Attorney General's
department of nsw

The Honourable C. Robertson MLC
Committee Chair
c/- Director
Standing Committee on Law and Justice
Legislative Council, Parliament House
Macquarie Street
SYDNEY NSW 2000

2004/CLRD0090

-8 APR 2004

Dear Madam Chair

Re: *Inquiry into Pre-Trial Disclosure*

Thank you for your letter of 12 February 2004 requesting a submission from the Department in respect of the *Criminal Procedure Amendment (Pre-trial Disclosure) Act* 2001 and the system of pre-trial disclosure in NSW.

As the Attorney General stated in his second reading speech to Parliament, the aim of the Act is to introduce a process where courts, on a case-by-case basis, may impose pre-trial disclosure requirements on both the prosecution and the defence. The intention of this process is to reduce delays and complexities in criminal trials, enabling the parties to focus on issues that are in contention, rather than having to prepare evidence in relation to issues that are not in dispute. This should result in the more efficient use of court time and the time of counsel and less inconvenience to witnesses whose evidence would not be challenged in any event. Adjournments in response to unexpected developments in the course of a trial should also be minimised.

The above factors should be taken into account when considering the success of the legislation to date.

I understand that the Committee has also sought submissions from other parties including the Chief Justice, the Chief Judge of the District Court, the Chief Magistrate, the Director of Public Prosecutions (DPP), the Legal Aid Commission, the Law Reform Commission and the Bureau of Crime Statistics and Research (BOCSAR).

I shall address the Committee's Terms of Reference.

1(a) Frequency and type of orders made in the Supreme and District Courts

The pre-trial disclosure legislation imposes an obligation upon the prosecution in every criminal trial to settle and present an indictment within four weeks of committal for trial.

Goodsell Building, 8-12 Chifley Square, Sydney 2000 | GPO Box 6 Sydney 2001
Tel 02 9228 7777 | Fax 02 9233 1860 | DX 1227 | www.lawlink.nsw.gov.au

This obligation is subject to extension of the prescribed time by regulation, rules of court or by order of the relevant court. After the indictment is presented the court may order both the prosecuting authority and the accused person to undertake pre-trial disclosure where the court is satisfied that the case falls within the definition of a "complex criminal trial."

Frequency of orders made in the Supreme and District Courts

Since commencement of the legislation on 19 November 2001 I am informed by the DPP and the Legal Aid Commission that a declaration that a matter was a complex criminal trial has been made by courts in a total of nine matters. Six matters in the Supreme Court and three matters in the District Court.

In one matter no orders for pre-trial disclosure were subsequently sought or made. In the remaining eight matters orders for pre-trial disclosure were made.

Why pre-trial disclosure orders have not been made in a greater number of cases is a question I have considered.

There is a gateway provision through which a case must pass before pre-trial disclosure orders are made. That provision is section 136(2) of the Criminal Procedure Act 1986 which provides that:

> *(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 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.*

It is possible that some judges have considered that all three subsections must be met prior to the making of an order. If the legislation is so interpreted then it will be applicable to a smaller number of cases than if an order can be made if one subsection is met.

The Honourable Justice O'Keefe in the case of *R v Monroe* [2003] NSWSC 55 considered the correct interpretation of s.136(2) as requiring the court to be satisfied of (a) or (b) or (c).

The facts of the case were that the three month old son of the Accused was admitted to hospital with brain damage consisting of subdural haemorrhages, together with retinal haemorrhages and minor bruising. The baby died. The Accused was charged with manslaughter. The Crown case was that the Accused had violently shaken the baby. The defence case was that the injury was not as a result of trauma.

The Court had been advised that the principle issue in the trial was causation of injuries, that the Accused would be relying on medical experts, but they were not willing to supply copies of reports to the prosecution in advance of the close of the Crown case.

The trial was not going to be a lengthy trial, but was going to involve complex expert evidence.

Type of orders made in the Supreme and District Courts

The structure of the legislation has enabled orders in most cases to simply specify a date upon which:

1. the prosecution are to serve the notice of the case for the prosecution;
2. the defence are to serve notice of the defence response; and
3. the prosecution are to serve their notice in response to the defence response.

The legislation sets out in detail the nature of the disclosure which must be made, by the prosecution and the defence, in each of the abovementioned notices.

Individual orders to fit the needs of the particular case were made by the Honourable Justice O'Keefe in the case of *R v Monroe* [2003] NSWSC 55. The orders are detailed following paragraph 40 of the judgment.

The Court was able to make specific orders about the provision of expert medical reports. The provision of medical reports by the defence is one head of defence disclosure under the *Defence Response* section (section 139(1)(b) of the Criminal Procedure Act).

1(b) Rate of compliance with pre-trial disclosure requirements by legally aided accused, privately funded accused, Police and the ODPP

I am advised by the DPP that pre-trial disclosure orders have been complied with by legal representatives of accused persons and the Office of the Director of Public Prosecutions. The DPP has indicated to me that in the matter of *R v Ian Styman, Shannon Styman and Peter Taber* [2003] some of the defence counsel did not comply with the orders by the date specified. The Honourable Justice Graham Barr was the presiding judge during the trial.

I am not aware of whether the accused subject to pre-trial disclosure requirements were legally aided or privately funded. Because of the provision of section 26 of *the Legal Aid commission Act* 1979 No 78 I did not request that information from the Legal Aid Commission.

1(c) Impact of pre-trial disclosure requirements on unrepresented accused

Pre-trial disclosure requirements have no impact on unrepresented accused because section 136(4) of the *Criminal Procedure Act 1986* provides that the court may only order pre-trial disclosure if the court is satisfied that the accused person will be represented by a legal practitioner.

