

Standing Committee on Law and Justice

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

First Report

Ordered to be printed 24 September 2002

New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice

Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001 First Report / Standing Committee on Law and Justice
[Sydney, NSW]: The Committee, 2002 – 18 p; 30 cm (Parliamentary paper, no 188 (Report 21)

Chair: Ron Dyer

"Ordered to be printed 24 September 2002".

ISBN 0-7313-9768-1

1. Criminal Law
 2. Pre-Trial Disclosure – New South Wales – Law & Legislation
- I. Title
II. Dyer, Ron
III. Series: Parliamentary paper (New South Wales) ; no 188
IV. Series: New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice Report ; 21

345.94405 (DDCC21)

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Terms of Reference

That the Standing Committee on Law and Justice inquire and report on:

1. *The provisions of the Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001, as passed by the House, together with the system of pre-trial disclosure in New South Wales including:*
 - (a) *the provision of funding to various legal bodies required to undertake pre-trial disclosure, including but not limited to:*
 - (i) *the Legal Aid Commission,*
 - (ii) *the Office of the Director of Public Prosecutions,*
 - (iii) *the Public Defenders,*
 - (iv) *the Sydney Regional Aboriginal Corporation Legal Service and other Aboriginal legal services, and*
 - (v) *any other legal service,*
 - (b) *the frequency and type of pre-trial disclosure orders made in the Supreme Court and District Court,*
 - (c) *the rate of compliance with pre-trial disclosure requirements by:*
 - (i) *legally aided defendants,*
 - (ii) *privately funded defendants,*
 - (iii) *Police,*
 - (iv) *the Office of the Director of Public Prosecutions,*
 - (d) *the impact of pre-trial disclosure requirements on unrepresented defendants,*
 - (e) *the effect of pre-trial disclosure requirements on court delays and waiting times in the Supreme Court, District Court and the Court of Criminal Appeal,*
 - (f) *the effect of pre-trial disclosure requirements on the doctrine of the right to silence,*
 - (g) *the effect of pre-trial disclosure requirements on the doctrine of the presumption of innocence,*
 - (h) *the effect of pre-trial disclosure requirements on the doctrine of the burden of proof resting with the prosecution,*
 - (i) *any other matter arising out of or incidental to these terms of reference.*
2. *That the Committee report within 18 months from the date of commencement of the Act, as assented to.*

Committee Membership

The Hon Ron Dyer, MLC, Australian Labor Party, Chair

The Hon John Ryan, MLC, Liberal Party, Deputy Chair

The Hon Peter Breen, MLC, Reform the Legal System

The Hon John Hatzistergos, MLC, Australian Labor Party

The Hon Peter Primrose, MLC, Australian Labor Party

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Chair's Foreword

The Committee commenced its inquiry into the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001* in late May this year and received its final submissions in late August. The Committee was informed that very few orders for pre-trial disclosure have been made by the District and Supreme Courts of New South Wales under the new provisions. Submissions generally expressed the view, therefore, that it was too early to assess the merits of the legislation and to address the terms of reference.

The Committee agrees that the limited use of pre-trial disclosure orders to date precludes an effective assessment of the Amendment Act and the system of pre-trial disclosure in New South Wales, as required by the terms of reference. While some of the terms of reference can be addressed superficially, the Committee does not believe that a thorough inquiry into the terms of reference is possible at this stage.

The Committee consequently has formed the view that substantially more time should be allowed to pass before it can undertake a comprehensive inquiry into the terms of reference. The Committee would like to stress that it considers the inquiry to be a necessary undertaking and therefore has recommended that the Attorney General refer the terms of reference back to the Committee at a later date.

I would like to thank my colleagues on the Committee for their participation in the Inquiry. I would also like to thank the Committee Secretariat for their assistance, in particular, Ms Rachel Callinan, the Senior Project Officer for this Inquiry, for her assistance in drafting this report. Thanks are also due to the participants in the Inquiry who made submissions.

**The Hon Ron Dyer MLC
Committee Chair**

Summary of Recommendations

Recommendation 1 Page 5

The Committee recommends that the Attorney General refer the same or similar terms of reference to the Standing Committee on Law and Justice in the next session of Parliament. The terms of reference should require the Committee to inquire and report within three years of the commencement of the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*, in other words, by 19 November 2004.

