

Passed by both Houses



New South Wales

# Criminal Procedure Amendment (Pre-trial Disclosure) Bill 2001

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*I certify that this PUBLIC BILL, which originated in the LEGISLATIVE ASSEMBLY, has finally passed the LEGISLATIVE COUNCIL and the LEGISLATIVE ASSEMBLY of NEW SOUTH WALES.*

*Clerk of the Legislative Assembly.  
Legislative Assembly,  
Sydney, , 2001*



New South Wales

## **Criminal Procedure Amendment (Pre-trial Disclosure) Bill 2001**

Act No , 2001

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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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*I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses.*

*Chairman of Committees of the Legislative Assembly.*

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**The Legislature of New South Wales enacts:****1 Name of Act**

This Act is the *Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001*.

**2 Commencement**

This Act commences on a day or days to be appointed by proclamation.

**3 Amendment of Criminal Procedure Act 1986 No 209**

The *Criminal Procedure Act 1986* is amended as set out in Schedule 1.

**4 Amendment of Director of Public Prosecutions Act 1986 No 207**

The *Director of Public Prosecutions Act 1986* is amended as set out in Schedule 2.

**5 Amendment of Crimes (Sentencing Procedure) Act 1999 No 92**

The *Crimes (Sentencing Procedure) Act 1999* is amended as set out in Schedule 3.

**6 Review of pre-trial disclosure provisions enacted by this Act**

- (1) The Attorney General is to review the pre-trial disclosure procedures enacted by this Act to determine:
  - (a) whether they are utilised by the courts and whether they have been effective in reducing delays in complex criminal trials, and
  - (b) the cost impacts of the procedures.
- (2) The review is to be undertaken as soon as possible after the period of 18 months after the commencement of this section.
- (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.

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## Schedule 1 Amendment of Criminal Procedure Act 1986

(Section 3)

**[1] Section 42 Listing for mention following committal for trial**

Omit the section.

**[2] Part 3, Division 2A**

Insert after Division 2 of Part 3:

**Division 2A Pre-trial disclosure—case management**

**47A Purpose**

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.

**47B Definitions**

In this Division:

*court* means the Supreme Court or District Court.

*criminal proceedings* means proceedings before the Supreme Court or District Court relating to the trial of a person on indictment.

*pre-trial disclosure requirements* means requirements for pre-trial disclosure imposed by the court in accordance with this Division.

**47C Court may order pre-trial disclosure in particular case**

- (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.

- (2) The court may order pre-trial disclosure only if the court is satisfied that it will be a complex criminal trial having regard to:
  - (a) the likely length of the trial, and
  - (b) the nature of the evidence to be adduced at the trial, and
  - (c) the legal issues likely to arise at the trial.
- (3) The court may order pre-trial disclosure on application of any party or on the court's own initiative.
- (4) The court may order pre-trial disclosure only if the court is satisfied that the accused person will be represented by a legal practitioner.
- (5) The court may limit pre-trial disclosure to any specified aspect of the proceedings.

**47D Pre-trial disclosure requirements—general**

- (1) Pre-trial disclosure is to be made as follows:
  - (a) the prosecuting authority is to give the accused person notice of the case for the prosecution,
  - (b) after the accused person has been given notice of the case for the prosecution, the accused person is to give the prosecuting authority notice of the defence response to the case for the prosecution (referred to in this Division as *the defence response*),
  - (c) after the prosecuting authority has been given notice of the defence response, the prosecuting authority is to give the accused person notice of the prosecution response to the defence response.
- (2) Pre-trial disclosure is to be made in accordance with a timetable determined by the court.
- (3) For the purposes of the pre-trial disclosure requirements, a reference to the accused person is to be read as including a reference to the legal practitioner of the accused person.

**47E Disclosure of case for the prosecution**

The notice of the case for the prosecution is to contain the following:

- (a) a copy of the indictment,
- (b) an outline of the prosecution case,
- (c) copies of statements of witnesses proposed to be called at the trial by the prosecuting authority,
- (d) copies of any documents or other exhibits proposed to be tendered at the trial by the prosecuting authority,
- (e) if any expert witnesses are proposed to be called at the trial by the prosecuting authority, copies of any reports by them that are relevant to the case,
- (f) a copy of any information in the possession of the prosecuting authority that is relevant to the reliability or credibility of a prosecution witness,
- (g) a copy of any information, document or other thing provided by police officers to the prosecuting authority, or otherwise in the possession of the prosecuting authority, that may be relevant to the case of the prosecuting authority or the accused person, and that has not otherwise been disclosed to the accused person,
- (h) a copy of any information, document or other thing in the possession of the prosecuting authority that is adverse to the credit or credibility of the accused person.

