrence of a specified event if, taking into account, among other considerations, the need to ensure consistent decisions, it is satisfied that it is in the interests of justice to do so.

(7) Unless the court is satisfied that it would not be in the interests of justice, any decision under section 446D (pre-trial rulings) which is made before any order issued under this section takes effect continues to bind the parties if the decisions are made or could have been made before the stage at which the evidence at trial is presented.

(8) Any power of the court under this section shall be in addition to and not in derogation of any other power of the court for the same or similar purposes.

(9) If it becomes necessary to draw up a formal record where an amendment has been made, the record shall be drawn up setting out the indictment as amended, and without taking any notice of the fact of the amendment having been made.”;

- (e) deleting section 501 and by substituting the following—

“Continuation of trial and adjournment of trial

501 (1) The trial of an accused person shall proceed continuously, subject to adjournment or postponement by the court.

(2) A judge may adjourn or postpone a trial from time to time in the same sitting.

(3) For the purpose of subsection (2), no formal adjournment of trial or entry thereof is required.

(4) A judge, in any case tried without a jury, may reserve final decision on any question raised at the trial, or any matter raised further to a case management hearing, and the decision, when given, shall be deemed to have been given at the trial.

(5) In any case to be tried with a jury, the judge before whom an accused is or is to be tried has jurisdiction, before any juror on a panel of jurors is called and in the absence of any such juror, to deal with any matter that would ordinarily or necessarily be dealt with in the absence of the jury after it has been sworn.

(6) On any such adjournment or postponement the Court may direct the trial to be held upon such day as the Court may determine, and may remand the accused person accordingly.

(7) In any such case, the accused person is bound to attend to be tried, and the witnesses are bound to attend to give evidence, at the time and place to which the trial is adjourned or postponed without entering into any fresh recognizances for that purpose, in the same manner as if they had respectively been originally bound by their recognizances to attend to be tried and to attend to give evidence at the time and place to which the trial is adjourned or postponed.”;

(f) amending section 518—

(i) in subsection (3) by inserting after the words “Subject to” the words “subsection (4) and”; and

(ii) by inserting next after subsection (3) the following—

“(4) If the judge considers it advisable in the interests of justice to have one, two or three alternate jurors, the judge shall order that one, two or three further names be drawn.”;

(g) amending section 522(1) by inserting next after the words “The jury” the words “(including any alternate jurors)”;

(h) inserting next after section 522 the following—

“Substitution of alternate jurors

522A (1) Alternate jurors shall attend the presentation of the evidence at trial and, if there is not a full jury present, shall replace any absent juror, in the order in which their cards were drawn under subsection 518(4).

(2) An alternate juror who is not required as a substitute shall be excused.”;

(i) amends section 525 by replacing the word “ten” with the word “nine”;

(j) amends section 536 by inserting next after subsection (2) the following—

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“(3) In the event that, because of section 525, a jury is reduced to ten or nine members, subsection (2) shall be read with “eight” in place of “nine”.;”

(k) repeal and replace section 540 with the following—

“Criminal Procedure Rules

540 (1) There are to be rules of court (to be called “Criminal Procedure Rules”), not inconsistent with this Act or any other enactment, governing the practice and procedure to be followed in the criminal jurisdiction (original, appellate or otherwise) of the magistrates’ court and Supreme Court.

(2) Without limiting the generality of subsection (1) or any other enactment or provision relating to criminal procedure, such rules may—

- (a) prescribe the manner in which applications and notices or notifications may be made or given (including whether orally or in writing), and the manner in which they may be responded to;
- (b) prescribe the manner in which charging documents, applications, notices, and other documents are to be filed;
- (c) prescribe the manner in which charging documents, summonses, warrants, applications, notices, and other documents are to be authenticated (including by signature or any other means);
- (d) prescribe the manner in which summonses, warrants, notices, and other documents are to be issued by a court, a Registrar, or any other person;
- (e) prescribe information that shall be contained in charging documents, summonses, warrants, applications, notices, and other documents to be filed, made, or given;
- (f) prescribe forms for charging documents, summonses, warrants, applications, notices, and other documents, or other requirements relating to the form or presentation of documents;
- (g) prescribe other information that may be required in connection with criminal proceedings and any requirements relating to the form and presentation of that information;
- (h) require the service of any summons, application, or other document;
- (i) prescribe who has responsibility for serving any summons, application, or other document;
- (j) prescribe who may, on behalf of a person responsible as described in paragraph (i), serve any summons, application, notice, or other document;
- (k) prescribe the procedure for the service of summonses, notices, and other documents;