Chapter 1 Introduction

Reference from the Legislative Council

- 1.1** During the passage of the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2001, the Legislative Council resolved to refer the provisions of the bill, as passed, to the Standing Committee on Law and Justice for inquiry and report. The terms of reference are as follows:

That the Standing Committee on Law and Justice inquire and report on:

1. *The provisions of the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2001, as passed by the House, together with the system of pre-trial disclosure in New South Wales including:*
 - (a) *the provision of funding to various legal bodies required to undertake pre-trial disclosure, including but not limited to:*
 - (i) *the Legal Aid Commission,*
 - (ii) *the Office of the Director of Public Prosecutions,*
 - (iii) *the Public Defenders,*
 - (iv) *the Sydney Regional Aboriginal Corporation Legal Service and other Aboriginal legal services, and*
 - (v) *any other legal service;*
 - (b) *the frequency and type of pre-trial disclosure orders made in the Supreme Court and District Court;*
 - (c) *the rate of compliance with pre-trial disclosure requirements by:*
 - (i) *legally aided defendants,*
 - (ii) *privately funded defendants,*
 - (iii) *Police,*
 - (iv) *the Office of the Director of Public Prosecutions;*
 - (d) *the impact of pre-trial disclosure requirements on unrepresented defendants;*
 - (e) *the effect of pre-trial disclosure requirements on court delays and waiting times in the Supreme Court, District Court and the Court of Criminal Appeal;*
 - (f) *the effect of pre-trial disclosure requirements on the doctrine of the right to silence;*
 - (g) *the effect of pre-trial disclosure requirements on the doctrine of the presumption of innocence;*
 - (h) *the effect of pre-trial disclosure requirements on the doctrine of the burden of proof resting with the prosecution; and*
 - (i) *any other matter arising out of or incidental to these terms of reference.*

2. That the Committee report within 18 months from the date of commencement of the bill, as assented to.

- 1.2** The bill, as amended, was assented to on 18 April 2001 and commenced on 19 November 2001.

Conduct of this Inquiry

- 1.3** The Committee placed advertisements in newspapers on 25 May 2002 calling for written submissions. The Committee Chair also wrote directly to 29 individuals and organisations advising them of the inquiry and inviting them to make submissions. The Committee received 14 submissions. A list of the individuals and organisations that made submissions is included as Appendix 1.
- 1.4** The submissions generally indicated that, since only a few pre-trial disclosure orders had been made pursuant to the new provisions, it was too early for the Committee to undertake a thorough inquiry into the terms of reference. On the strength of those submissions, and additional research, the Committee resolved to publish this first report.
- 1.5** The Chair's draft first report was prepared in early September 2002 and was circulated for consideration at a deliberative meeting on 19 September 2002. Relevant minutes of proceedings are set out as Appendix 2.

Structure of this Report

- 1.6** This report contains two chapters. **Chapter 1** contains introductory information about the Inquiry and this report.
- 1.7** **Chapter 2** sets out the Committee's reasoning for preparing this first report and advises of its wish to revisit the terms of reference at a later date.

Chapter 2 **Inquiry into the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001***

2.1 The principal object of the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001* (the Amendment Act) is to amend the *Criminal Procedure Act 1986* to enable the District and Supreme Courts of New South Wales, on a case-by-case basis, to impose pre-trial disclosure requirements on both the prosecution and the defence in complex criminal trials.¹ The primary purpose of the reform is to reduce delays in complex criminal trials. The most significant and controversial aspect of the reform is its application to the defence:

The judge will be able to require both the Crown and the defence to reveal specific evidence and material at a reasonable time before the trial. Pre-trial disclosure will forever change the conduct of complex criminal trials in New South Wales. For the first time, with the consent of the court, the defence must disclose before the actual trial whether it intends to rely on specific defences – such as insanity, self-defence, provocation, accident, duress, claim of right, automatism or intoxication – as well as the already required disclosure when a defendant seeks to rely on an alibi or impairment of mind. If those requirements are not met, the judge can refuse to allow the evidence to be admitted later.²

