2nd Reading Brief to the House of Assembly:

Disclosure and Criminal Reform Act 2015

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Mr. Speaker,

Government wishes that this Honourable House give consideration to the Bill entitled the "Disclosure and Criminal Reform Act 2015". The Bill has a simple, practical ambition: to create a speedier and more efficient criminal justice system which maintains fairness for everyone connected by it.

I do believe, **Mr. Speaker**, that the reforms contained in this Bill, together with its companion Bill, the"Criminal Jurisdiction and Procedure Act 2015", contain some of the most consequential reforms ever undertaken to criminal procedure in Bermuda. This should hardly surprise anyone; the legislation governing procedure on our books is based on 19th century English precedents. It has been showing its age for a considerable amount of

time, and has had to adapt to the stresses and strains of modern life. The need for reform has been clear for a long time coming, and I am pleased to come before this Honourable House today toeffect that reform.

Mr. Speaker,

It is important to set these reforms in historical context. Efforts have for years been made by various policy-makers, from both sides of the House. As far back as 1992, a Criminal Justice Review Team led by Judge Stephen Tumin, made the case for continuing reform to our criminal justice system. Certain of its recommendations set Bermuda on the path towards implementing the Police and Criminal Evidence Act 2006 (PACE). In 2000, Government drafted a Prosecution of Offences Bill which would have streamlined the commencement and continuation of criminal proceedings. There is substantial overlap between the policy objectives of that Bill and the legislation before the Honourable House today. That Bill was never taken up by this Honourable House. A Justice System Review commissioned by a predecessor of mine, then Senator Larry Mussenden, was published in 2004. That report made far reaching recommendations, many of which are only now being brought to this Honourable House. That report also advocated for PACE and a new Bail Act.

All of this is to say that we have pursued criminal reform through fits and starts, without considering rationale, root-and-branch reforms of the way criminal cases are started and tried in Bermuda.

That is, **Mr Speaker**, until now.

It is also important to point out that the judiciary have been for many years calling for legislation which streamlines and modernizes the functions of our criminal courts. In January 2013, the Honourable Chief Justice put the case for reform succinctly in his comments at the opening of the legal year; and I quote:

> *The financial cost of this system threatens its long-term existence. Some of these costs can be curtailed if the criminal trial process is modernised to reduce the length of criminal trials where this can be justly achieved. With the support of the new Parliament, it is hoped that new Criminal Procedure Rules will be brought into force in the first quarter of this year. This represents a first step towards empowering the Court to manage cases with a view to increased efficiency without diluting fairness. Primary legislation is however required to empower the courts to make costs orders against parties who flout court directions, to compel the prosecution to give adequate disclosure, to require the defence to give disclosure and to abolish preliminary inquiries.*

End quote.

Mr. Speaker,

I am pleased with the work of this Honourable House in supporting the passage of the Chief Justice's Criminal Procedure Rules 2013. Those rules were an important first step towards modernization and efficiency in our trials. Rule 1.1 requires that criminal cases by dealt with justly; this involves, amongst other considerations:

- acquitting the innocent and convicting the guilty;
- dealing with the prosecution and the defence fairly;
- recognising the rights of a defendant;
- respecting the interests of witnesses, victims and jurors; and
- dealing with the case efficiently and expeditiously.

However, without the proper legislative tools in place, the courts cannot fully realize this overriding duty to deal with cases justly. This legislation provides those very tools. Consistent with the objectives of the Ministry and the Judiciary who are hand-in-hand on the need for reform, the Bill will foster a new culture of active case management in place of the old culture of delay and adjournments.

Mr. Speaker,

I receive a number of complaints from many who are affected by the criminal justice system. Some of the most frequent concerns addressed to me come from victims of crime and their families concerned about the inordinate time it seems to take for their case to be processed through our courts. It is frequently said that justice delayed is justice denied. This should

be an area of common interest with criminal advocates, since defendants also have an interest in the speedy resolution of cases.

Mr. Speaker,

Let me now provide this Honourable House with a brief overview of the tools contained in this Bill which the Government believes will help foster this important paradigm shift in our criminal justice system:

- The prosecution duty to disclose its case will be placed on a statutory footing, together with a new duty to disclose material in its possession which is reasonably capable of undermining its case against a defendant.

- There will be a new duty by the defence to serve on the court and the prosecution a defence statement setting out, in summary form, the important details of its case at trial. This will note aspects of the prosecution case which are disputed and legal issues required to be determined by the court in advance of, and during, trial.

- A new pre-trial case management hearing will be instituted in the Supreme Court. Such a hearing will also be available on application in the Magistrates' Court. These hearings, together with the new rules on disclosure, will assist in actively managing cases and narrowing issues in a case, thus shortening the average length of trials in

Bermuda. Binding rulings can also be sought and made by the judge in advance of trial.

- This procedure will be complemented by the appointment of case management judges. This official can be a different judge who can decide matters before a trial, or matters referred to him or her during trial, thus allowing a case to be disposed of more efficiently.

