

**House of Representatives**  
**Supplementary Order Paper**

**Tuesday, 27 September 2011**

**Criminal Procedure (Reform and Modernisation)  
Bill**

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*Proposed amendments*

Hon Simon Power, in Committee, to move the following amendments:

*Clause 4(1)*

*Paragraph (h):* to omit “not exceeding 3 years” (lines 24 and 25 on page 26) and substitute “of less than 2 years”.

*Paragraph (k):* to omit “more than 3 years” (line 36 on page 36) and substitute “2 years or more”.

*Paragraph (s):* to omit “, requirements for the defendant to notify issues in dispute,” (lines 30 and 31 on page 27).

*Clause 6(1)*

Definition of **category 2 offence**: *paragraph (a):* to omit “not exceeding 3 years” (lines 23 and 24 on page 33) and substitute “of less than 2 years”.

Definition of **category 2 offence**: *paragraph (b):* to omit “not exceeding 3 years” (line 27 on page 33) and substitute “of less than 2 years”.

Definition of **category 3 offence**: *paragraph (a):* to omit “more than 3 years” (line 34 on page 33) and substitute “2 years or more”.

Definition of **category 3 offence**: *paragraph (b):* to omit “more than 3 years” (line 37 on page 33) and substitute “2 years or more”.

*Clause 22*

To omit *subclauses (1) and (2)* (line 33 on page 42 to line 13 on page 43) and substitute the following subclauses:

- (1) A charging document may be filed at any time in respect of a category 4 offence.
- (1A) A charging document in respect of a category 3 offence—
  - (a) must be filed within 5 years after the date on which the offence was committed, if an enactment specifies that

- the penalty for the offence includes a term of imprisonment not exceeding 3 years, unless the prior consent of the Solicitor-General is obtained to file a charging document after that date; or
- (b) may be filed at any time in any other case.
- (2) A charging document in respect of a category 1 or 2 offence must be filed—
- (a) within 6 months after the date on which the offence was committed if an enactment specifies that the penalty for the offence—
- (i) includes a term of imprisonment not exceeding 3 months; or
- (ii) does not include a term of imprisonment, but includes a fine not exceeding \$7,500; or
- (b) within 12 months after the date on which the offence was committed if an enactment specifies that the penalty for the offence—
- (i) includes a term of imprisonment greater than 3 months but not exceeding 6 months; or
- (ii) does not include a term of imprisonment, but includes a fine greater than \$7,500 but not exceeding \$20,000; or
- (c) within 5 years after the date on which the offence was committed in any other case, unless the prior consent of the Solicitor-General is obtained to file a charging document after that date.

*Clause 54(2)*

To insert the following paragraph after *paragraph (b)* (after line 32 on page 65):

- (ba) any indication the defendant wishes to give of—
- (i) any fact (not being a fact to which **paragraph (b)** refers) that the defendant will, or will not, dispute at the trial; and
- (ii) any issue that the defendant will, or will not, dispute at the trial or on which the defendant intends to rely at the trial:

*Subpart 3B of Part 3*

To omit this subpart (line 1 on page 70 to line 19 on page 72).

*Clause 88(2)*

To insert the following paragraph after *paragraph (b)* (after line 5 on page 87):

- (ba) any indication the defendant wishes to give of—
- (i) any fact (not being a fact to which **paragraph (b)** refers) that the defendant will, or will not, dispute at the trial; and

- (ii) any issue that the defendant will, or will not, dispute at the trial or on which the defendant intends to rely at the trial:

*Clause 105(1)(b)*

To omit this paragraph (lines 26 and 27 on page 96) and substitute the following paragraph:

- (b) in the case of the defendant, a short outline of the issue or issues at the trial.

*Clause 106*

To omit this clause (line 19 on page 97 to line 12 on page 98).

*Clause 110(2)*

To omit this subclause (lines 19 to 22 on page 100) and substitute the following subclause:

- (2) After the opening statement by the prosecutor and before any evidence is adduced, the defendant may make an opening statement for the purposes of identifying the issue or issues at the trial.

*Heading above clause 112*

To omit this heading (lines 22 and 23 on page 101).

*Clauses 112 to 114*

To omit these clauses (line 24 on page 101 to line 2 on page 104).

*Clause 128*

To omit this clause (line 7 on page 112 to line 18 on page 113) and substitute the following clause:

**128 Non-attendance of defendant charged with offence in category 2, 3, or 4: after plea is entered but before trial or sentencing**

- (1) This section applies to any hearing, other than a trial or a sentencing hearing, if—
  - (a) the offence charged is a category 2, 3, or 4 offence; and
  - (b) a not guilty plea has been entered to the offence charged; and
  - (c) the defendant is required, under **section 125**, to be present at the hearing; and
  - (d) the prosecutor attends the hearing, but the defendant does not.
- (2) When this section applies, the court may do either or both of the following:
  - (a) proceed in the absence of the defendant;
  - (b) issue a warrant to arrest the defendant and bring him or her before the court.

