



New South Wales

# **Criminal Procedure Amendment (Pre-trial Disclosure) Bill 2000**

## **Explanatory note**

This explanatory note relates to this Bill as introduced into Parliament.

### **Overview of Bill**

The principal object of this Bill is to enable a court, on a case by case basis, to impose pre-trial disclosure requirements on both the prosecution and the defence in order to reduce delays in complex criminal trials.

The Bill also inserts other general provisions relating to pre-trial disclosure, including:

- (a) voluntary pre-trial disclosures, and
- (b) a prohibition on the prosecutor amending an indictment that has been presented at a trial without the leave of the court or the consent of the accused person, and
- (c) a general duty of disclosure by investigating police officers, and

- (d) a discretion for a sentencing court to reduce the sentence imposed on a convicted person having regard to the degree of pre-trial disclosures made by the defence.

## Outline of provisions

**Clause 1** sets out the name (also called the short title) of the proposed Act.

**Clause 2** provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

**Clause 3** is a formal provision giving effect to the amendments to the *Criminal Procedure Act 1986* set out in Schedule 1.

**Clause 4** is a formal provision giving effect to the amendments to the *Director of Public Prosecutions Act 1986* set out in Schedule 2.

**Clause 5** is a formal provision giving effect to the amendments to the *Crimes (Sentencing Procedure) Act 1999* set out in Schedule 3.

**Clause 6** requires the Attorney General to review the pre-trial procedures enacted by the proposed Act after a period of 18 months and report the results of the review to Parliament.

## **Schedule 1 Amendment of Criminal Procedure Act 1986**

**Schedule 1 [1]** enacts provisions to enable a court, on a case by case basis, to impose pre-trial disclosure requirements on both the prosecution and the defence in order to reduce delays in complex criminal trials. The matters to be disclosed will be prescribed by the regulations and will comprise the case for the prosecution, the response of the defence to that case and the response of the prosecution to that response. The court will be able to impose a number of sanctions for non-compliance, including the rejection of evidence, dispensing with formal proof, the grant of an adjournment or comment to the jury. The obligations relating to pre-trial disclosure will not affect any legal immunity, such as client legal privilege, public interest immunity and sexual assault communications privilege.

**Schedule 1 [2]** makes a consequential amendment.

**Schedule 1 [3]** alters the period after committal for trial within which the defence is required to disclose any alibi on which the accused intends to rely from the period of 10 days after committal to the period from committal until 21 days before the trial.

**Schedule 1 [4]** provides for voluntary pre-trial disclosures and the sanctions that may be imposed by the court if notice of objection to disclosed evidence is not given before the hearing.

**Schedule 1 [5]** prevents the prosecutor from amending an indictment that has been presented for the purposes of a trial without the leave of the court or the consent of the accused person.

**Schedule 1 [6] and [7]** make provisions of a savings and transitional nature consequent on the enactment of the proposed Act.

## **Schedule 2   Amendment of Director of Public Prosecutions Act 1986**

The Schedule imposes a general duty on investigating police officers to disclose to prosecuting authorities dealing with the matter all relevant information, documents or other things obtained during the investigation of an indictable offence that might reasonably be expected to assist the case for the prosecution or the case for the accused person.

## **Schedule 3   Amendment of Crimes (Sentencing Procedure) Act 1999**

The Schedule gives the court a discretion to impose a lesser penalty than it would otherwise impose on an offender, having regard to the degree to which the defence has made pre-trial disclosures for the purposes of the trial.



New South Wales

# Criminal Procedure Amendment (Pre-trial Disclosure) Bill 2000

## Contents

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|  | Page |
|--|------|
| 1 Name of Act  | 2    |
| 2 Commencement   | 2    |
| 3 Amendment of Criminal Procedure Act 1986 No 209                  | 2    |
| 4 Amendment of Director of Public Prosecutions Act 1986<br>No 207  | 2    |
| 5 Amendment of Crimes (Sentencing Procedure) Act 1999<br>No 92     | 2    |
| 6 Review of pre-trial disclosure provisions enacted by this<br>Act | 2    |
| <br>   |      |
| Schedules  |      |
| 1 Amendment of Criminal Procedure Act 1986                         | 3    |
| 2 Amendment of Director of Public Prosecutions Act 1986            | 9    |
| 3 Amendment of Crimes (Sentencing Procedure) Act 1999              | 10   |



New South Wales

# **Criminal Procedure Amendment (Pre-trial Disclosure) Bill 2000**

No. , 2000

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## **A Bill for**

An Act to amend the *Criminal Procedure Act 1986* with respect to pre-trial disclosure by the prosecution and the defence; to make related amendments to the *Crimes (Sentencing Procedure) Act 1999* and the *Director of Public Prosecutions Act 1986*; and for other purposes.