- The prosecution will be given the right to appeal a ruling by a judge or magistrate terminating a case. This will bring the law back to where it was before a 2000 Privy Council ruling which drastically restricted the prosecution's ability to appeal cases.

- The prosecution's right to appeal an acquittal following the later discovery of new and compelling evidence will be expanded. The application of this procedure only to cases from 2010 onwards will be removed, and the limit to only murder will be extended to a wider number of serious offences.

- Criminal appeals from the Magistrates' Court to the Supreme Court will need to be perfected before they can be heard.

- The process relating to the appointment of jurors will be updated to reduce the risk of prematurely discharging a jury.

- Courts will be given the power to order wasted costs against legal representatives owing to their negligent conduct.

- Provision is made for a number of other technical and consequential amendments aimed to support the overall policy rationale of these reforms.

Mr. Speaker,

The effortsby policy-makers, prosecutors and members of the judiciaryto introduce legislation providing for prosecution and defence disclosure have been for many years now largely inspired by the experience of the UK which introduced such legislation in 1996. The legal obligation of the prosecution to provide its case to the defence and any information which could undermine that case and/or assist the defence was put on a statutory footing.

The proposed disclosure legislation would impose a robust duty of disclosure on the part of the prosecution. In addition, the prosecution will need to make available to the defence any relevant evidence it has access to and which it does not propose to use at trial. The prosecution will be placed under a continual duty in respect of this "unused evidence".

Common law rules have always required such disclosure by the prosecution. These rules have over time become obscured. It is particularly difficult for litigants-in-person who are not legally trained to rely upon them. However, these will be placed on a statutory footing, together with clear statutory guidance as to how the rules will be operationalized. Active and speedy disclosure will also be important to ensuring the success of another of the

Ministry's key proposed reforms, namely the abolition of preliminary inquiries. This will be made effective by the complementary Bill, the Criminal Jurisdiction and Procedure Act 2015.

Mr. Speaker,

As a fair trial hinges upon the accused knowing the case to which he/she has to answer, more robust requirements of disclosure will be required from the Defence under this Bill. On the other side, Defence Case Statements will be required from defendants early on. These statements must set out what aspects of the prosecution's case are agreed and what aspects are subject to challenge. The judge will in turn use the results of disclosure by all parties to manage the length of trial, improve ease of understanding and simplify the jury's task.

Mr. Speaker,

The impetus for this is the huge wastage of costs in criminal trials that arises when issues in dispute are not identified early and criminal proceedings are not sufficiently focused from the outset. A very concrete example of this might be where expert witnesses for the prosecution provide evidence which is not under challenge from the defence and are flown to Bermuda at great public expense and are not questioned by defence counsel. Equally, trials are adjourned or extended because there are no clear statutory rules

governing the time table of the prosecution's obligation of disclosure to the Defence.

The Bill reflects longstanding criminal case management practice in England & Wales, a jurisdiction from which our own criminal procedural rules are otherwise largely derived, and various Australian and Canadian jurisdictions. In addition, these reforms have the support of the judiciary.

Mr. Speaker,

The Bill will help to further the objective of 'active case management' shared by the Ministry and the judiciary in the conduct and management of criminal cases. It will do this by establishing case-management hearings empowered to decide legal and evidentiary questions before the presentation of evidence at trial and before a jury is sworn and empanelled.

There is already some limited scope for pre-trial determinations to be made by the court. However, the extent to which these rules might permit pre-trial determinations on substantive matters is not clear. It is equally unclear what the consequences are for failure of the court or parties to abide by their obligations at present. For example, the Criminal Procedure Rules already in place fail to prescribe consequences, and are unable to do so in the absence of a foundation in primary legislation.

Often, **Mr. Speaker**, issues need to be resolved during the course of trial. This is partially a consequence of counsels' inability or unwillingness to proceed with cases expeditiously, and this will mean further delays to trial after jurors have been sworn and witnesses bound over.

A further problem arises when judges allow parties to reopen a ruling previously made, thus allowing collateral issues to be relitigated. The principle of *res judicata* requires some degree of finality in decisions which are made. Often times, these collateral proceedings will add to the length and costs of trial – costs more often than not borne by the public purse as most criminal advocates are paid for from the legal aid budget.

Of course, **Mr. Speaker**, it is impossible to eliminate all in-trial rulings. The Bill before us today does not propose to do that. The dynamic nature of trials means that certain issues unforeseen by either party or the court will inevitably arise. Nonetheless, there is still much scope for anticipating such matters, especially in conjunction with disclosure requirements and active case management. In addition, these binding rulings must remain final, unless the overriding interests of justice require that they be re-opened.

The provisions draw largely from the practice of English and Canadian courts, which have been utilizing such robust powers of case management for many years now. They enact a number of tools missing from the current Criminal Procedure Rules so as to make active case management a reality in our courts.