- (3) Despite **subsection (2)**, the court must not proceed with a hearing in the absence of the defendant if the court is satisfied that it would be contrary to the interests of justice to do so.
- (4) Without limiting the matters the court may consider in making its decision under **subsection (3)**, the court must consider the following factors:
  - (a) any information available to the court about the reasons for the defendant's absence:
  - (b) any issues that the defendant has indicated are in dispute and the extent to which the defendant's evidence is critical to an evaluation of those issues:
  - (c) the likely length of any adjournment, given the particular interests of victims and witnesses that a trial takes place within a reasonable time of the events to which it relates and the effect of any delay on the memories of witnesses:
  - (d) the nature and seriousness of the offence:
  - (e) the interests of any co-defendant.
- (5) If the hearing is in front of a Registrar under **section 55(4)**, the Registrar may—
  - (a) proceed with the hearing in the absence of the defendant; or
  - (b) issue a warrant to arrest the defendant and bring him or her before the court.

*New clause 128AA*

To insert the following clause after *clause 128* (after line 18 on page 113):

**128AA Non-attendance of defendant at trial for offence in category 2, 3, or 4**

- (1) This section applies to any trial if—
  - (a) the offence charged is a category 2, 3, or 4 offence; and
  - (b) the defendant is required, under **section 125**, to be present at the trial; and
  - (c) the prosecutor attends the trial, but the defendant does not.
- (2) If the court is satisfied that the defendant has a reasonable excuse for his or her non-attendance, the court must not proceed with the trial unless it is satisfied that the defendant's absence will not prejudice his or her defence.
- (3) If the court is not satisfied that the defendant has a reasonable excuse for his or her non-attendance, the court may do either or both of the following:
  - (a) proceed with the trial in the absence of the defendant:
  - (b) issue a warrant to arrest the defendant and bring him or her before the court.

- (4) Despite **subsection (3)**, the court must not proceed with the trial in the absence of the defendant if the court is satisfied that it would be contrary to the interests of justice to do so.
- (5) Without limiting the matters the court may consider in making its decision under **subsection (4)**, the court must consider the matters set out in **section 128(4)**.

*Clause 136(3B) and (3C)*

To omit these subclauses (lines 1 to 13 on page 122).

*Clause 141A(6)*

To omit this subclause (lines 26 to 33 on page 127).

*Clause 157(4)*

To omit this subclause (lines 16 to 19 on page 139) and substitute the following subclause:

- (4) With the consent of all parties, an order under this section may be made by the Registrar in respect of a proceeding for—
  - (a) a category 1 or 2 offence; or
  - (b) a category 3 offence punishable by a term of imprisonment not exceeding 3 years, if the defendant has not elected a jury trial.

*Clause 183A(1)*

To omit this subclause (lines 21 to 27 on page 157) and substitute the following subclause:

- (1) This section applies if—
  - (a) a defendant is convicted of—
    - (i) a category 1 or 2 offence; or
    - (ii) a category 3 offence punishable by a term of imprisonment not exceeding 3 years, if the defendant did not elect a jury trial; or
  - (b) an order is made under section 106(3) of the Sentencing Act 2002 in relation to a defendant who pleads guilty or is found guilty of—
    - (i) a category 1 or 2 offence; or
    - (ii) a category 3 offence punishable by a term of imprisonment not exceeding 3 years, if the defendant did not elect a jury trial; or
  - (c) an order is made under **section 372(1)(b)** in relation to an infringement offence.

*Clause 227(3)(b)*

To omit “substantial” (line 21 on page 185).

*Clause 236*

*Subclause (3)(b)*: to omit “substantial” (line 12 on page 188).

*Subclause (3)(c)*: to omit “substantial” (line 20 on page 188).

*Subclause (5)*: to omit “**substantial**” (line 24 on page 188).

*Clause 241(2)(b)*

To omit “substantial” (line 31 on page 191).

*Clause 257(3)(b)*

To omit “substantial” (line 3 on page 198).

*Clause 268(2)(b)*

To omit “substantial” (line 21 on page 202).

*Clause 280(2)(b)*

To omit “substantial” (line 13 on page 206).

*Clause 293(2)(b)*

To omit “substantial” (line 31 on page 210).

*Clause 304(1)(b)*

To omit “substantial” (line 5 on page 215).

