22 June 2004

The Hon Christine Robertson MLC
Chair
Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Ms Robertson

Inquiry into pre-trial disclosure

Thank you for agreeing to accept this late submission to your Committee's Inquiry into the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001* (NSW), now contained in Part 3 Division 3 of the *Criminal Procedure Act 1986* (NSW) ("the Division").

Between 1997 and 2000, the NSW Law Reform Commission ("the Commission") conducted an extensive review of the law in New South Wales relating to the right to silence and pre-trial disclosure in criminal cases. The results of that review are contained in the Commission's final report to the Attorney General: see NSW Law Reform Commission, *The right to silence* (Report 95, 2000) ("Report 95"). Report 95 draws on the extensive experience of the Commissioners who conducted the review; on the results of a large number of submissions made to the Commission in the course of its inquiry, as well as consultations with relevant interest groups; on a full consideration of the relevant literature; and, by no means least, on the findings of the Commission's widespread empirical research: see NSW Law Reform Commission, *The right to silence and pre-trial disclosure in NSW* (Research Report 10, 2000).

The regime of pre-trial disclosure established by Parliament in Part 3 Division 3 of the *Criminal Procedure Act* does not fully implement the Commission's recommendations in Report 95: see NSW, *Parliamentary Debates, Legislative Assembly (Hansard)*, 23 November 2000, at 10750 (Mr Brown) (bill adopts "majority of recommendations" of the Law Reform Commission); NSW, *Parliamentary Debates, Legislative Council (Hansard)*, 7 December 2000, at 11748 (Hon P J Breen) (bill "more or less consistent" with the recommendations of the Law Reform Commission). Indeed, in two significant respects the legislation substantially weakens the Commission's recommendations relating to defence disclosure.

In formulating its recommendations in Report 95, the Commission was mindful that any statutory scheme of pre-trial disclosure should facilitate and strengthen voluntary and informal disclosure: see Report 95 at para 3.136. In addition, the Commission was careful to ensure that, while any system of pre-trial disclosure that it embraced for criminal trials would promote the fairness of the trial as well as general efficiencies (for example, reducing delays, focusing issues and diminishing the likelihood of ambush defences), it would not undermine the presumption of innocence, the right to silence and the burden of proof on the prosecution: see Report 95 especially at paras 3.85-3.125. In view of paragraphs 1(e), (f) and (g) of your Committee's terms of reference, the Commission reaffirms this fundamental approach.

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Bearing that approach in mind, this submission is directed particularly to paragraphs 1(a) and 1(h) of your terms of reference. It is our understanding that the new provisions relating to pre-trial disclosure in criminal cases are not being used to any significant extent in practice. The Commission's essential submission is that Part 3 Division 3 of the *Criminal Procedure Act* should be amended to make it consistent with the recommendations in Report 95. If the Division is so amended, the Commission believes that there would be greater scope for its beneficial operation in practice. In particular, we draw attention to the principal features and sections of the Division that are inconsistent with the recommendations in Report 95 and that, we believe, inhibit its usefulness.

(1) *The reach of the Division*

The first limitation on the operation of the Division is that it applies only to "complex criminal trials" (see *Criminal Procedure Act 1986* ss 134, 136(2)), meaning those trials that a court is satisfied fall within the description by reason of:

- the likely length of the trial, and
- the nature of the evidence to be adduced at the trial, and
- the legal issues likely to arise at the trial (s 136(2)).

Clearly, this acts as a significant restraint on the types of case to which the Division is capable of applying, the more so if the words "and" in the section are to be read conjunctively rather than disjunctively. In *Monroe* (2003) 56 NSWLR 652 at [29], O'Keefe J held that, having regard to the form of s 136(2) and the purpose of the legislation to reduce delays in criminal trials, the words "and" in the subsection should be read as "or". His Honour pointed out that if the words were read conjunctively the ambit of s 136(2) would be "significantly reduced" (at [30]). The Commission agrees, but notes that his Honour's interpretation of the legislation will not necessarily be followed. If nothing else, this needs clarification.

The Commission can, however, see no reason why the Division should be limited to "complex criminal trials". We reiterate that courts ought to be able to invoke the provisions on pre-trial disclosure in all cases in which they are appropriate: see Report 95 at paras 3.98 and 3.127. The appropriate question is not whether the trial can be described as "complex" but whether, having regard to the issues in the trial it is useful to set in train the indicated regime of mutual disclosure. For example, many sexual assault cases are relatively simple but disclosure of the nature of the defence will enable the trial judge more readily to determine the relevance of cross-examination (which will, in many cases, be distressing for the complainant) and confine counsel to matters that are actually in dispute; moreover, the Prosecutor may well not need to question the complainant in chief about intimate details when it is clear that these are not in issue. The relevant considerations are discussed in the Report at paras 3.100 to 3.107 and 3.127 to 3.137. Whether a case is complex or not, trial by ambush is not conducive to the due administration of justice.