Mr. Speaker,

The Bill enacts a number of reforms to the jury system to further the Ministry and Judiciary's overall objective of administering a more efficient criminal justice system. Judges will be able to appoint up to 3 additional alternate jurors to follow the evidence together with the 12 regular jurors where it would be in the interests of justice to do so. This might happen in complex trials expected to take a long time and which face a particular risk of collapsing prematurely. Alternate jurors reduce the risk of this happening. Where an original juror is discharged, the alternate juror can take his or her place having already listened to the evidence and submissions.

In addition, criminal trials in Bermuda must be determined by at least 10 or more jurors. Where the jury falls below 10, the entire jury is discharged, and the trial collapses. This threshold should be amended so that 9 jurors can constitute an effective trial jury. (Though where a jury does fall to 9 or 10 jurors, the threshold for a majority verdict will now be 8.)

Mr. Speaker,

Legislation currently provides for costs to be awarded in favour of parties to criminal proceedings. Similar rules exist in England & Wales. However, at times it is the acts or omissions of legal representatives and third parties that might lead to increased costs faced by courts and parties. Facing this

conundrum, UK legislative provisions brought in 1991 and 2004 respectively allow for the courts to order that liability for wasted costs be borne by legal representatives and third parties personally.

The Bill would import these provisions into our domestic law. Such liability would only arise as a result of any improper, unreasonable, or negligent act or omission on the part of the person concerned. The possibility of this sanction will work in conjunction with the Ministry's other proposed reforms aimed at active case management by providing an effective incentive for legal representatives to advance a case expeditiously.

Mr. Speaker,

At present, criminal appellants challenging a conviction or sentence from the Magistrates' Court in the Supreme Court are not required to perfect their appeal before setting down a date for the hearing of an appeal.

What currently transpires is that the prosecution and Court often receive no materials from defence counsel in such appeals until the morning of the hearing which jeopardizes the ability of the prosecution to respond and the Court to correctly decide the appeal. Often this practice of just showing up to argue an appeal necessitates adjournments and/or lengthier than necessary oral submissions.

This reform accords with the Ministry's general desire to foster active case management within the criminal courts.

Mr. Speaker,

The Bill seeks to update the law on criminal appeals from the Supreme Court. Before 2000 the prosecution was able to appeal acquittals following certain terminatory rulings such as a successful 'no case' submission at the midway point of a criminal trial. The Bermudian practice was reversed by the Privy Council decision of *Smith v The Queen.*

The Court of Appeal Act 1964 was amended in 2010 to partially reverse this result by deeming acquittals appealable following a successful 'no case' submission for murder or premeditated murder. This Bill builds on those reforms by allowing all termintory rulings to be appealable by the prosecution, and thereby, returning the Bermudian position to as it was understood before 2000 and bringing it in line with the practice of the UK and other jurisdictions.

Mr. Speaker,

The Court of Appeal Act 1964 also allows for appeals by the DPP where someone is acquitted or discharged of murder or premeditated murder and where new and compelling evidence later emerges. This follows amendments introduced and passed in 2010. However, the right of appeal

only applies in respect of offences occurring after 2010 and for acquittals based on murder and premeditated murder.

The Bill removes this retrospective limitation. In addition, it will expand the number of offences to which this procedure applies to include all serious arrestable offences contained in Schedule 1 of the Police and Criminal Evidence Act 2006. This includes, amongst others, manslaughter, most forms of sexual crime, kidnapping and serious firearms offences.

Mr. Speaker,

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.

Mr. Speaker,

There is also a strong policy imperative at cost containment, both within the criminal justice system itself and in respect of indirect pressure on the Ministry's Legal Aid Budget. By removing what is felt by many to be a redundant stage in criminal proceedings (namely, preliminary inquiries) and

by fostering an active culture of case management, the cost of the average trial should be contained or come down.

Mr. Speaker,

It is often said that justice delayed is justice denied. Robust rules of disclosure and expedited proceedings will stand to benefit all those involved in the criminal justice system, in particular, those who face the daunting task of being tried and judged. Speedy justice is also key to meeting our obligation under the Constitution to secure a fair trial for defendants.

However, the perceived fairness of a criminal justice system derives from the experiences of victims of crime, witnesses and their families. Certainly, there must be proper provisions for the preparation of defences and prosecutions. But when everyday Bermudians say that they want cases to be brought to trial as quickly as possible, they invariably think of the effect on the victims of crime and their families of waiting for the case to be heard and of society's need to have justice served. It can have a terrible effect on these unwilling participants to a crime if cases take a long time to come to court.

Right-thinking Bermudians also are quick to accept that the interests of a defendant in a fair trial must be addressed. However, they also sometimes question if the interests of victims of crime factor at all. I know this because as the Minister with responsibility for the criminal justice system, I am privy to a number of complaints and concerns that stem from their place within

that system – as victims, as witnesses, as their family members. From an expanded prosecution right of appeal for legal technicalities to reducing the trauma for witnesses of multiple court appearances, I trust that members will see these reforms as an important stage in acknowledging the concerns of all parties involved in the criminal justice system.

Mr. Speaker,

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