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| <b>The Legislature of New South Wales enacts:</b>   | 1        |
| <b>1 Name of Act</b>  | 2        |
| This Act is the <i>Criminal Procedure Amendment (Pre-trial Disclosure) Act 2000</i> .   | 3<br>4   |
| <b>2 Commencement</b>   | 5        |
| This Act commences on a day or days to be appointed by proclamation.  | 6<br>7   |
| <b>3 Amendment of Criminal Procedure Act 1986 No 209</b>  | 8        |
| The <i>Criminal Procedure Act 1986</i> is amended as set out in Schedule 1.   | 9        |
| <b>4 Amendment of Director of Public Prosecutions Act 1986 No 207</b>   | 10       |
| The <i>Director of Public Prosecutions Act 1986</i> is amended as set out in Schedule 2.  | 11<br>12 |
| <b>5 Amendment of Crimes (Sentencing Procedure) Act 1999 No 92</b>  | 13       |
| The <i>Crimes (Sentencing Procedure) Act 1999</i> is amended as set out in Schedule 3.  | 14<br>15 |
| <b>6 Review of pre-trial disclosure provisions enacted by this Act</b>  | 16       |
| (1) The Attorney General is to review the pre-trial disclosure procedures enacted by this Act to determine:                                   | 17<br>18 |
| (a) whether they are utilised by the courts and whether they have been effective in reducing delays in complex criminal trials, and           | 19<br>20 |
| (b) the cost impacts of the procedures.   | 21       |
| (2) The review is to be undertaken as soon as possible after the period of 18 months after the commencement of this section.                  | 22<br>23 |
| (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of that 18-month period. | 24<br>25 |

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| <b>Schedule 1</b>                  | <b>Amendment of Criminal Procedure Act 1986</b>   | 1                    |
|                                    |   | 2                    |
|                                    | (Section 3)   | 3                    |
| <b>[1] Part 3, Division 2A</b>     |   | 4                    |
| Insert after Division 2 of Part 3: |   | 5                    |
| <b>Division 2A</b>                 | <b>Pre-trial disclosure—case management</b>   | 6                    |
| <b>47A</b>                         | <b>Purpose</b>  | 7                    |
|                                    | The purpose of this Division is to enable the court, on a case by case basis, to impose pre-trial disclosure requirements on both the prosecution and the defence in order to reduce delays in complex criminal trials. | 8<br>9<br>10<br>11   |
| <b>47B</b>                         | <b>Definitions</b>  | 12                   |
|                                    | In this Division:   | 13                   |
|                                    | <i>court</i> means the Supreme Court or District Court.   | 14                   |
|                                    | <i>criminal proceedings</i> means proceedings before the Supreme Court or District Court relating to the trial of a person on indictment.   | 15<br>16<br>17       |
|                                    | <i>pre-trial disclosure requirements</i> means requirements for pre-trial disclosure imposed by the court in accordance with this Division.   | 18<br>19<br>20       |
| <b>47C</b>                         | <b>Court may order pre-trial disclosure in particular case</b>  | 21                   |
|                                    | (1) After the indictment is presented in any criminal proceedings, the court may order both the prosecuting authority and the accused person to undertake pre-trial disclosure in accordance with this Division.        | 22<br>23<br>24<br>25 |
|                                    | (2) The court may order pre-trial disclosure on application of any party or on the court’s own initiative.  | 26<br>27             |
|                                    | (3) The court may limit pre-trial disclosure to any specified aspect of the proceedings.  | 28<br>29             |

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| <b>47D</b> | <b>Requirements with respect to pre-trial disclosures</b>   | 1                          |
| (1)        | The regulations may make provision for or with respect to pre-trial disclosure requirements under this Division.  | 2<br>3                     |
| (2)        | Without limiting subsection (1), the regulations may make provision for or with respect to the following:   | 4<br>5                     |
| (a)        | pre-trial disclosure of the case for the prosecution,   | 6                          |
| (b)        | pre-trial disclosure of the defence's response to the case for the prosecution,   | 7<br>8                     |
| (c)        | pre-trial disclosure of the prosecution's response to the response by the defence,  | 9<br>10                    |
| (d)        | the matters required to be disclosed,   | 11                         |
| (e)        | the times at which the pre-trial disclosures are to be made.  | 12<br>13                   |
| (3)        | The regulations may:  | 14                         |
| (a)        | authorise any matter with respect to pre-trial disclosure, and any exemption from pre-trial disclosure, to be determined or granted by the court in any particular case, and  | 15<br>16<br>17<br>18       |
| (b)        | require pre-trial disclosures to be made during the period from the presentation of the indictment until the end of the trial.  | 19<br>20<br>21             |
| <b>47E</b> | <b>Sanctions for non-compliance with pre-trial disclosure requirements</b>  | 22<br>23                   |
| (1)        | <b>Exclusion of evidence</b>  | 24                         |
|            | The court may refuse to admit evidence in any criminal proceedings that is sought to be adduced by a party who failed to disclose the evidence to the other party in accordance with pre-trial disclosure requirements.   | 25<br>26<br>27<br>28       |
| (2)        | <b>Dispensing with formal proof</b>   | 29                         |
|            | The court may allow evidence to be adduced by a party to criminal proceedings without formal proof of a matter if the evidence was disclosed to the other party and the other party did not disclose an intention to dispute or require proof of the matter as required by the pre-trial disclosure requirements. | 30<br>31<br>32<br>33<br>34 |