- (l) prescribe the manner of proving service;
 - (m) prescribe requirements relating to the custody of documents, exhibits, and other things connected with criminal proceedings;
 - (n) prescribe periods, or minimum or maximum periods, within which, or times or stages in the criminal proceedings before or after which, steps shall, or shall not, be taken;
 - (o) prescribe circumstances in which a judicial officer may grant leave for applications or any other matter to be made or done later than a time prescribed in the rules;
 - (p) impose duties on Registrars, and prescribe the manner in which Registrars shall carry out any action for the purposes of criminal proceedings;
 - (q) prescribe procedures relating to the delivery of judgments and other decisions in criminal proceedings;
 - (r) prescribe the manner in which criminal proceedings are to be transferred between courts;
 - (s) prescribe matters relating to the permanent court record, including—
 - (i) the formal steps in a proceeding that shall be recorded;
 - (ii) the manner in which the permanent court record shall be maintained;
 - (iii) who may discharge courts' obligations to maintain the permanent court record;
 - (iv) procedures for ensuring the accuracy of the permanent court record;
 - (v) procedures for correcting the permanent court record;
 - (t) prescribe the manner in which a record of oral evidence is to be authenticated;
 - (u) provide for the establishment, form, and maintenance of registers of notices of appeal and judgments, and provide for the registers to be available for inspection by members of the public in accordance with the rules;
 - (v) provide for any other matters in respect of which rules are contemplated by this or any other Act pertaining to criminal procedure.
- (3) Without limiting the generality of subsection (1), rules may provide for the use of electronic technology in relation to any matter described in subsection (2).

(4) Rules are to be made by the Chief Justice, following consultation with the Senior Magistrate, the Director of Public Prosecutions, the Bar Council and such other persons as the Chief Justice may consider appropriate.

(5) The power to make rules includes power to make different provision for different cases, offences or classes of prosecutor or accused persons, including different provision—

- (a) for a specified court or description of courts;
- (b) for specified descriptions of proceedings or a specified jurisdiction.

(6) Any power to make rules is to be exercised with a view to securing that—

- (a) the criminal justice system is accessible, fair and efficient; and
- (b) the rules are both simple and simply expressed.

(7) Rules made under this section are subject to the negative resolution procedure.”

(l) inserts next after section 556 the following—

“556A Costs against legal representatives etc.

556A (1) In any criminal proceedings—

- (a) the Court of Appeal;
- (b) the Supreme Court; and
- (c) the magistrates’ court,

may order the legal or other representative concerned to meet the whole of any wasted costs or such part of them as may be determined in accordance with rules of the court.

(2) In subsection (1), “wasted costs” means any costs incurred by a party—

- (a) as a result of any improper, unreasonable, or negligent act or omission on the part of any representative or any employee of a representative; or
- (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.

(3) An order under subsection (1) may be made on the court’s own motion or on application by any party to the proceedings to which the order may relate.

(4) An order made under subsection (1) may be appealed to the —

- (a) Supreme Court, where made in the magistrates’ court; or

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(b) Court of Appeal, where made in the Supreme Court.

(5) No further appeal from a decision made under subsection (4) may be permitted.

Provision for award of costs against third parties

556B (1) The Minister may by regulations make provision empowering the magistrates' courts, the Supreme Court and the Court of Appeal to make a third party costs order if the conditions in subsection (3) are satisfied.

(2) A "third party costs order" is an order as to the payment of costs incurred by a party to criminal proceedings by a person who is not a party to those proceedings ("the third party").

(3) The conditions are that—

- (a) there has been serious misconduct (whether or not constituting a contempt of court) by the third party; and
- (b) the court considers it appropriate, having regard to that misconduct, to make a third party costs order against him.

(4) Regulations made under this section may, in particular—

- (a) specify types of misconduct in respect of which a third party costs order may be made;
- (b) allow the making of a third party costs order at any time;
- (c) make provision for any other order as to costs which has been made in respect of the proceedings to be varied on, or taken account of in, the making of a third party costs order;
- (d) make provision for account to be taken of any third party costs order in the making of any other order as to costs in respect of the proceedings.

(5) Regulations made under this section are subject to the negative resolution procedure."