1(d) Effect of pre-trial disclosure requirements on court delays and waiting times in the Supreme Court, District Court and Court of Criminal Appeal

On 3 September 2002 the Attorney General requested the Bureau of Crime Statistics and Research (BOCSAR) to monitor the impact of the pre-trial disclosure legislative reforms.

BOCSAR sought and obtained information from the DPP detailing the number of pre-trial disclosure orders made and whether, in the view of the DPP, those orders had been effective in reducing delays for complex criminal trials.

BOCSAR advised my department in February this year that because of the small number of orders that have been made it would be pointless to make a formal statistical assessment of the impact of the pre-trial disclosure reforms on trial court delay.

The DPP recently provided the Attorney General with a report containing full details of the cases in which pre-trial disclosure orders were made.

The DPP specifically identified three matters where pre-trial disclosure orders were made and where the Crown Prosecutors who conducted the trials reported that the application of the pre-trial disclosure orders had a positive effect on the efficient conduct of those proceedings. The three cases identified were *R v Monroe, R v Styman, Styman and Taber and R v Folbigg*. They were all Supreme Court trials.

In the case of *R v Monroe* (discussed above) the Crown Prosecutor with the conduct of the matter considered that the pre-trial disclosure requirements had the effect of reducing the hearing time in the trial by approximately a week.

In the case of *R v Folbigg* the Crown Prosecutor with conduct of the matter considered that the pre-trial disclosure requirements had the effect of reducing hearing time in the trial by over three weeks.

Of the three matters in the District Court where pre-trial disclosure orders have been made, one ended with a plea of guilty on the first day of the trial, in another the prosecution was discontinued prior to the commencement of the trial and the remaining matter is subject to a timetable for orders at the time of writing. Accordingly, it is too early to assess the effect of pre-trial disclosure requirements on court delays and waiting times in the District Court.

Disclosure orders occur pre-trial in the Supreme and District Court. The effect upon the court delays and waiting times in the Court of Criminal Appeal are likely to be indirect in nature, for example, a reduction in the material that needs to be read and considered because the trial has been run more efficiently. I am aware that an appeal is pending, but not yet listed in the matter of *Folbigg*. The Court of Criminal Appeal heard appeals on conviction and sentence from two accused in the *Styman and Taber* matter on 19 February 2004 and has reserved its decision.

1(e) Effect of pre-trial disclosure requirements on the doctrine of the right to silence

In its 2000 report *The Right to Silence* the NSW Law Reform Commission (LRC), at page three, defined the right to silence as "a group of rights which arises at different points in the criminal justice system.
This group of rights include:

1. a general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies,
2. a general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them;
3. a specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind;

4. a specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock;
5. a specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority; and
6. a specific immunity (at least in certain circumstances), possessed by accused persons undergoing trial, from having adverse comment made on any failure to answer questions before the trial, or to give evidence at the trial."

As was noted by the Honourable Justice O'Keefe at paragraph 11 of his judgment in *R v Monroe*, "under the common law, the rule against self-incrimination extended so as to prevent pre-trial disclosure in criminal cases. The Court did not have the power to require an accused person to reveal his or her defence or matters of evidence involved in such defence."

Pre-trial disclosure by the accused person brings forward the time at which the prosecution becomes aware of the issues at trial and the contents of any expert reports that will be relied upon by an accused person. In my view the pre-trial disclosure requirements do not infringe on the doctrine of the right to silence.

1(f) Effect of pre-trial disclosure requirements on the doctrine of the presumption of innocence

There is nothing about the pre-trial disclosure requirements which effects the doctrine of the presumption of innocence.

The recommended direction in the Judicial Bench Book in relation to the presumption of innocence remains the same regardless of whether or not pre-trial disclosure is ordered:

> *"It is, and always has been, a critical part of our system of justice that persons tried in this court are presumed to be innocent, unless and until they are proved guilty beyond reasonable doubt. This is known as the "presumption of innocence."*

1(g) Effect of pre-trial disclosure requirements on the doctrine of the burden of proof resting with the prosecution

There is nothing about the pre-trial disclosure requirements which effects the doctrine of the burden of proof resting with the prosecution.

The recommended direction in the Judicial Bench Book in relation to the burden of proof remains the same regardless of whether pre-trial disclosure is ordered:

> *"This is a criminal trial of a most serious nature and the burden of proof of guilt of the accused is placed on the Crown. That onus rests upon the Crown in respect of every element of the charge. There is no onus of proof on the accused at all. It is not for the accused to prove his innocence but for the Crown to prove his guilt and to prove it beyond reasonable doubt."*

1(h) any other matter arising out of or incidental to these terms of reference

Requirement for disclosures by investigating police officers to the DPP

Police officers investigating alleged indictable offences have a duty to disclose to the DPP 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 (section 15A of the *Director of Public Prosecutions Act* 1986).

I am not aware of any matters where the police have failed to comply with this provision.

New requirements for the presentation and amendment of indictments by the prosecution

After the enactment of the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act* 2001 the ODPP received supplementary funding to establish a Trial Preparation Unit to enable the filing of final bills of indictment within the 28 days prescribed by the legislation.

The DPP reports that to his knowledge the prosecution has complied with the 28-day time limit in all matters to which it is applicable.

The DPP further reports that the TPU has had some impact on: securing earlier pleas of guilty in some matters and narrowing the issues for trial, which in turn reduces trial time.

The DPP names the absence of defence counsel with whom to negotiate because no defence counsel has been briefed to appear on behalf of the accused in the trial at an early stage; and listing practices in the District Court, as the existing impediments to the negotiation of earlier pleas and the narrowing of issues at an early stage.

Yours faithfully

for **Laurie Glanfield**
Director General