2nd Reading Brief to the House of Assembly:
Criminal Jurisdiction and Procedure Act 2015

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Mr. Speaker,

Government wishes that this Honourable House give consideration to the Bill entitled the "Criminal Jurisdiction and Procedure Act 2015".As I noted during my comments in support of the Bill entitled, the "Disclosure and Criminal Reform Act 2015", this Bill before us today forms part of a comprehensive programme of reform in respect of the criminal justice system in Bermuda.

Given that my comments on the policy rationale for the earlier Bill apply with equal force to this Bill before us today, and further given that the two Bills form part of the same programme of reform, I do not propose to repeat much of what was already stated to Honourable members. Instead I simply offer a broad overview. I do however wish to emphasize that the changes contemplated by this Bill are consequential and wide-ranging, and

will help to achieve the policy objective of ensuring a criminal justice system which is fit for purpose in the 21st century.

Mr. Speaker,

It is anticipated that the tools contained in this Bill will help foster this important paradigm shift in our criminal justice system as follows:

- The framework governing the criminal jurisdiction of the Magistrates' Courts will be done away with, and in its place will be a comprehensive code governing the commencement of prosecutions, the trial of summary offences, the allocation of either-way offences and the speedy sending of matters to be dealt with in the Supreme Court.
- Judges and juries will be able to draw adverse inferences from a criminal suspect's failure to account for matters which are reasonably expected on police questioning and in court.
- There will be a number of other technical and consequential amendments aimed to support the overall policy rationale of these reforms.

Mr. Speaker,

At present, all criminal offences commence in the Magistrates' Court. Matters which are transferred to the Supreme Court must first be subject to a preliminary inquiry in the Magistrates' Court. These proceedings involve the Prosecution putting forward much of their case and tendering their main witnesses to give evidence, and the court must then be satisfied that there is sufficient evidence before it proceeds to the Supreme Court; otherwise, the matter is discharged.

In practice, the legal test for a matter to be committed is very easy to meet. Except in the rarest and most obvious cases where there is no evidence to support an important element of an offence, these proceedings arelargely *pro forma*. Having consulted with the Department of Public Prosecutions, I have been informed that in their collective memory, only one matter has ever been discharged following a preliminary inquiry. That case involved a short-form inquiry, and in any event, was brought to the Supreme Court by way of a voluntary bill of indictment.

Mr. Speaker,

Preliminary inquiries are often used as an opportunity for defence counsel to test the prosecution's case early on or to lay the groundwork for inconsistent statements to be put to witnesses at trial, and oftentimes a particularly grueling cross-examination can be used to dissuade witnesses from appearing in front of a jury. There is also a strong public policy imperative to prevent vulnerable witnesses (such as children, sexual offence

complainants, seniors or those under threat from gangs) from testifying multiple times in what might potentially be a traumatic experience. It is in the interests of all parties, including innocent defendants eager to vindicate their name, for a criminal defendant to proceed to trial expeditiously. Fairness has many facets, and the speed with which a criminal is disposed of is a fundamental aspect of it.

Mr. Speaker,

Preliminary Inquiries are thought to be extremely laborious, time consuming, costly, and even prejudicial in some instances where there is adverse pre-trial publicity. Therefore the length and cost of criminal proceedings can be effectively reduced, so that more speedy trials may be achieved in accordance with the constitutional requirement for a fair hearing of criminal offences within a reasonable time.

Preliminary inquiries have historically served the purpose of allowing a limited form disclosure of the prosecution's case to defendants in criminal trials. This will become a far less compelling reason to retain preliminary inquiries in light of new and robust rules of prosecution disclosure also enacted as part of the current reforms.

To these ends, Mr. Speaker, the Bill before this Honourable House would eliminate preliminary inquiries. Cases will instead be transferred

administratively to the Supreme Court once a defendant elects trial by jury or the Magistrate declines jurisdiction. Fairness does require that a defendant facing an obviously weak case be given the chance to have charges dismissed as quickly as possible. In this situation, a defendant can make an 'application to dismiss' before a Supreme Court judge once the prosecution discloses its case. Where there is insufficient evidence for the trial on one or multiple counts to continue, a defendant must have them thrown out.

In a clear example of a 'nudge' popularized by behavioural economists, the law will shift from requiring an additional stage in every criminal procedure to only requiring it in clear cases and where requested by the defence.

Mr. Speaker,

We note that the Magistrates' Court's administrative structure is overburdened, which can lead to unconscionable delays to all involved. The Supreme Court is not perfect, but significant progress has been made in clearing up the Court's backlog following efforts by the former Chief Justice, Sir Richard Ground (and continued under his successor, Chief Justice Kawaley). The effect of abolishing committal proceedings and letting the Supreme Court decide whether or not to dismiss a case would keep in meritorious matters to be prosecuted while filtering out unmeritorious ones, thereby allowing the Magistrates' Court to concentrate on tackling its backlog. As the workhorse of our criminal justice system, a healthy and speedy Magistrates' Court is in the interest of everyone.

England abolished preliminary inquiries in 1980, replacing them with paper-based committals. These were then abolished in 1999 for indictment-only offence. Finally, in 2012, committals were abolished altogether. In addition to England, note that the preliminary inquiry process was reformed in Canada and Antigua in 2004, and abolished in St Lucia, Trinidad & Tobago and Jamaica in the years from 2008 to 2013.

