OUR REFERENCE

YOUR REFERENCE

DATE 19 March 2004

DIRECTOR'S CHAMBERS

DPP
NEW SOUTH WALES

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

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Dear Ms Robertson

Inquiry into Pre-Trial Disclosure

I refer to your letter dated 12 February 2004 inviting a submission in relation to the Committee's Inquiry into the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*. I enclose for the Committee's consideration a submission addressing the Committee's terms of reference.

Thank you for the opportunity to comment.

Yours sincerely

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OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

SUBMISSION BY THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS TO THE INQUIRY INTO PRE-TRIAL DISCLOSURE BY THE LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND JUSTICE

(a) The frequency and type of pre-trial disclosure orders made in the Supreme Court and District Court

Declarations that a matter was a complex matter to which the pre-trial disclosure provisions applied have been made by the Supreme Court of NSW in six matters and by the District Court in three matters to date. Particulars of the nine matters in which declarations have been made are set out in the table at **Appendix 1**.

In one matter no orders for pre-trial disclosure were subsequently sought or made, as the court had made the declaration of its own motion and the Crown Prosecutor conducting the matter did not consider that orders were necessary.

Unsuccessful applications for pre-trial disclosure orders have been made in two Supreme Court matters and one District Court matter. Particulars of those matters are set out in the table at **Appendix 2**.

(b) The rate of compliance with pre-trial disclosure requirements

In all matters in which pre-trial disclosure orders have been made both the Office of the Director of Public Prosecutions and the legal representatives of the accused persons have complied with the orders made. However, in the *Styman, Taber and Ravell* matter some of the defence counsel did not comply with the orders by the date specified.

(c) The impact of pre-trial disclosure requirements on unrepresented defendants

Pursuant to s.136(4) of the *Criminal Procedure Act 1986* the court may order pre-trial disclosure only if the court is satisfied that the accused person will be represented by a legal practitioner.

Accordingly, no pre-trial disclosure orders have been made in respect of matters in which the accused was unrepresented.

(d) The effect of pre-trial disclosure requirements on court delays and waiting times

Of the nine matters in which pre-trial disclosure orders were made, two matters *(Gonzales* and *Gillett*) are subject to the timetable for the orders at the time of writing, and the matters have not yet come to trial, so it is too early to assess the impact of the orders in those matters.

In one matter *(Yammine and Chami)* an order was made for the Crown to disclose specific information relating to the medical condition of a Crown witness, and the defence indicated shortly after the orders were made that the orders would not be pursued; so the orders had no impact on the conduct of the matter.

In two other matters (*Eleter and others* and *Barri and others)* the prosecutions were finalised by pleas of guilty on the first day of the trial or pleas before the trial date. The lawyers involved in those two matters indicated that, in their view, the pleas were not the result of the application of the pre-trial disclosure regime.

In the remaining three matters (*Folbigg, Monroe* and *Styman and others*), the Crown Prosecutors who conducted the trials have reported that the application of the pre-trial disclosure orders had a positive effect in that they enabled:

- the Crown to be aware of the expert medical evidence and other experts' evidence to be relied upon by the defence, prior to the commencement of the trial;

- the narrowing of the issues prior to commencement of the trial, via the preparation of statements from Crown experts in response to the statements of defence experts and the service of these statements on the defence;

- the preparation prior to the trial by the Crown Prosecutor of cross-examination of defence experts, based on the reports served by the defence and the statements of the Crown experts in response. This enabled the Crown's cross-examination to proceed immediately after the completion of the defence experts' examination in chief. Without the prior service of the reports, the Crown would have sought an adjournment in order to prepare the cross examination and to enable the Crown's experts to prepare their statements in reply – this would have caused delay and interrupted the smooth flow of the trial;

- reduction in the time required for the calling of evidence, as a result of the narrowing of the issues; the reading of evidence from non-contentious witnesses and the calling of non-contentious witnesses by agreement at convenient times;

- reduction in the number of witnesses needed to be called and a consequential saving in witness expenses, including expenses for overseas witnesses, and reduced inconvenience to witnesses;

- reduction in the time needed for closing addresses by the prosecutor and the defence attorney as a result of the narrowing of the issues;

- reduction in the time needed for summing-up by the trial judge as a result of the narrowing of the issues;

- the focus of the trial to be on the issues in dispute from the outset, in that the Crown could in its opening address confidently focus on and direct the jury's attention to the issues in dispute;

- the trial to progress smoothly without any applications for adjournment by the Crown after having been taken by surprise by new defences raised by the defence for the first time in evidence; and no applications for adjournment by the defence on the basis of failure by the prosecution to disclose.