AMENDMENTS TO THE CRIMINAL APPEAL ACT 1952

Amends the Criminal Appeal Act 1952

19 The Criminal Appeal Act 1952 is amended—

- (a) in section 4 by—
 - (i) inserting subsection "(1)" before the word "A";
 - (ii) inserting after the new subsection (1) the following—

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“(2) For the purposes of this section, a decision of a court of summary jurisdiction in respect of a trial on an information—

- (a) discharging an accused person on the grounds that there is no case to answer;
- (b) staying proceedings as an abuse of process; and
- (c) issuing a ruling which would otherwise have the effect of terminating the trial,

shall be deemed to involve a question of law alone.”;

- (b) inserting next after section 13 the following—

“Perfection of appeals

13A (1) Before the Registrar can set a date upon which an appeal will be heard under section 13(3)(b), the appeal shall be perfected.

- (2) An appeal is perfected when—

- (a) the requirements of section 13(2) are complied with;
- (b) the appellant has finalized his grounds for appeal;
- (c) the appellant has served his finalized grounds of appeal and supporting submissions and authorities to the court and to the respondent; and
- (d) such other requirements are complied with as may be provided for by rules made pursuant to section 540 of the Criminal Code Act 1907.

(3) The date upon which an appeal will be heard shall be at least ten clear days from the time an appeal is perfected under this section.”.

AMENDMENTS TO THE COURT OF APPEAL ACT 1964

Amends the Court of Appeal Act 1964

20 The Court of Appeal Act 1964 is amended—

- (a) in section 17 by repealing subsection (5) and substituting the following—

“(5) For the purposes of this Part, a decision of a judge in respect of a trial on indictment—

- (a) directing the jury to acquit an accused person on the grounds that there is no case to answer;
- (b) staying proceedings as an abuse of process; and
- (c) issuing a ruling which would otherwise have the effect of terminating the trial,

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shall be deemed to involve a question of law alone.”;

(b) in section 17B—

- (i) in the headnote by deleting the word “murder” and by substituting the words “serious offences”;
- (ii) in subsection (1)(a) by deleting the word “murder” and by substituting the words “a serious arrestable offence listed in Schedule 1 to the Police and Criminal Evidence Act 2006”; and
- (iii) by deleting subsection (5).

Commencement

21 (1) This Act comes into operation on a day to be appointed by the Minister by notice published in the Gazette.

(2) The Minister may appoint different days for different provisions of the Act.

DISCLOSURE AND CRIMINAL REFORM BILL 2015

EXPLANATORY MEMORANDUM

This Bill would introduce a new prosecution and defence disclosure regime in Bermuda.

Clause 1 is self-explanatory.

Clause 2 sets out the definitions in the Act.

Clause 3 sets out the general prosecution duty to disclose its case, and to notify the defence and court in writing of this fact. Prosecution disclosure includes: (a) a written summary of the prosecution case; (b) a copy of the charges that are to be pursued against the accused person at trial; (c) a copy of the evidence on which the prosecutor intends to rely at trial; and (d) such other particulars or material as may be required under regulations and which reasonably relate to disclosure by the prosecution. Subsection (3) preserves the prosecution's ability to evolve its case against the accused person.

Clause 4 sets out the prosecution duty to disclose relevant unused material in the possession of the police or prosecution, and to notify the defence and court in writing of this fact. 'Relevant unused material' means unused material that might reasonably be considered capable of (a) undermining the case for the prosecution against the accused person; or (b) assisting the case of the accused person. Where there is no such material, this fact must be notified to the accused.

Clause 5 sets out the defence duty to prepare and serve a defence statement on the prosecution and the court, once the prosecution's duty mentioned in clauses 4 and 5 is completed.

A defence statement sets out the nature of the accused person's defence, including any particular defences on which he intends to rely; indicates the matters of fact on which he takes issue with the prosecution; sets out, in the case of each such matter, why he takes issue with the prosecution; indicates any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose; and contains such other particulars or material as may be required under regulations and which reasonably relate to disclosure by the defence. The statement must also give particulars of any alibi defence, which remains unchanged from the current obligation.

An updated defence statement must also be prepared and served where there are any changes to a defence. The statement must be signed by the accused person (and his barrister and attorney where he is represented by a barrister and attorney).

Clause 6 sets out the prosecution's continuing duty to disclose relevant unused material and to keep under review disclosure to date. When new material is discovered, this must be served as soon as is reasonably practicable or within such time as the court may order. It is envisaged that service of a defence statement would trigger further review, especially if matters unforeseen by the prosecution are raised in the statement.

Clause 7 makes clear that 'disclosure' of relevant unused material is made by supplying copies of the material or, where this is not reasonably practicable, allowing the accused person a reasonable opportunity to inspect the material or take reasonable steps to ensure he is able to.