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| (3) <b>Adjournment</b>  | 1                              |
| The court may grant an adjournment to a party if the other party seeks to adduce evidence in the criminal proceedings that the other party failed to disclose in accordance with pre-trial disclosure requirements and that would prejudice the case of the party.  | 2<br>3<br>4<br>5<br>6          |
| (4) <b>Comment to jury</b>  | 7                              |
| The judge or, with the leave of the court, any party may comment on a failure by a party to comply with pre-trial disclosure requirements in any criminal proceedings. However, the comment must not suggest that an accused person failed to comply because the accused person was, or believed that he or she was, guilty of the offence concerned. | 8<br>9<br>10<br>11<br>12<br>13 |
| (5) <b>Regulations</b>  | 14                             |
| The regulations may make provision for or with respect to the exercise of the powers of a court under this section (including the circumstances in which the powers may not be exercised).  | 15<br>16<br>17                 |
| <b>47F Miscellaneous provisions</b>   | 18                             |
| (1) The court may make orders to resolve any dispute between the parties to criminal proceedings about:   | 19<br>20                       |
| (a) pre-trial disclosure requirements, or   | 21                             |
| (b) the use of anything disclosed under this Division (including restrictions on publication or further disclosure).  | 22<br>23<br>24                 |
| (2) This Division does not affect the obligations or powers under Division 3 (Pre-trial disclosure—general).  | 25<br>26                       |
| (3) This Division prevails, to the extent of any inconsistency, over any rule relating to pre-trial disclosure of the common law, the rules of court or the rules of practice of barristers or solicitors.  | 27<br>28<br>29                 |
| (4) However, this Division does not affect any immunity that applies by law to the disclosure of any information, document or other thing, including, for example, client legal privilege, public interest immunity and sexual assault communications privilege under Part 7.   | 30<br>31<br>32<br>33<br>34     |

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| <b>[2] Part 3, Division 3, heading</b>  | 1                                      |
| Omit the heading. Insert instead:   | 2                                      |
| <b>Division 3      Pre-trial disclosure—general</b>   | 3                                      |
| <b>[3] Section 48 Notice of alibi</b>   | 4                                      |
| Omit “the period of 10 days commencing at the time of the accused person’s committal for trial” from the definition of <i>prescribed period</i> in section 48 (8).  | 5<br>6<br>7                            |
| Insert instead “the period commencing at the time of the accused person’s committal for trial and ending 21 days before the trial is listed (either for mention or hearing)”.   | 8<br>9<br>10                           |
| <b>[4] Section 49A</b>  | 11                                     |
| Insert after section 49:  | 12                                     |
| <b>49A Voluntary pre-trial disclosures</b>  | 13                                     |
| (1) The prosecuting authority or the accused person may, after the indictment is presented in any criminal proceedings and before the hearing in the trial commences, voluntarily disclose to the other party to the proceedings any information, document or other thing that the prosecuting authority or accused person proposes to adduce in evidence in the proceedings.       | 14<br>15<br>16<br>17<br>18<br>19       |
| (2) The court may, subject to the regulations, allow evidence to be adduced by a party to criminal proceedings without formal proof of a matter if the evidence was disclosed to the other party and the other party did not disclose an intention to dispute or require proof of the matter in accordance with this section.   | 20<br>21<br>22<br>23<br>24             |
| (3) The regulations may authorise the court to refuse to admit evidence that is sought to be adduced by a party to criminal proceedings for the purpose of disputing any evidence given in the proceedings if the evidence given was disclosed in accordance with this section and the party did not disclose an intention to dispute the evidence in accordance with this section. | 25<br>26<br>27<br>28<br>29<br>30<br>31 |