2.2 The Amendment Act also implements other reforms relating to pre-trial disclosure including: a prohibition on the prosecutor amending an indictment presented at trial without the leave of the court or the consent of the accused person; a general duty of disclosure by investigating police officers; and 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.³

2.3 The Committee has been advised that very few orders for pre-trial disclosure have been made under the new provisions. On 15 July 2002, the Chief Judge of the District Court of New South Wales, the Honourable Justice R O Blanch, informed the Committee that either no such orders have been made in the District Court or that such an order is an extreme rarity.⁴ The Honourable Justice Graham Barr of the Supreme Court of New South Wales advised the Committee, on 21 August 2002, as follows:

So far six trials have been noted on arraignment in this Court as possibly being complex, attracting the provisions of this legislation. I say possibly because whether a trial is to be designated complex is decided by the trial judge. Orders for disclosure have been made in only one case. That trial is not yet due to start. Of the other possibly complex trials two are fixed to begin in September this year and

¹ Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000, Explanatory note.

² NSWPD (LA), 8 August 2000, p 7939.

³ Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000, Explanatory note.

⁴ Submission 2, 15 July 2002.

the other three early in 2003. For these reasons the Court is not yet in a position to indicate to the Standing Committee how the legislation is working, though it might be able to do so in a few months' time if the Standing Committee considers it appropriate to invite submissions later on.⁵

2.4 Justice Barr's comment, that it is too early to indicate how the legislation is working, was echoed in several other submissions received by the Committee, including submissions from the Law Society of New South Wales, the Police Association of New South Wales, Legal Aid New South Wales, Public Defenders, the Director of Public Prosecutions, the Attorney General's Department, and the New South Wales Bar Association.

2.5 In this regard, the submission from the Law Society of New South Wales stated:

As far as the [Law Society's Criminal Law] Committee can ascertain, the District Court has not yet made any orders in relation to pre-trial disclosure, and none of the Supreme Court trials in which the legislation has been invoked has been completed. Accordingly, it is not possible to make any comment about the compliance with pre-trial disclosure requirements, or about the effect or impact of the pre-trial disclosure system and legislation.⁶

2.6 Legal Aid New South Wales made similar comments:

As a result of orders having been recently made, the Commission is unable to comment as to the rate of compliance with pre-trial disclosure requirements by legally aided defendants. It will only be after we have matters where pre-trial disclosure orders have been made, and the matter completed, that we will be in a position to comment.⁷

2.7 Mr Peter Zahra SC, Senior Public Defender, stated:

At the outset it is important to emphasise that in view of the short period of time the legislation has been operating, it is too early to assess the efficacy of the legislation.⁸

2.8 The Director of Public Prosecutions advised the Committee that:

To date there have been two matters awaiting trial in the Supreme Court in which pre-trial disclosure orders have been made and a further two matters that have been identified as complex but are awaiting disclosure orders to be made. These trials have future listing dates and it is too early to assess either the extent of compliance with the orders made or the impact of the orders on the length of the trials. The accused in all of these matters are legally represented. I am not aware of

⁵ Submission 11, 21 August 2002.

⁶ Submission 3, 17 July 2002.

⁷ Submission 5, 5 August 2002, p 1.

⁸ Submission 7, 14 August 2002, p 1.

any pre-trial disclosure orders having been made by the District Court although one matter has been identified as suitable.⁹

- 2.9** The Director General of the Attorney General's Department, Mr Laurie Glanfield, informed the Committee of his view, as follows:

As the Supreme Court trials in which disclosure orders have been made have not yet commenced it is not yet possible to comment on the impact of the legislation on: unrepresented accused; the doctrine of the right to silence; the doctrine of the presumption of innocence; and the doctrine of the burden of proof being on the prosecution [ie terms of reference 1(d)(f)(g) and (h)].¹⁰

- 2.10** The Committee agrees that the limited use of pre-trial disclosure orders to date precludes an effective assessment of the Amendment Act and the system of pre-trial disclosure in New South Wales as required by the terms of reference. While some of the terms of reference can be addressed superficially, the Committee does not believe that a thorough inquiry into the terms of reference is possible at this stage.
- 2.11** The Committee notes that it is not required to table this report until 19 May 2003. The Committee considers it is unlikely that there will be a significant increase in the use of pre-trial disclosure orders in the intervening months to the reporting date. It is the Committee's view, therefore, that delaying the completion of this inquiry until that time will not render an inquiry into the terms of reference any more viable.
- 2.12** The Committee consequently has formed the view that substantially more time should be allowed to pass before it can assess the legislation and undertake a comprehensive inquiry into the terms of reference. The Committee would like to stress that it considers the inquiry to be necessary and therefore recommends that the terms of reference be referred back to the Committee at a later date.