**47F Defence response**

- (1) The notice of the defence response is to contain the following:
  - (a) notice as to whether the accused person proposes to adduce evidence at the trial of any of the following contentions:
    - (i) insanity,
    - (ii) self-defence,
    - (iii) provocation,
    - (iv) accident,
    - (v) duress,
    - (vi) claim of right,
    - (vii) automatism,
    - (viii) intoxication,

- (b) if any expert witnesses are proposed to be called at the trial by the accused person, copies of any reports by them proposed to be relied on by the accused person,
  - (c) the names and addresses of any character witnesses who are proposed to be called at the trial by the accused person (but only if the prosecution has given an undertaking that any such witness will not be interviewed before the trial by police officers or the prosecuting authority in connection with the proceedings without the leave of the court),
  - (d) the accused person's response to the particulars raised in the notice of the case for the prosecution (as provided for by subsection (2)).
- (2) The accused person's response to the particulars raised in the notice of the case for the prosecution is to contain the following:
- (a) if the prosecuting authority disclosed an intention to adduce expert evidence at the trial, notice as to whether the accused person disputes any of the expert evidence and which evidence is disputed,
  - (b) if the prosecuting authority disclosed an intention to adduce evidence at the trial that has been obtained by means of surveillance, notice as to whether the accused person proposes to require the prosecuting authority to call any witnesses to corroborate that evidence and, if so, which witnesses will be required,
  - (c) notice as to whether the accused person proposes to raise any issue with respect to the continuity of custody of any proposed exhibit disclosed by the prosecuting authority,
  - (d) if the prosecuting authority disclosed an intention to tender at the trial any transcript, notice as to whether the accused person accepts the transcript as accurate and, if not, in what respect the transcript is disputed,
  - (e) notice as to whether the accused person proposes to dispute the accuracy or admissibility of any proposed documentary evidence or other exhibit disclosed by the prosecuting authority,

- (f) notice as to whether the accused person proposes to dispute the admissibility of any other proposed evidence disclosed by the prosecuting authority and the basis for the objection,
- (g) notice of any significant issue the accused person proposes to raise regarding the form of the indictment, severability of the charges or separate trials for the charges.

**47G Prosecution response to defence response**

The notice of the prosecution response to the defence response is to contain the following:

- (a) if the accused person has disclosed an intention to adduce expert evidence at the trial, notice as to whether the prosecuting authority disputes any of the expert evidence and, if so, in what respect,
- (b) if the accused person has disclosed an intention to tender any exhibit at the trial, notice as to whether the prosecuting authority proposes to raise any issue with respect to the continuity of custody of the exhibit,
- (c) if the accused person has disclosed an intention to tender any documentary evidence or other exhibit at the trial, notice as to whether the prosecuting authority proposes to dispute the accuracy or admissibility of the documentary evidence or other exhibit,
- (d) notice as to whether the prosecuting authority proposes to dispute the admissibility of any other proposed evidence disclosed by the accused person, and the basis for the objection,
- (e) a copy of any information, document or other thing in the possession of the prosecuting authority, not already disclosed to the accused person, that might reasonably be expected to assist the case for the defence,
- (f) a copy of any information, document or other thing that has not already been disclosed to the accused person and that is required to be contained in the notice of the case for the prosecution.



**47H Disclosure requirements are ongoing**

- (1) The obligation to undertake pre-trial disclosure continues until any of the following happens:
  - (a) the accused person is convicted or acquitted of the charges in the indictment,
  - (b) the prosecution is terminated.
- (2) Accordingly, if any information, document or other thing is obtained or anything else occurs after pre-trial disclosure is made by a party to the proceedings, that would have affected that pre-trial disclosure had the information, document or thing been obtained or the thing occurred before pre-trial disclosure was made, the information, document, thing or occurrence is to be disclosed to the other party to the proceedings as soon as practicable.

**47I Court may waive requirements**

- (1) A court may, by order, waive any of the pre-trial disclosure requirements that apply under this Division.
- (2) The court may make such an order on its own initiative or on the application of the prosecuting authority or the accused person.
- (3) An order may be made subject to such conditions (if any) as the court thinks fit.

