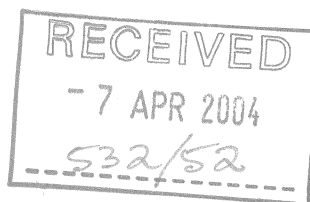




## SUBMISSION FOR INQUIRY INTO PRE-TRIAL DISCLOSURE

To: Director  
 Standing Committee on Law and Justice  
 Legislative Council  
 Parliament House  
 Sydney NSW 2000  
 By email: [lawandjustice@parliament.nsw.gov.au](mailto:lawandjustice@parliament.nsw.gov.au)



Thank you for your invitation to make submissions to your inquiry into Pre-Trial Disclosure.

Justice Action believes that the overriding goal of the criminal justice system should be on achieving fair and compassionate results for all people involved. Simultaneously it is important to protect individuals and the community from arbitrary interference by the State.

Provided these overriding goals are not compromised, Justice Action supports appropriate measures to make trials and other court processes more efficient and to avoid delays.

Accordingly, Justice Action considers that any reforms or laws, such as the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001* ("the Act"), which are directed primarily at "reducing delay" need to be considered carefully against the primary aims of the justice system as well as their stated goal.

### Our concerns about the pre-trial disclosure regime

1. An immediate concern of Justice Action is that the Act does not in fact reduce delay. Rather, it prolongs the criminal process by extending the length of the pre-trial stages. When the defence now has to make pre-trial disclosures (the prosecution always had to), supposedly to confine the issues at trial, police and prosecutors take the opportunity to identify weaknesses in their case and then investigate further to reinforce the case. Not only does this cause delay (contrary to the stated aims of the Act) but it also seriously erodes the fundamental right to silence which protects accused people by requiring police to make out their case entirely without the assistance of the accused person.

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2. Delays can also result from argument in court about whether pre-trial disclosure obligations have been fulfilled and what to do if they are not. This was the likely result of the increased complexity.
3. Justice Action is concerned that the major advantages of the changes to the law accrue to the State, the police and the prosecution, not the community and individuals. The main effect of the legislation seems to be to allow prosecutors to fix up deficient cases.
4. Another problem with the requirements of the Act is that they favour the rich. The legislation creates various additional obligations for the defence, including additional deadlines. These requirements impact disproportionately on people who cannot afford premium representation and who are represented by under-resourced lawyers. The additional complexity and pre-trial steps also increase pre-trial legal costs. The result is higher costs and more prejudice for poorer defendants.
5. The Act also makes it more difficult for defendants to participate in the preparation of their defence, potentially prejudicing them. First, the increased complexity makes it more difficult for defendants to understand and keep up with the already alien criminal process. Second, there are more stages that require their input, requiring more conferences between lawyers and their clients. Where this is not possible or does not happen (for instance due to limited resources), the defendant's case may suffer.
6. Justice Action believes that it is unfair and inappropriate that the penalties for breaching the new rules may affect the outcome of the case. Any sanctions for inadequate compliance with the rules should be separate to the outcome of the principal case. We do not agree that substantial consequences (like the exclusion or admission of evidence or adverse comment to the jury) should flow from the non-observance of procedural requirements in ordinary cases.
7. Additionally, it is unfair that the accused person suffer the consequences of a matter that is out of their hands. Many accused people do not have a good understanding of all the legal complexities of their case. This is particularly true for people who have limited education, have intellectual disabilities, do not speak English as their first language etc. Typically these same people are represented by Legal Aid or community legal centre lawyers who do not

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have the resources to take the time to properly explain it to them either. Further they often have only limited input into the preparation of their case. Why should they suffer when their lawyers do not meet all the requirements of the Act? We consider there is a better chance of avoiding delay and achieving the desired outcomes by making lawyers responsible for their own work, including any unreasonable failures to comply with the Act.

8. We suggest that exposing lawyers to findings of unsatisfactory professional conduct would be a more appropriate and effective way of ensuring the Act's requirements are satisfied.
9. Justice Action supports the obligation on police to disclose all relevant information and documents. We believe the Act should go further and create corresponding obligations for the prosecutors to assist police to identify all relevant material including by making all reasonable inquiries and assisting police to discover additional relevant information.

Prepared by Simon Etherington on behalf of Justice Action

16 March 2004

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