*Clause 306(2)(b)*

To omit “substantial” (line 19 on page 217).

*Clause 361*

To omit *subclauses (1) and (2)* (lines 18 to 31 on page 251) and substitute the following subclauses:

(1) In this section and **section 378**,—

**costs order** means an order under **subsection (2)**

**procedural failure** means a failure, or refusal, to comply with a requirement imposed by or under this Act or any rules of court or regulations made under it, or the Criminal Disclosure Act 2008 or any regulations made under that Act

**prosecution**—

(a) means any proceedings commenced by the filing of a charging document; but

(b) does not include an appeal.

(2) A court may order the defendant, the defendant’s lawyer, or the prosecutor to pay a sum in respect of any procedural failure by that person in the course of a prosecution if the court is satisfied that the failure is significant and there is no reasonable excuse for that failure.

*Clause 376*

To omit “substantial” (lines 6 and 7 on page 260).

*Clause 421*

To omit “**422 to 423A**” (line 21 on page 293) and substitute “**423 and 423A**”.

*Clause 422*

To omit this clause (lines 23 to 31 on page 293).

*Clause 429*

To omit this clause (lines 6 to 9 on page 298) and substitute the following clause:

**429 Rights of person charged**

Section 24(e) is amended by omitting “more than 3 months” and substituting “2 years or more”

*Schedule 3: Item relating to section 277:*

*New section 277(10):* to omit this subsection (lines 1 to 9 on page 358) and substitute the following subsection:

“(10) If an adult is tried with a child or young person in the Youth Court under **subsection (6)(b) or (7)**, the following apply in respect of the adult, with the necessary modifications:

“(a) all applicable pre-trial processes under **subparts 1 to 3 of Part 3 of the Criminal Procedure (Reform and Modernisation) Act 2010**; and

“(b) **sections 58 to 60(1), 60(2) to 63, and 122** of that Act (which relate to sentence indications).

*Schedule 3: item relating to new Schedule 1*

*Schedule 1: clause 2(h):* to omit this paragraph (lines 7 to 9 on page 368).

*Schedule 6*

Item relating to the Arms Act 1983: to omit the item relating to section 61(1) (line 22 on page 417) and substitute:

Section 61(1): omit “indictable offence” and substitute “category 3 offence punishable by imprisonment for life or by more than 3 years’ imprisonment or a category 4 offence”.

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## Explanatory note

This Supplementary Order Paper sets out proposed amendments to the Criminal Procedure (Reform and Modernisation) Bill.

### Jury trial threshold

The Supplementary Order Paper amends the definitions of **category 2 offence** and **category 3 offence**. The effect of these amendments is to provide that a defendant may elect trial by jury if charged with an offence for which the penalty is or includes imprisonment for 2 years or more. This amends the threshold currently provided for in the Bill, which is an offence carrying imprisonment for a term of more than 3 years.

*Clause 429*, which amends the provision in the New Zealand Bill of Rights Act 1990 concerning the right to a trial by jury, is also amended. The effect of the

amendment would be to provide that a defendant has the right to a trial by jury if the penalty for the offence is or includes imprisonment for 2 years or more.

The Supplementary Order Paper makes related amendments to *clauses 157 and 183A*. A new *clause 157(4)* is substituted. This provision enables the Registrar to transfer proceedings for category 1 and 2 offences, if the parties consent. The amendment will ensure that the Registrar continues to have the power to transfer Judge-alone proceedings for offences punishable by terms of imprisonment not exceeding 3 years, with the consent of all parties, despite the redefining of category 2 and 3 offences. The Supplementary Order Paper makes a similar amendment to *clause 183A*, which makes provision for retrials and rehearings as to sentence in certain cases. The amendment preserves the current effect of the clause, so that the power of the court to order a retrial or rehearing as to sentence continues to apply to a defendant who is tried by Judge alone for an offence punishable by imprisonment not exceeding 3 years.

The Supplementary Order Paper also alters the amendment to section 61 of the Arms Act 1983 that is currently in the Bill. That section provides the Police with a power to search, without warrant, for arms if they have reason to suspect that an offence under the Arms Act 1983 or any indictable offence has been or is about to be committed. Currently, the Bill substitutes a reference to a category 3 or 4 offence for the reference to an indictable offence. However, the change in jury trial threshold provided for in this Supplementary Order Paper and the consequent re-categorisation of offences would have significantly extended the scope of this power to all offences carrying a term of imprisonment of 2 years or more. Therefore, section 61 is amended by this Supplementary Order Paper to apply to any Arms Act offence or offence with a penalty of more than 3 years' imprisonment.