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| (4) The regulations may make provision for or with respect to voluntary pre-trial disclosures under this section, including the notification of whether a party intends to dispute or require proof of disclosed evidence. | 1<br>2<br>3<br>4 |
| (5) In this section:<br><i>criminal proceedings</i> means proceedings before the Supreme Court or the District Court relating to the trial of a person on indictment.  | 5<br>6<br>7<br>8 |
| <b>[5] Section 63A</b>   | 9                |
| Insert after section 63:   | 10               |
| <b>63A Amendment of indictment</b>   | 11               |
| (1) An indictment may not be amended after it is presented, except:  | 12<br>13         |
| (a) by order of the court, or  | 14               |
| (b) by the prosecuting authority with the leave of the court or with the consent of the accused person.  | 15<br>16         |
| (2) This section does not itself authorise the court to order an indictment to be amended.   | 17<br>18         |
| (3) For the purposes of this section, an amendment of an indictment includes the substitution of an indictment.  | 19<br>20         |
| <b>[6] Schedule 2 Savings, transitional and other provisions</b>   | 21               |
| Insert at the end of clause 1 (1):   | 22               |
| <i>Criminal Procedure Amendment (Pre-trial Disclosure) Act 2000</i>  | 23<br>24         |

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| <b>[7] Schedule 2</b>   | 1                        |
| Insert at the end of the Schedule with appropriate Part and clause numbers:   | 2                        |
| <br>  |                          |
| <b>Part Provisions consequent on enactment of<br/>Criminal Procedure Amendment (Pre-trial<br/>Disclosure) Act 2000</b>  | 3<br>4<br>5              |
| <br>  |                          |
| <b>Application of Division 2A of Part 3 (Pre-trial disclosure—case<br/>management) and section 49A (Voluntary pre-trial disclosures)</b>  | 6<br>7                   |
| Division 2A of Part 3, and section 49A, extend to proceedings<br>for an offence that were instituted before the commencement<br>of that Division or section, but do not apply to any such<br>proceedings if the indictment was presented before that<br>commencement. | 8<br>9<br>10<br>11<br>12 |
| <br>  |                          |
| <b>Application of amendments to section 48 (Notice of alibi)</b>  | 13                       |
| The amendment made to section 48 by the <i>Criminal Procedure<br/>    Amendment (Pre-trial Disclosure) Act 2000</i> applies to<br>proceedings in which the accused person is committed for trial<br>after the commencement of the amendment.                          | 14<br>15<br>16<br>17     |
| <br>  |                          |
| <b>Application of section 63A (Amendment of indictment)</b>   | 18                       |
| Section 63A applies to indictments presented after the<br>commencement of that section.   | 19<br>20                 |

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|--------------------------|--|-------------------------|
| <b>Schedule 2</b>        | <b>Amendment of Director of Public Prosecutions Act 1986</b>   | 1                       |
|                          |  | 2                       |
|                          | (Section 4)  | 3                       |
| <b>Section 15A</b>       |  | 4                       |
| Insert after section 15: |  | 5                       |
| <b>15A</b>               | <b>Disclosures by investigating police officers</b>  | 6                       |
| (1)                      | Police officers investigating alleged indictable offences have a duty to disclose to the Director all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person. | 7<br>8<br>9<br>10<br>11 |
| (2)                      | The regulations may make provision for or with respect to the duty of disclosure, including for or with respect to:  | 12<br>13                |
| (a)                      | the recording and retention of any such information, documents or other things, and  | 14<br>15                |
| (b)                      | verification of compliance with the duty of disclosure.  | 16                      |
| (3)                      | The duty imposed by this section is in addition to any other duties of police officers in connection with the investigation and prosecution of offences.   | 17<br>18<br>19          |

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|-------------------|---|-------------------|
| <b>Schedule 3</b> | <b>Amendment of Crimes (Sentencing Procedure) Act 1999</b>  | 1                 |
|                   |   | 2                 |
|                   | (Section 5)   | 3                 |
| <b>[1]</b>        | <b>Section 22A</b>  | 4                 |
|                   | Insert after section 22:  | 5                 |
|                   | <b>22A Power to reduce penalties for pre-trial disclosure</b>   | 6                 |
|                   | (1) A court may impose a lesser penalty than it would otherwise impose on an offender who was tried on indictment, having regard to the degree to which the defence has made pre-trial disclosures for the purposes of the trial. | 7<br>8<br>9<br>10 |
|                   | (2) A lesser penalty that is imposed under this section in relation to an offence must not be unreasonably disproportionate to the nature and circumstances of the offence.   | 11<br>12<br>13    |
| <b>[2]</b>        | <b>Schedule 2 Savings, transitional and other provisions</b>  | 14                |
|                   | Insert at the end of the Schedule with appropriate Part and clause numbers:   | 15                |
|                   | <b>Part Provisions consequent on enactment of Criminal Procedure Amendment (Pre-trial Disclosure) Act 2000</b>  | 16<br>17<br>18    |
|                   | <b>Application of section 22A (Power to reduce penalties for pre-trial disclosure)</b>  | 19<br>20          |
|                   | Section 22A extends to proceedings for an offence that were instituted (but not finally determined) before the commencement of that section.  | 21<br>22<br>23    |