Attached is a summary of the information provided by the relevant Crown Prosecutors concerning the impact of the pre-trial disclosure orders on the conduct of the three relevant matters **(Appendix 3)**.

The prisoner in the *Folbigg* matter has served on the Crown Notice of Intention to Appeal against Conviction and Sentence. The appeal has not yet been listed in the Court of Criminal Appeal.

Ian Styman and Peter Taber lodged appeals to the Court of Criminal Appeal in relation to their convictions and sentences. The Court of Criminal Appeal heard the appeals on 19 February 2004 and has reserved its decision.

(e) The effect of pre-trial disclosure requirements on the doctrine of the right to silence

The expression *"the right to silence"* was described by the NSW Law Reform Commission in its report *The Right to Silence* (at p.3) as *"a group of rights which arise at different points in the criminal justice system"* which includes: 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 or to answer questions the answers to which may incriminate them; 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; a specific immunity possessed by accused persons undergoing trial from being compelled to give evidence or from being compelled to answer questions put to them in the dock; 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 similar); and a specific immunity (at least in some circumstances) possessed by accused undergoing trial from having adverse comment made on any failure to answer questions before trial or to give evidence at trial.

In some of the matters in which pre-trial disclosure orders were made, the order compelled the defence to respond to the prosecution notice of its case and to serve on the prosecution copies of the experts' reports (principally the evidence of medical experts) upon which the defence intended to rely. A detailed description of the nature of the pre-trial orders made and the impact of the orders is contained in **Appendix 3**. The orders had no impact on the "right to silence" outlined above.

(f) The effect of pre-trial disclosure requirements on the doctrine of the presumption of innocence

The application of the orders did not alter the presumption of innocence.

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

The application of the orders did not alter the doctrine of the burden of proof resting with the prosecution. The onus of proof remained on the prosecution to prove its case beyond reasonable doubt.

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

Law Reform and Related Issues

The following issues relating to law reform and comments on the legislation in practice have been drawn to attention by prosecutors involved in matters in which pre-trial disclosure has been ordered.

(i) Amendment of Section 136(2) of the Criminal Procedure Act 1986

Section 136 of the *Criminal Procedure Act* provides as follows:

> *"(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 produced at the trial, and*
>
> *(c) the legal issues likely to arise at the trial."*

His Honour Justice O'Keefe in the matter of *R v Monroe* [2003] NSWSC55 considered the interpretation of section 136(2) and held that the word *"and"* in (a) and (b) should be interpreted as *"or"*. It is suggested that for clarity and to put the issue beyond doubt section 136(2) be amended to replace *"and"* with *"or"* in (a) and (b).

The rationale for the desirability of this approach is found in paragraphs 33-39 of the judgment of Justice O'Keefe in *R v Monroe*. In essence, trials which are lengthy or involve complex evidence or involve complex legal issues will benefit from the application of the pre-trial disclosure procedures. If the legislation is interpreted as requiring all three pre-requisites, then the legislation will be applicable to a smaller number of cases. For example, a matter which is not lengthy but in which the medical issues are quite complex will not be a candidate for the making of the orders.

If, for example, an order for pre-trial disclosure is not made in a baby shaking case in which the cause of the child victim's death will be the crucial issue in dispute, the Crown will generally not be served with the defence medical reports until such time as the defence

experts give their evidence. This will create difficulties for the Crown in the cross-examination of defence experts and may result in the Crown having to lead further evidence in reply. If the defence reports are served ahead of the trial, the Crown can seek response and comments from its own experts so as to be in a position to immediately cross-examine defence experts and call evidence in its own case if necessary.