Mr. Speaker,

Bermuda currently has an absolute statutory right to silence. That is, a person arrested in connection with the commission of any offence is not obliged to say anything to the police as part of that investigation. The Bill before this Honourable House proposes to relax this statutory rule by allowing courts during the course of criminal proceedings to draw adverse comments in the following circumstances:

- when failing to mention certain facts when questioned or charged by the police;
- when failing to account for objects, substances or marks on his person, clothing, possessions or at a place where arrested; and
- when failing to account for his presence at a particular case when arrested.

Allowing a criminal suspect to provide certain reasonable explanations early on in an investigation is an important part of the overall scheme to

modernize and streamline the criminal justice system. Encouraging the early disclosure of explanations can assist in focusing the scope of a police investigation. In order to ensure that trials proceedwith all due expedition, criminal suspects have their part to play in this process; indeed, it is most in their interest that proceedings are dealt with as expeditiously as possible. Refusing to cooperate with the police when a reasonable explanation could be offered at an early stage in certain circumstances provides no tactical advantage to the defence and serves only to unnecessarily lengthen proceedings. For example, a person found with a dangerous weapon or with bloodied fists can be reasonably expected to provide an account to the police.

Mr. Speaker,

Empirical evidence from other jurisdictions suggests that the vast majority of criminal suspects do not remain silent during their police detention, even where an absolute right exists. There is no reason to doubt this state of affairs for Bermuda. Therefore, the proposed changes would have little effect on current practice. Where it will cause change is in respect of defence lawyers who advise their clients to simply stay quiet or those 'professional criminals' who are familiar with the criminal justice system and who just bide their time until they can be released. The need for adverse inference as an investigatory tool will be more acute when the final provisions of PACE come into force. Those provisions will drastically

shorten the period of detention. The police will have a shorter period during which to investigate an alleged offence. I anticipate that the final stages of PACE will come into effect towards the end of this year. The detention time-clock in PACE and the right to draw adverse inferences should be seen as complementary reforms.

Mr. Speaker,

Submissions received from the Bermuda Bar expressed concern about the constitutionality of these provisions. I am certain that this question may arise during debate on this point as well. Let me just say this. I am satisfied that the provisions being introduced are constitutional.

The UK legislation which is the model of our adverse inference provisions was subject to thorough judicial scrutiny. It was ultimately considered by the European Court of Human Rights. In that case, the Court said that the right to silence and the privilege against self-incrimination were not absolute. An accused's silence could be taken into consideration when deciding guilt, though it could not be determinative of the matter.

The Court did interpret a requirement that an accused be entitled to consult with a lawyer early on in the process of questioning. With this implied requirement, the legislation was held by the Court to strike an appropriate balance between the right to silence and the right to account for matters which a suspect could reasonably be expected to do. I am pleased to say that this additional safeguard is incorporated into the Bill

before the House today as a requirement to allow a criminal suspect to consult with a lawyer before being questioned by the police in interview.

Mr. Speaker,

It is important that we are clear about what is and what is not being proposed in this legislation. We are not removing the criminal suspect's right to silence. The right will continue. What will change is there will now be reasonable consequences to exercising that right in an unreasonable way. There is no compulsion under the legislation to give evidence. Maintaining one's silence after this Bill is passed will not amount to a criminal offence or contempt of court. This position is consistent with guidance of the UN Committee on Human Rights in respect of the International Covenant on Civil and Political Rights. This convention is applicable to Bermuda, and our courts will have regard to it in construing constitutional provisions. That guidance regards the absence of compulsion by the use of inhuman and degrading treatment as key to safeguarding the right to silence. A reasonable requirement to account for certain matters is not to be regarded as such compulsion.

What is most important, Mr. Speaker, is that the legislation will only permit the drawing of adverse inferences, NOT require it. This is a point worth repeating. It will not be mandatory for the court to draw an adverse inference if a suspect is silent during a police investigation or trial. There will

still be a residual power by the judge NOT to draw an inference and to not put such an inference before the jury.

In addition, an adverse inference drawn from a suspect's silence is not in itself sufficient to establish guilt. There must be a compelling case to call for an answer before the court can allow an adverse inference to be drawn. In practice, the use of this legal provision in a trial is mainly to draw the jury's attention to the suspect's failure to answer questions when interviewed under caution. A jury can be invited to consider why an innocent party would refuse to answer reasonable questions and whether a subsequent defence offered was plausible.

It is on this basis that I am confident the provisions are fair and constitutional.

Mr. Speaker,

The Bill also makes a number of complementary consequential amendments which are within the overall spirit of the purpose of these reforms. They include, amongst others:

- expanding the scope of Criminal Procedure Rules which may be issued by the Chief Justice;
- improving the provisions on amending indictment rules; and
- clarifying the procedures to be used in a trial against corporations.

I propose to go into more detail as appropriate in my comments when this Bill goes into committee.

Mr. Speaker,

As also indicated in my earlier comments in respect of the Bill entitled the "Disclosure and Criminal Reform Act 2015", there is a possibility of future changes and tweaks in respect of the reforms to be enacted by this Bill.

It also bears repeating that fairness is an expansive concept which in addition to the criminal defendant must also take into account the interests of the victims of crime, the taxpayers and the general public, all of whom have an overarching interest in an efficient and effective criminal justice system. The reforms proposed in this Bill should go a long way towards achieving this objective, and they draw on practices from overseas that have been tried and tested.

This Bill should go a significant way towards meeting the Government's policy objectives of cost containment, minimizing delays and safeguarding the interests of victims of crime, witnesses and their families.

Mr. Speaker,

With these introductory remarks, I look forward to debate and to further comments from my Honourable Colleagues.