**47J Requirements as to notices**

- (1) A notice under this Division is to be in writing.
- (2) Any notice purporting to be given under this Division on behalf of the accused person by his or her legal practitioner is, unless the contrary is proved, taken to have been given with the authority of the accused person.
- (3) A notice under this Division that is required to be given to a prosecuting authority may be given to the prosecuting authority in the following manner, or as otherwise directed by the court:
  - (a) by delivering it to the prosecuting authority,
  - (b) by leaving it at the office of the prosecuting authority,
  - (c) by sending it by post or facsimile to the prosecuting authority at the office of the prosecuting authority,

- (d) by sending it by electronic mail to the prosecuting authority, but only if the prosecuting authority has agreed to notice being given in that manner.
- (4) A notice under this Division that is required to be given to an accused person may be given to the accused person in the following manner, or as otherwise directed by the court:
  - (a) by delivering it to the accused person,
  - (b) by leaving it at the office of the legal practitioner of the accused person,
  - (c) by sending it by post or facsimile to the legal practitioner of the accused person at the office of the legal practitioner,
  - (d) by sending it by electronic mail to the legal practitioner, but only if the legal practitioner has agreed to notice being given in that manner.

**47K Copies of exhibits and other things not to be provided if impracticable**

- (1) A copy of a proposed exhibit, document or thing is not required to be included in a notice under this Division if it is impossible or impractical to provide a copy.
- (2) However, the party required to give the notice:
  - (a) is to specify in the notice a reasonable time and place at which the proposed exhibit, document or thing may be inspected, and
  - (b) is to allow the other party to the proceedings a reasonable opportunity to inspect the proposed exhibit, document or thing referred to in the notice.

**47L Personal details not to be provided**

- (1) The prosecuting authority is not to disclose in any notice under this Division the address or telephone number of any witness proposed to be called by the prosecuting authority, or of any other living person, unless:
  - (a) the address or telephone number is a materially relevant part of the evidence, or
  - (b) the court makes an order permitting the disclosure.

- (2) An application for such an order may be made by the accused person or the prosecuting authority.
- (3) The court must not make such an order unless satisfied that the disclosure is not likely to present a reasonably ascertainable risk to the welfare or protection of any person or that the interests of justice (including the accused person's right to prepare properly for the hearing of the evidence for the prosecution) outweigh any such risk.
- (4) This section does not prevent the disclosure of an address if the disclosure does not identify it as a particular person's address, or it could not reasonably be inferred from the matters disclosed that it is a particular person's address.
- (5) An address or telephone number that must not be disclosed may, without reference to the person who made the statement being disclosed, be deleted from that statement, or rendered illegible, before the statement is given to the accused person.

**47M Requirements as to statements of witnesses**

- (1) A statement of a witness that is included in a notice under this Division may be in the form of questions and answers.
- (2) If a notice includes a statement that is, wholly or in part, in a language other than English, there must be annexed to it a document purporting to contain a translation of the statement, or so much of it as is not in the English language, into the English language.

**47N Exemption for matters disclosed in brief of evidence**

The prosecuting authority is not required to include in a notice under this Division anything that has already been included in a brief of evidence served on the accused person in accordance with section 25.

**47O Sanctions for non-compliance with pre-trial disclosure requirements**

(1) **Exclusion of evidence**

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.

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- (2) **Dispensing with formal proof**  
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.
- (3) **Adjournment**  
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.
- (4) **Comment to jury**  
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.
- (5) **Application of sanctions**  
Without limiting subsection (6), the powers of the court may not be exercised under this section to prevent an accused person adducing evidence or to comment on any non-compliance by the accused person unless the prosecuting authority has complied with the pre-trial disclosure requirements.
- (6) **Regulations**  
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).

**47P Miscellaneous provisions**

- (1) A statement about any matter that is made by or on behalf of the accused person for the purposes of complying with the pre-trial disclosure requirements does not constitute an admission of that matter by the accused.
- (2) The court may make orders to resolve any dispute between the parties to criminal proceedings about:
- (a) pre-trial disclosure requirements, or

- (b) the use of anything disclosed under this Division (including restrictions on publication or further disclosure).
- (3) This Division does not affect the obligations or powers under Division 3 (Pre-trial disclosure—general).
- (4) Nothing in this Division prevents any voluntary pre-trial disclosure by the accused person to the prosecuting authority of any information, document or other thing that the accused person proposes to adduce in evidence in the proceedings.
- (5) This Division does not limit any obligation (apart from this Division) for pre-trial disclosure, but this Division prevails to the extent of any inconsistency with any such obligation. Any such obligation extends to obligations imposed by the common law, the rules of court, the rules of practice of barristers or solicitors and prosecution guidelines issued by the Director of Public Prosecutions.
- (6) 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, legal professional or client legal privilege, public interest immunity and sexual assault communications privilege under Part 7.