(ii) Sanctions

In the *Styman* matter, despite the making of pre-trial disclosure orders, the defence DNA experts' and telephone experts' reports, although provided to the Crown pursuant to the orders, were not provided before the commencement of the trial.

One very experienced Crown Prosecutor commented that although the legislation provides in section 148 for various sanctions for parties who fail to disclose evidence in accordance with pre-trial requirements, it is difficult to envisage appropriate sanctions applying to defaulting accused persons in murder trials. Such sanctions may significantly affect the right of the accused to receive a fair trial.

(iii) Participation in Pre-Trial Disclosure Proceedings by Trial Counsel

In the *Styman* matter one of the accused's counsel complained that he had not been briefed in relation to the pre-trial disclosure proceedings and that these proceedings had been conducted by a solicitor. It appears that this may have occurred because the Legal Aid Commission was unable to fund the participation of trial counsel at the earlier stage of the matter. If pre-trial disclosure is to be effective it is essential that the counsel briefed in the trial participate in the pre-trial procedures.

(iv) Timing of Pre-Trial Disclosure Orders

Section 136 (1) of the *Criminal Procedure Act* provides:

> *"(1) After the indictment is presented in any criminal proceedings, the court may order both the prosecutor and the accused person to undertake pre-trial disclosure in accordance with this Division."*

The legislation provides for the presentation of an indictment as a pre-requisite to the making of pre-trial disclosures orders. Many list judges, however, do not formally arraign the accused; the judge simply receives the indictment from the prosecutor and places it on the court file. The reason for this approach is the time involved in having the indictment (which may be lengthy) read out to the accused, when the list may contain 40 or more matters for arraignment.

Accused persons are not normally brought to court for directions hearings after the arraignments day, so if a pre-trial disclosure application is to be pursued after the arraignments day, special arrangements need to be made to bring the accused to court on a later occasion and then to arraign them.

One Crown Prosecutor suggested that the Chief Justice and the Chief Judge could issue a direction that accused persons are to be formally arraigned (rather than the indictment filed) on the arraignments day, which will enable the pre-trial disclosure legislation to be applied.

For the reason referred to above (the time involved) this is unlikely to be favoured by the Court. An alternative approach would be the amendment of the legislation to provide that the pre-trial disclosure orders may be made after the *presentation* by the Crown of the indictment, even though a plea is not formally entered by the accused.

(v) Earlier Notice to Crown of Alibi

The pre-trial disclosure legislation changed the requirement for the giving of an alibi notice by an accused to the Crown in matters committed for trial after 19 November 2001. Under the previous regime, the accused was required to provide the Crown with notice of his alibi ten days after committal. This date was chosen on the basis that this was the earliest opportunity for most accused to obtain legal representation; ie. most accused were not legally represented at the time of committal for trial.

Section 150 of the *Criminal Procedure Act* requires the accused to serve alibi notice on the Crown no later than three weeks prior to trial. In effect, this allows the Crown only three weeks to investigate the alibi and this period, it is submitted, is inadequate.

One prosecutor drew to attention a matter in which the alleged offence occurred in March 2002 and the matter was listed for trial on 17 November 2003. An alibi notice was given exactly two weeks prior to trial. The Crown Prosecutor successfully sought an adjournment of the trial on the basis that the investigation of the alibi notice had not been completed. This investigation involved, in that case, police locating five witnesses; arranging to interview each of them and reducing their statements to writing and having them sign their statements; and investigating issues arising from the material provided by these five alibi witnesses.

Two weeks was simply not sufficient time for all of these steps to be taken. This prosecutor suggested that the accused should be required to provide an alibi notice at an earlier time than is currently required; possible suggestions are as per the old regime (ie. within ten days of committal for trial) or at the latest six weeks before the trial date.

(vi) Alibi Evidence to be relevant to the Credibility of the Alibi Defence

As noted from the example given above, it is not unusual for a trial to be conducted many years after the alleged offence. Assuming that police can locate alibi witnesses at the time of the trial, it is difficult for the Crown to effectively test such witnesses because of the long lapse of time since the events in question.