Furthermore, the limitation of the Division to complex criminal trials has effect at sentencing. Pre-trial disclosure by the defence is capable of being taken into account as a mitigating factor in determining the appropriate sentence for an offence: see *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(l), 22A (implementing

Report 95, Recommendation 13). One view is that such disclosure is only a relevant mitigating factor where it is made in accordance with the Division: see *Abou-Chabake* [2003] NSWSC 125 (28 February 2003) at [23]. The Commission does not read the legislation so narrowly. In any event, the Commission's Recommendation 13 is framed more broadly and was intended to be more inclusive (for example, to include voluntary pre-trial disclosure). Whether limited in this way or not, the sentencing legislation "tends to discriminate in favour of those persons who have been charged with a more complicated offence where disclosure by the defence can facilitate the administration of justice by limiting the issues in dispute and hence limiting the length and complexity of the trial": see *Abou-Chabake* at [23] per Howie J. This discriminating tendency is at least reduced if the Division is capable of being applied in *all* cases in which pre-trial disclosure is appropriate.

The second limitation on the scope of the Division is that it is only the Supreme Court and the District Court that can take advantage of its provisions: *Criminal Procedure Act 1986* s 135 ("court"). While the Commission does not favour extending the whole pre-disclosure regime to local courts, it does support the defence's disclosure of alibi evidence and the exchange of expert reports in such courts: Report 95 at para 3.140 and Recommendation 8.

(2) *The defence's obligation to disclose its case*

An essential element of the regime of pre-trial disclosure proposed by the Commission in Report 95 is that, in addition to the disclosure obligations placed on the prosecution, disclosure obligations ought to be placed on the defence to the extent that these can be justified. In particular, the Commission is of the view that the due administration of justice does not require that defendants have the right to insist on strict proof of the prosecution's case when there is no reason to dispute much of it; or the right to raise issues for the first time at trial when the prosecution will have no opportunity, or only inadequate opportunity, to investigate those issues: see Report 95 at para 3.128. The Commission recommendations were directed to the introduction of a pre-trial disclosure regime that gave effect to these considerations: see Report 95, Recommendations 5 and 6. They are aimed at two main targets: first, the clear identification of the real issues in the case so that the prosecution does not need to waste resources or court time in tilting at windmills; and, second, the prevention of opportunistic and spurious defences.

Apart from imposing an obligation to respond to the particulars raised in the notice of the case for the prosecution (see *Criminal Procedure Act 1986* s 139(1)(d), 139(2)), the legislation requires the defence to disclose only three matters. Broadly, these are: the defence to the charge but only where the defence proposes to adduce evidence of it; copies of reports of any expert witnesses that will be called; and the names and addresses of any character witnesses: s 139(1)(a)-(c). This fails to give effect to the Commission's recommendations in three important respects.

First, and crucially, the legislative scheme fails to implement the Commission's Recommendation 5(b), which gives the trial judge a discretion to order the defendant, in any particular case, to disclose the general nature of the case the defendant proposes to present at trial. Recommendation 5(b) would come into play where the judge was of the view that the matters that the defendant must disclose (as listed in

Recommendation 5 (a)) were, in the circumstances of the particular case, insufficient to achieve the objectives of defence pre-trial disclosure and are necessary to ensure a fair trial: see Report 95 at paras 3.132, 3.139. One of the objects of the recommendations was to reduce the scope of facts in dispute to those which are genuinely in issue. Mere disclosure of the formal defence would not be sufficient in many cases. Moreover, even the defence is only required to be disclosed where the defendant intends to adduce evidence of it: s139(1)(a). This might cover an intention to adduce the evidence in cross-examination of the prosecution witnesses as well as an intention to call positive evidence in the defence case as to the contention but the matter is certainly not free from doubt and requires attention at all events.

A significant practical difficulty is that a defendant may well not know if he or she intends to adduce the relevant evidence. For example, it may be supposed that the prosecution will do so, in order then to answer it; often, no decision is or can reasonably be required to be made as to whether the defendant will go into evidence at all until the close of the prosecution case. These questions are all the more difficult to answer where, as is mostly the case, no full committal hearing has occurred so that both prosecution and defence must rely on witness statements taken by police officers at various stages in the investigation. Whether it is proposed by the defendant that evidence of any particular matter is to be adduced is therefore highly speculative. Moreover, knowledge of the particular contention as defined by the section will not be of much practical utility to a prosecutor who wants to know the nature of the real issues in the case in order to confine the case in chief to the truly relevant material. A defendant, in caution, might well nominate all conceivable defence contentions and thus defeat the whole purpose of the disclosure.

It follows that defence disclosure is of practical utility only where the general nature of the defence case is disclosed as specified in Recommendation 5(b) and where the actual defence contention is disclosed, regardless as to whether or not it is proposed to adduce evidence of it.