**[3] Part 3, Division 3, heading**

Omit the heading. Insert instead:

**Division 3      Pre-trial disclosure—general**

**[4] Section 48 Notice of alibi**

Omit “the period of 10 days commencing at the time of the accused person’s committal for trial” from the definition of *prescribed period* in section 48 (8).

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 for hearing”.

**[5] Section 53A**

Insert after section 53:

**53A Manner of presenting indictments**

The regulations and (subject to the regulations) the rules of court may make provision for or with respect to the manner of presenting indictments (including by the filing of the indictment in a court registry).

**[6] Section 54**

Omit the section. Insert instead:

**54 Time within which indictment to be presented**

- (1) In this section, *relevant court*, in relation to a matter, means the Supreme Court or the District Court before which the matter has been listed for trial or mention.
- (2) An indictment is to be presented within 4 weeks after the committal of the accused person for trial, except as provided by this section.
- (3) The time within which the indictment is to be presented may be extended:
  - (a) by the regulations or (subject to the regulations) the rules of the relevant court, or
  - (b) by order of the relevant court.
- (4) If an indictment is not presented within the time required by this section, the relevant court may:
  - (a) proceed with the trial if an indictment has been presented, or
  - (b) adjourn the proceedings, or
  - (c) take such other action as it thinks appropriate in the circumstances of the case.
- (5) The prosecutor has no right to an adjournment merely because an indictment has not been presented.

- (6) The relevant court must, in exercising any power under this section, have regard to the fact that the Crown does not have a right of appeal if the accused person is acquitted.
- (7) This section does not affect the powers of the relevant court under section 64.

**[7] Section 63A**

Insert after section 63:

**63A Amendment of indictment**

- (1) An indictment may not be amended after it is presented, except by the prosecuting authority:
  - (a) with the leave of the court, or
  - (b) with the consent of the accused.
- (2) This section does not affect the powers of the court under section 64.
- (3) For the purposes of this section, an amendment of an indictment includes the substitution of an indictment.

**[8] Schedule 2 Savings, transitional and other provisions**

Insert at the end of clause 1 (1):

*Criminal Procedure Amendment (Pre-trial Disclosure)  
Act 2001*

**[9] Schedule 2**

Insert at the end of the Schedule with appropriate Part and clause numbers:

**Part Provisions consequent on enactment of  
Criminal Procedure Amendment (Pre-trial  
Disclosure) Act 2001**

**Application of Division 2A of Part 3 (Pre-trial disclosure—case  
management)**

Division 2A of Part 3 extends to proceedings for an offence that were instituted before the commencement of that Division, but does not apply to any such proceedings if the accused person was committed for trial before that commencement.

**Application of amendments to section 48 (Notice of alibi)**

The amendment made to section 48 by the *Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001* applies to proceedings in which the accused person is committed for trial after the commencement of the amendment.

**Application of substituted section 54 (Time within which  
indictment to be presented)**

Section 54, as substituted by the *Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001*, does not apply to proceedings in which the accused person was committed for trial before the substitution of that section.

**Application of section 63A (Amendment of indictment)**

Section 63A applies to indictments presented after the commencement of that section.



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

(Section 4)

### **Section 15A**

Insert after section 15:

#### **15A Disclosures by investigating police officers**

- (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.
- (2) The duty of disclosure continues until one of the following happens:
  - (a) the Director decides that the accused person will not be prosecuted for the alleged offence,
  - (b) the prosecution is terminated,
  - (c) the accused person is convicted or acquitted.
- (3) Police officers investigating alleged indictable offences also have a duty to retain any such documents or other things for so long as the duty to disclose them continues under this section. This subsection does not affect any other legal obligation with respect to the possession of the documents or other things.
- (4) The regulations may make provision for or with respect to the duties of police officers under this section, including for or with respect to:
  - (a) the recording of any such information, documents or other things, and
  - (b) verification of compliance with any such duty.
- (5) 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.

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

(Section 5)

### **[1] Section 22A**

Insert after section 22:

#### **22A Power to reduce penalties for pre-trial disclosure**

- (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.
- (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.

### **[2] Schedule 2 Savings, transitional and other provisions**

Insert at the end of the Schedule with appropriate Part and clause numbers:

## **Part Provisions consequent on enactment of Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001**

### **Application of section 22A (Power to reduce penalties for pre-trial disclosure)**

Section 22A extends to proceedings for an offence that were instituted (but not finally determined) before the commencement of that section.