### **Issues in dispute**

Currently, the Bill requires the defendant to formally identify the issues that are in dispute before the trial. If the defendant fails to identify those issues adequately, the Bill allows the fact-finder (whether Judge or jury) to draw adverse inferences from that failure when deciding whether or not the defendant is guilty. This Supplementary Order Paper proposes amendments to the Bill that would remove the requirement for the defendant to identify issues in dispute, and the power of the fact-finder to draw adverse inferences from a failure to do so. Among a number of amendments to achieve that purpose, it is proposed that *subpart 3B of Part 3 and clauses 106 and 112 to 114* are omitted.

New provisions are added to *clause 54* (relating to the content of a case management memorandum for a Judge-alone trial) and *clause 88* (relating to the content of a trial callover memorandum for a jury trial). These require the relevant memorandum to include any indication the defendant wishes to make of—

- any fact that the defendant will, or will not, dispute at the trial; and
- any issue that the defendant will, or will not, dispute at the trial or on which the defendant intends to rely at the trial.



*Clause 105* (which relates to the procedure for the conduct of a Judge-alone trial) is amended to allow the defendant to make an opening statement identifying the issues at the trial. An opening statement of this kind is permitted but is not a requirement.

*Clause 110* (which relates to the procedure for the conduct of a jury trial) is amended to provide that the defendant may make an opening statement identifying issues in dispute. This differs from the current provision in the Bill, which requires this opening statement. The revised approach is similar to the current position in section 367 of the Crimes Act 1961.

*Clause 422* is omitted from the Bill. This clause amended section 32 of the Evidence Act 2006 to remove the prohibition on a fact-finder in a criminal proceeding from inferring guilt from a failure by a defendant to disclose a defence before trial.

*Schedule 3* (which relates to amendments to the Children, Young Persons, and Their Families Act 1989) is amended to remove references to any requirement to identify issues in dispute.

### **Limitation periods**

This Supplementary Order Paper amends *clause 22*, which deals with limitation periods for commencing proceedings for an offence. The limitation periods applicable to proceedings for category 1 and 2 offences are amended to reduce the limitation period to 6 months if the penalty for the offence does not exceed 3 months' imprisonment or is a fine not exceeding \$7,500. The Bill currently provides that a charging document for a category 3 or 4 offence may be filed at any time. The Supplementary Order Paper preserves that position for category 4 offences. As a result of the change to the jury trial threshold, it has been necessary to amend this provision to apply a limitation period of 5 years to any category 3 offence with a term of imprisonment not exceeding 3 years. This preserves the current position in the Bill in relation to these offences.

### **Proceeding in the absence of the defendant**

*Clause 128* requires the court to proceed with hearings (other than sentencing hearings) relating to offences in category 2, 3, or 4 in the absence of the defendant, provided that certain conditions are met. *Clause 128* only applies after a not guilty plea has been entered. The court must proceed with the hearing if it is not satisfied that the defendant has a reasonable excuse for his or her absence. However, the court must not proceed if satisfied that it would be contrary to the interests of justice to do so. This Supplementary Order Paper substitutes a *new clause 128*, which applies to hearings other than trials and sentencing hearings, and only after a not guilty plea has been entered. It does not contain the requirement to proceed in the absence of the defendant. Instead, the court will have the ability to proceed in the absence of the defendant, provided that to do so would not be contrary to the interests of justice.

This Supplementary Order Paper inserts a *new clause 128AA*. This clause restricts the ability of the court to proceed with trials in the absence of the defen-

dant. The powers of the court depend on whether the court is satisfied that the defendant has a reasonable excuse for his or her non-attendance. If the court is so satisfied, then it must not proceed unless it is also satisfied that the defendant's absence will not prejudice his or her defence. If the court is not satisfied that the defendant has a reasonable excuse, then the court has the same discretion to proceed as it has under *new clause 128*.

### **Costs orders**

This Supplementary Order Paper amends *clause 361*, which allows a court to make a costs order against a defendant, a defendant's lawyer, or a prosecutor for a failure by that person to comply with procedural requirements. The amendment provides that the failure must be significant in order for a costs order to be made.

### **Miscarriage of justice test for appeals**

The Supplementary Order Paper amends the phrase "substantial miscarriage of justice" in *clause 236*, which governs the determination of appeals against conviction, by omitting the adjective "substantial". The amendment simplifies but does not alter the test for allowing an appeal against conviction. For this purpose, *clause 236* defines "miscarriage of justice" in line with current case law. To ensure consistent terminology throughout the Bill, the adjective "substantial" is also omitted where the phrase "substantial miscarriage of justice" is used in other appeals and related provisions.

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