Clause 8 exempts disclosure of relevant unused material where the prosecution applies for, and is granted, a ruling by the court that it would not be in the public interest to do so. Prior notice of such an application must be made, but information about the material in question need not be given. The defence may make representations before an application is granted or apply for a review of any such decision. The court is under a continuing duty to review its decision and may order disclosure where it concludes that it is in the public interest to disclose the material. The court may hear from anyone with a proprietary right or interest in the information under consideration.

Clause 9 sets out the consequences for faults in prosecution disclosure. The court will order disclosure to rectify the fault. If there is no realistic prospect of securing compliance within a reasonable time and without the disclosure the accused person would not have a fair trial, the prosecution must be stayed as an abuse of process.

Clause 10 sets out the consequences for faults in defence disclosure. The court will order service of a defence statement where none has been served, order that a defence statement service is rectified or order that an alibi defence not be put to the court, whichever is relevant.

Failure to put forward a defence statement, putting forward a different defence to that in a defence or updated defence statement, or setting out inconsistencies in a defence or updated defence statement can lead to further consequences. This includes giving a jury all or part of a defence or update a defence statement, making appropriate comment, and drawing proper adverse inferences. At all times, the court will hear representations from the defence, and will consider whether the accused person has a justification for his failure and the extent of any inconsistencies.

Clause 11 allows the court to give directions, on its own or on application by a party, to give directions aimed at securing compliance with the principal Act.

Clause 12 sets out a duty of confidentiality in not using or disclosing relevant unused material for any purpose not connected with criminal proceedings. Exceptions include disclosure for the purpose of any advice or appeal, to the extent that the material has been mentioned in open court (save for contempt proceedings under clause 13), and with the leave of the court.

Clause 13 makes it a contempt to disregard the duty of confidentiality as set out under this clause. Under this clause, contempt is punishable in the magistrates' court by imprisonment for up to 6 months, a fine of up to \$10,000 or both; and punishable in the Supreme Court by imprisonment of up to 2 years, an unlimited fine or both. A person guilty of a contempt under this section and who has the concerned material in his possession may be ordered to forfeit the material.

Clause 14 sets out the power of the Minister to issue regulations relating to additional material and particulars which may form part of the prosecution's duty of disclosure or the defence statement. Such regulations are subject to the negative resolution procedure.

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Clause 15 sets out the power of the Chief Justice making rules under section 540 of the Criminal Code Act 1907 for carrying into effect the principal Act, including relating to contempt proceedings, applications, directions and periods of time for disclosure obligations.

Clause 16 allows the Minister to issue disclosure guidelines and the Chief Justice to issue judicial protocols concerning the control or management of unused material in criminal proceedings. These would not lead to legally enforceable obligations or consequences but would be relevant to deciding any question arising in proceedings. Such guidelines and protocols would not be subject to section 6 of the Statutory Interpretation Act 1977.

Clause 17 repeals the alibi provisions (where an accused person offers an excuse or defence by providing an account of their whereabouts at the time of an alleged act) in the Evidence Act 1905, now made redundant by the provisions of the Act.

Clause 18 makes consequential amendments to the Criminal Code Act 1907 thereby setting out the prerequisites for case management in the Supreme Court, specific to: 1. the purpose of a case management hearing; 2. timing of a case management hearing; 3. holding a case management hearing; 4. powers exercisable at case management hearing; 5. appointment of a case management judge; 6. role of a case management judge; 7. powers of a case management judge; 8. information relevant to be part of the court record; 9. the need for continuous (uninterrupted) trials; 10. issues to be referred to a case management judge; 11. restrictions on reporting; 12. offences in connection with restrictions on reporting; 13. amendment of indictments; 14. orders for amendment of indictments, separate trials and postponement of trials; 15. continuation of trial and adjournment of trial; 16. the allowance for criminal procedure rules; 17. costs against legal representatives; and 18. provision for award of costs against third parties.

Clause 19 makes consequential amendments to the Criminal Appeal Act 1952 regarding the discharge of an accused person (to be determined on law alone) on the grounds that there is no case to answer, and staying proceedings where there is an abuse of process. Clause 19 also sets out the requirements for perfecting appeals made to the Supreme Court.

Clause 20 makes consequential amendments to the Court of Appeal Act 1964, in relation to a trial on indictment, to allow a trial judge to (to be determined on law alone): 1. direct a jury to acquit an accused person where there is no case to answer; 2. stay proceedings where the court considers the proceedings an abuse of process; and 3. issue a ruling which would otherwise have the effect of terminating a trial. Clause 20 also makes consequential amendments regarding serious offences.

Clause 21 is the commencement provision.