A very experienced prosecutor suggested that where an accused is legally represented, is offered the opportunity to provide answers to questions and provides information but makes no reference to an alibi and then subsequently advances an alibi for the first time at trial, the earlier failure to raise alibi be admissible as evidence relevant to the credibility of the alibi defence. It is not suggested that the evidence be relevant to the guilt or innocence of the accused.

This position equates to that outlined by Hunt CJ at CL (as he then was) in his judgment in the matter of *Maiden and Petty* in the Supreme Court (1988 35 A. Crim R 346). The decision was reversed on appeal to the High Court: (1991) 173 CLR 95.

As things currently stand, it is likely that juries are taking into account whether or not an alibi was offered for the first time at trial, and as a result are being permitted to reason without guidance. It may be that as a result juries are taking this into account and using it to infer the guilt of the accused. It would be far preferable for the position to be codified and clarified so that impermissible reasoning of this type does not occur.

A special case can be made for evidence of alibi. This has previously been recognised, in that alibi was initially the only defence of which the accused was required to give prior notice to the Crown.

The Trial Preparation Unit

The *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001* introduced a requirement in relation to all matters committed for trial on or after 19 November 2001, that the prosecutor file a final bill of indictment within 28 days of committal for trial, which thereafter cannot be changed without the leave of the court or the consent of the accused: see sections 20 and 129 of the *Criminal Procedure Act 1986.*

My Office received supplementary funding to enable the establishment of a Trial Preparation Unit (TPU) to enable the finding of final bills of indictment within the 28 days prescribed by the pre-trial disclosure legislation. The TPU is staffed mainly by Crown Prosecutors who are located in Head Office and in the regional offices. A solicitor and three administrative officers have been included in the TPU to assist the Head Office Crown Prosecutors (who are also responsible for appearing in the regular arraignments lists in the Supreme and District Courts). The TPU also performs other chambers work and assists ODPP lawyers with advice generally and in the further screening of some complex matters.

The costs of staffing the TPU since its inception and associated costs are set out in the attached table headed *"Cost of Pre-trial Disclosure Unit"* **(Appendix 4)**.

To my knowledge the prosecution has complied with the 28 day time limit in all matters to which it is applicable. (The District Court Rules permit the filing of an indictment within 8 weeks of committal for trial in proclaimed places which are located outside the main regional centres: see Clause 10C of Part 53 of the District Court Rules.)

The introduction of the TPU has had some impact on:

(a) securing earlier pleas of guilty in some matters, ie. pleas at the arraignment date or pre-trial. The TPU Crown Prosecutors sometimes negotiate pleas after finding a bill, whereas when bills were being found by *ad hoc* Crown Prosecutors (who were not subsequently responsible for the conduct of the trial) there was not such an incentive or opportunity to negotiate a plea - the introduction of a new negotiating party bringing a fresh mind to a case can open up avenues for pleas which were not previously explored by the Local Court advocate;

(b) narrowing the issues for trial, which reduces the amount of time required for the hearing of the matter;

(c) assisting lawyers with pre-committal cases in the form of:

(i) identification of appropriate alternate charges, which enable the matter to be dealt with to finality at the Local Court, (and sometimes by way of a plea of guilty) or committal for sentence rather than for trial;

(ii) identification of deficiencies in the evidence at an earlier stage, so that steps to address this can be taken while the matter is still in the Local Court. Where such deficiencies can be addressed, the likelihood of a plea is increased, and the likelihood of a successful no further proceedings submission shortly before the trial date, is reduced.

(d) enabling earlier attention to the appropriateness of charges and early discontinuance of matters. For example, a significant number of recommendations for *ex officio* counts in indictments and for fine-tuning of indictments (including partial no bills) have come to the Director's Chambers for attention. These issues are being dealt with earlier in the proceedings than they might otherwise have been and one can assume that this has assisted in narrowing issues and facilitating pleas of guilty. The *ex officio* matters have frequently involved child sexual assault and complex fraud matters, where the examination of the committal transcript by the TPU Crown Prosecutor has identified additional or alternate charges;

(e) enabling timely responses to applications by the defence that there be no further proceedings;

(f) promoting discussion between solicitors and Crown Prosecutors in relation to legal issues and promoting the professional development of the solicitors (through some Crown Prosecutors adopting a mentoring role) and a team environment within the Office.