Recommendation 1

The Committee recommends that the Attorney General refer the same or similar terms of reference to the Standing Committee on Law and Justice in the next session of Parliament. The terms of reference should require the Committee to inquire and report within three years of the commencement of the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*, in other words, by 19 November 2004.

⁹ Submission 9, 16 August 2002, p 1.

¹⁰ Submission 13, 26 August 2002, p 3.

Appendix 1

Submissions Received

No	Author
1	DAWSON , Mr Brett (Australian Justice & Reform Incorporated)
2	BLANCH , The Hon Justice R O (The Chief Judge, District Court of New South Wales)
3	CULL , Ms Kim (The Law Society of New South Wales)
4	CHILVERS , Mr Greg (Police Association of New South Wales)
5	HUMPHREYS , Mr Doug (Legal Aid New South Wales)
6	PARKES , Mr Damien
7	ZAHRA , Mr Peter (Public Defenders Office)
8	KABLE , Mr Gregory
9	COWDERY , QC, Mr N (Director of Public Prosecutions)
10	COSTA , MLC, The Hon Michael (Minister for Police)
11	BARR , The Hon Justice Graham (Supreme Court of New South Wales)
12	MARGUIN , Ms Ariel (Justice Action)
13	GLANFIELD , Mr Laurie (Attorney General's Department)
14	WALKER , SC, Mr Bret (The New South Wales Bar Association)

Appendix 2

Minutes of Proceedings

Proceedings of the Committee

Meeting No 65

10:00am 17 May 2002

Room 814/815, Parliament House, Sydney

1. MEMBERS PRESENT

Mr Dyer (in the Chair)

Mr Hatzistergos

Mr Ryan

Also in attendance: Director, Ms Tanya Bosch; Committee Officer, Ms Christine Lloyd

2. APOLOGIES

Mr Breen

3. ***

4. DELIBERATIVE MEETING

The Chairman briefed the Committee on the new reference received from the Legislative Council, requiring the Committee to inquire into the impact of the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*.

Resolved, on the motion of Mr Hatzistergos, that the draft advertisement previously circulated by the Secretariat be published in the Sydney Morning Herald and the Daily Telegraph on 25 May 2002, with a closing date for submissions of Tuesday 12 August 2002.

7. ADJOURNMENT

The Committee adjourned at 12.30pm, *sine die*.

Tanya Bosch

Director

Proceedings of the Committee

Meeting No 76

10:00am, 19 September 2002

Library Conference Room, Parliament House, Sydney

1. MEMBERS PRESENT

Mr Dyer (in the Chair)

Mr Breen

Mr Hatzistergos

Mr Primrose

Also in attendance: Director, Ms Tanya Bosch; and Senior Project Officer, Ms Rachel Callinan

2. APOLOGIES

Mr Ryan

3. ***

4. ***

5. CONSIDERATION OF CHAIRMAN'S DRAFT OF THE FIRST REPORT ON THE CRIMINAL PROCEDURE AMENDMENT (PRE-TRIAL DISCLOSURE) ACT 2001

The Chair submitted his draft First Report on the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001* which, having been circulated to Members of the Committee, was accepted as being read.

The Committee considered the draft report.

The draft report was read and agreed to in globo.

Resolved, on the motion of Mr Primrose, that the draft report be the Report of the Committee and that the Chairman, Director and Senior Project Officer be permitted to correct stylistic, typographical and grammatical errors.

Resolved on the motion of Mr Breen, that the draft report, together with the submissions, documents and correspondence in relation to the inquiry be tabled and made public.

6. ADJOURNMENT

The Committee adjourned at 10:10am, *sine die*.

Tanya Bosch

Director