Secondly, the legislation does not, in any event, cover all the matters that the Commission recommended must be disclosed by the defendant in particular types of cases. In sexual assault cases, these are: consent; a reasonable belief that the complainant was consenting; and, a denial that the defendant committed the act constituting the alleged sexual offence. In deemed supply cases, the defendant would be required to disclose a case that the illicit drug was possessed for purposes other than for the purpose of supply. The first of these is essential if there is to be a serious attempt at limiting unnecessary and distressing cross-examination of complainants; the second enables the prosecution to focus on the crucial issue in these cases.

The failure of the legislation to require the defence to disclose its case to the extent recommended in Report 95 has greatly reduced the usefulness of the pre-trial disclosure regime that the legislation establishes.

(3) *The presentment of the indictment*

Section 136(1) of the *Criminal Procedure Act* provides that the court can only order pre-trial disclosure "[a]fter the indictment is presented in any criminal proceedings". Section 130(2) of the *Criminal Procedure Act* enacts that the court has jurisdiction

with respect to the conduct of proceedings on indictment when the indictment is presented *and* the accused is arraigned. Section 136(1) may require amendment to ensure its consistency with s 130(2) by making it clear that the accused must be arraigned before pre-trial disclosure can be ordered. It is appropriate that the accused be formally arraigned before pre-trial disclosure is ordered because it is at the arraignments hearing that the accused will be asked to plead guilty or not guilty, and, if he or she pleads guilty, a trial will be unnecessary. It is important that this point be made clear because an accused is not formally arraigned where the indictment is presented by filing with the registrar of the District Court (see *District Court Rules 1973* r 10D) or received by the judge from the prosecutor and placed on the court file without being read to the accused.

(4) *Documentary evidence*

The *Criminal Procedure Act* imposes an obligation on the prosecution to disclose any documents or exhibits proposed to be tendered at trial (s 138(d)), the defence being required to disclose whether it will dispute the accuracy or admissibility of such evidence (s 139(1)(e)). Further, if the accused has disclosed an intention to tender documentary evidence or other exhibit at trial, the prosecutor must disclose whether it will dispute its accuracy or admissibility: *Criminal Procedure Act 1986* s 140(c). The Commission's recommendations in this respect referred to the tendering of "charts, diagrams or schedules": Report 95 Recommendation 2(e), 5(i). In the absence of any definition of documentary evidence in the legislation, the Commission considers that it is important to add these words to the relevant sections as these items are constructions from other evidence, while "documentary evidence" may be limited to documents otherwise admissible as direct evidence.

(5) *The time period for notice of alibi*

Section 150 of the *Criminal Procedure Act* provides that an accused may not, without the leave of the court, adduce evidence in support of an alibi unless notice of particulars of the alibi are given in the period between the date of the accused's committal for trial and 21 days before the trial is listed for hearing. The Commission's recommendation was that notice of alibi evidence should be given at least 35 days before trial: Report 95, Recommendation 4. The Commission is of the view that a period of no less than 21 days before the listing of the trial is simply too short to allow the prosecution sufficient opportunity to investigate alibi evidence.

(6) *Miscellaneous matters*

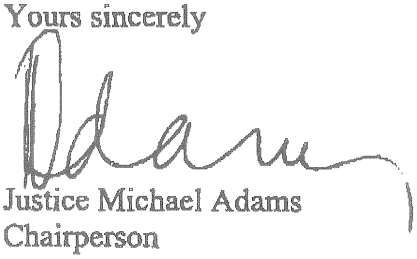
The Commission is of the view that the usefulness of the legislation would be enhanced if the Division reflected the Commission's recommendations in the following respects:

- That reasonable notice be given of the intention to cross-examine prosecution or defence expert witnesses: Report 95, Recommendations 2(c), 5(e).
- That, in respect of exhibits, the prosecution and the defence ought to give notice of intention to raise any issue in respect of to provenance, authenticity or continuity (rather than continuity only): see *Criminal Procedure Act* ss 139(2)(c), 140(b); compare Report 95, Recommendations 2(c), 5(g).

- That s 139(2)(g) should be extended to applications for a "Basha inquiry": Report 95, Recommendation 5(l).
- That s 148 should make it clear that, in trials without jury, the judge may have regard to the failure to comply with the disclosure requirements in the same way as a jury would be entitled to do so: Report 95, Recommendation 10(d).
- That, for the avoidance of doubt, the Division should contain express provision setting out the extent to which courts are empowered to make Rules of Court for the detailed and ongoing implementation of the Division: Report 95, Recommendation 12.

I would be pleased to provide any further clarification of these issues or, indeed, to discuss them with the Committee, should this be thought to be helpful.

Yours sincerely



Justice Michael Adams
Chairperson