Existing impediments to the negotiation of earlier pleas and the narrowing of issues include:

(a) 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 that stage;

(b) listing practices in the Sydney District Court.

The arraignment in the Sydney District Court occurs within 10 days of a matter being committed for trial from the Local Court. At this early stage a TPU Crown has often not been briefed and no bill of indictment has been found. (The Act allows 28 days for the finding of a bill.) However, it is the Court's common practice in Sydney to list matters for trial at this stage, ie. before the bill of indictment has been found. For example, of the 16 "first mention" matters dealt with on 13 February 2004, four were listed for trial; and of the 29 "first mention" matters dealt with on 20 February 2004, 12 were listed for trial.

The trial dates allocated at this first mention vary from between 1 and 4 months from arraignment.

APPENDIX 1

MATTERS IN WHICH PRE-TRIAL DISCLOSURE ORDERS HAVE BEEN MADE

ACCUSED, CASES N0 & COURT	PARTICULARS OF APPLICATION	LAWYERS	COMMENTS
FOLBIGG, Kathleen 2114320 Supreme Court	The trial judge Wood CJ at CL declared the matter complex on his own motion at first arraignment on 5.7.02. Pre-trial directions made on 13.9.02. Crown ordered to serve notice of its case by 1.11.02; defence to serve response by 15.11.02; Crown to serve reply by 29.11.02; liberty to apply on 48 hours notice to either party.	Mark Tedeschi QC, Jane Culver, Laurel Baglee	The issue was cause of death. The accused was convicted of 3 counts of murder; 1 manslaughter and 1 mal inflict GBH. Accused was mother of the four children killed on four occasions between 1989-1997. Prisoner convicted and subject of current conviction and sentence appeal to the CCA. Comments have been obtained from Crown Prosecutor - see impact report. On 29.10.03 the ODPP received a Notice of Intention to Appeal against Conviction and Sentence from the prisoner.
MONROE, James Stuart 2020499 Supreme Court	Application by Crown. Orders made 14.2.03 by O'Keefe J.: DPP to serve copies of all medical reports by 17.2.03; DPP to serve copies of any further medical reports obtained by the Crown within 24 hours of receipt; Accused to serve any reports of Professor Whitewall by 17.2.03; Accused to serve any further reports obtained on his behalf from any expert medical practitioner within 48 hours of receipt of such reports; liberty to apply on 3 days notice.	Richard Herps, Crown Prosecutor, and Lisa Viney	Issue was cause of death. Manslaughter charge re son of accused. Baby shaking case, where Crown alleged non-accidental injury. Accused found guilty of manslaughter by jury on 3.3.03. Sentenced to imprisonment for 7½ years with NPP 4 years to date from 28.3.03. See O'Keefe J. judgment 2003 SC 55 attached for interpretation of provisions. Comments have been obtained from the Crown Prosecutor – See attached impact report.

ACCUSED, CASES N0 & COURT	PARTICULARS OF APPLICATION	LAWYERS	COMMENTS
ELETER, Michael ELETER, Tony ELETER, George ELETER, Youssef Peter OBEID, Joseph 2111250 Supreme Court	Barr J at first arraign on own motion on 12.4.02. Declared trial complex and directed parties to approach trial judge to fix a date for directions. Direction made on 23.8.02 as follows: Defence response to Crown case to be served by 3.9.02; Crown response to be served by 10.9.02; Copies of the response to be sent to the Associate; Stood over for mention on 12.9.02.	Rob Ranken and Donna Daleo Mark Hobart Crown Prosecutor	Issues included proof of common purpose and joint enterprise; admissibility of admissions by one accused against another; and a hostile prosecution witness. Estimated length of trial 6 weeks. Each accused was to stand trial on 1 count of murder and 1 count of affray, which arose from a murder in a brothel of Victor Zaccat. Charge negotiations resulted in Michael Eleter pleading guilty to 1 count of murder and the remaining accused pleading guilty to 1 count of affray on the first day of the trial on 18.9.02. The instructing solicitor advised that in his view the plea was not brought about by the application of the PTD regime: however, had the matter proceeded to trial the issues had been narrowed to a degree by the PTD and this may have avoided unnecessary adjournments. Even with PTD the defence had not served the reports of ballistics experts upon which it indicated it intended to rely by the first day of the trial.
STYMAN, Ian Craig STYMAN, Shannon Troy TABER, Peter David RAVELL, Leonie Kaye 2113411 Supreme Court	Barr J at first arraign on own motion on 12.4.02. Declared the trial complex. In June 2002 Barr J made PPD directions i.e. that Crown serve all prosecution material including indictment and outline of Crown case by 12.7.02; Defence response be served by 9.8.02; Crown response to defence response by 16.8.02.	John Kiely SC and Nick Borosh	Two accused convicted of murder; one convicted of manslaughter and one convicted of accessory after the fact. Trial commenced 9.9.02 and verdicts delivered 11.12.02. Crown alleged that 3 male accused entered home of 70 year old victim with intent to rob/steal money which they knew she kept in the premises Victim left bound and gagged leading to death by asphyxia and dehydration associated with restraint. One accused made a 000 call alerting authorities to victim's situation, but it was clumsily done and regarded by the operator as a hoax and not acted upon. Three males charged with murder and Ravell charged as "accessory after to fact to murder" and accessory after fact to aggravated enter dwelling and receiving. Comments have been obtained from the Crown Prosecutor and instructing solicitor – see attached impact report. An appeal to the CCA by Ian Styman and P Taber against conviction and sentence was heard on 19.2.04. The CCA reserved its decision in relation to the appeals.

ACCUSED, CASES N0 & COURT	PARTICULARS OF APPLICATION	LAWYERS	COMMENTS
ESTERA, Michael ESTERA, Carlo IKA, Sione CORTEZ, Cliff Enriquoe TRAN, L 2110112 Supreme Court	Barr J at first arraign on own motion on 12.4.02. Stood over for trial on 9.9.02 and vacated before trial date. Application opposed by Crown.	Michael Barr, trial Crown Prosecutor Brook Benson	Charges laid after a fight between two groups of youths who were celebrating the end of the HSC in the city. Issues re identification; 50 witnesses; estimate of 8 weeks. Murder and affray. Guilty pleas. Two all counts on 18.10.02 IKA and CORTEZ – manslaughter and affray; C ESTERA, N ESTRA and TRAN – affray and malicious wounding. Although Barr J declared the matter complex (apparently because of the number of co-accused), the Crown Prosecutor involved has advised that no subsequent specific orders for pre-trial disclosure were sought or made, so PTD had no impact on the conduct of the matter.
BARRI, Omar Sharif ALHALABI, Maher ALHALABI, Wasim AYOUB, Daniel Roland GILROY, Paul Anthony LUCISANO, Michael Colin 2119276 Supreme Court	Defence. On or about 15.11.02. Orders made: Crown Case Statement to be served on defence within 6 weeks;Statement to particularise and itemise telephone intercepts that the Crown is to rely on at trial. Listed for trial 31.03.03. Vacated before trial date.	Paul Cattini, Crown Prosecutor; Kris Chapman, Wollongong	The orders declaring the matter of Barri were made at a time when all the accused were to plead not guilty. Shortly after, negotiations began as to a plea. Ultimately all matters resolved with a plea of guilty, and so no further steps were taken down the pre-trial disclosure path. Barri on 28.02.03 pleaded guilty to knowingly take part in manufacture of prohibited drug; supply cocaine and supply MDMA; W ALAHABI on 17.10.03 pleaded guilty to supply prohibited drug. Case involved large volume of telephone intercepts.
GONZALES, Sef 2216735 Supreme Court	Crown application on 9.12.03 before the trial judge. Orders made: Service of Crown case by 9.1.04;Service of defence response by 16.2.04;Crown response by 23.2.04;Alibi notice to be served by 9.2.04.	Mark Tedeschi QC Sarah Huggett Nicole Paul	Gonzales has been charged with the murder of his parents and 18 year old sister which occurred on 10.7.01. Gonzales was arrested in June 2002 and the matter is listed for trial on 29.3.04 in Sydney Supreme Court. The voir dire is listed for 1.3.04. Note that an earlier application for PTD orders by the Crown was refused without giving reasons by the list judge.

ACCUSED, CASES N0 & COURT	PARTICULARS OF APPLICATION	LAWYERS	COMMENTS
YAMMINE, Youssef & CHAMI, Walid 9913829 & 9916160 District Court	Defence application by Notice of Motion on 28.4.03 before the list judge at Parramatta. (Matter then listed for trial on 12.5.03). HH directed the DPP to disclose to the defence no later than 2.5.03 information in its possession in relation to: 1. medical and psychiatric conditions diagnosed re the principal Crown witness from 1997 to date; 2. names and addresses of medical practitioners, counsellors and hospitals attended by this witness or from which the witness had received treatment from January 1997 to date; 3. all medication prescribed or taken by this witness from January 1997 to date including the name of the prescribing medical practitioner.	Eric Balodis, Crown Prosecutor Samantha Mitchell, Solicitor	This matter involved a re-trial after the CCA upheld a conviction appeal on 23.7.02 [see R v Yammine & Chami [2202] NSW CCA 289]. Yammine and Chami were charged with supply of prohibited drugs, and with the detention of a Crown witness with intent to hold him for advantage, use of offensive weapon with intent to commit an indictable offence, namely assault and assault of that witness. The Crown witness was a drug addict who had been employed allegedly by Yammine and Chami in the sale of drugs. The witness was a schizophrenic. After the list judge made the disclosure orders against the prosecution on 28.4.03 the matter was stood over for call over on 8.5.03. The defence then indicated that the orders previously made would not be pursued. The matter was stood over to 14.5.03. Prior to the trial a Deputy DPP directed no further proceedings in relation to Yammine & Chami. The matter was then vacated before the trial date. The reason for the matter not proceeding to trial was the unwillingness of the Crown witness to give evidence and issues relating to his unreliability.

ACCUSED, CASES N0 & COURT	PARTICULARS OF APPLICATION	LAWYERS	COMMENTS
GILLETT, Ross 2315227 District Court	Crown application on 27.2.04. HH declared matter to be complex trial and ordered: 1. defence to serve on DPP any reports of Dr Beran by 4pm on 26.3.04; 2. defence to serve any other reports obtained thereafter from medical practitioners which they propose to rely upon at trial within 48 hours of receipt; 3. the DPP to serve any medical reports in response to Dr Beran's report by 4pm on 23.4.04. Matter adjourned to 26.3.04 for mention in arraignments list.	Paul Leask, Crown Prosecutor Derek Lee, Solicitor	The accused is charged with drive manner dangerous cause death (3 counts) and negligent driving as the result of an accident on 2 May 2003 at Manly Vale. The accident resulted in the death of a couple and their young daughter (Cameron and Michaela Howie and Shannon Howie). The defence foreshadowed that it would be calling neurological evidence to support the proposition that the accused suffers blackouts. The Crown Prosecutor anticipated that the trial would involve complex medico-legal issues and accordingly made an application on 27.2.04 for the making of pre-trial disclosure orders. The matter is next listed for mention on 26.3.04. The original trial date of 22.3.04 was vacated when the pre-trial disclosure orders were made.

APPENDIX 2

MATTERS IN WHICH PRE-TRIAL DISCLOSURE ORDERS SOUGHT BUT NOT MADE

ACCUSED, CASES NO. & COURT	PARTICULARS OF APPLICATION	LAWYERS	COMMENTS
STRBIK, Peter 2111874 2021519 2213680 District Court	Crown on 23.9.02	John Pickering and Shiva Rich	Car rebirthing matter (charges of steal motor vehicle, receiving, dispose of stolen property; estimated length 40 days) in which the Crown sought disclosure with approval from the Director's Chambers (approval given on 12.8.02) but the Chief Judge refused to order disclosure or to set a time table. On 30.05.03 accused pleaded guilty to 15 counts on indictment.
GONZALES, Sef 2216735 Supreme Court	Crown in Oct 2003	Mark Tedeschi QC Nicole Paul	Murder x 3. An application to declare the matter complex was refused by Wheatley J without giving reasons. A further application before the trial judge was successful-see other table.
WALSH, Richard & Ors including: LOTT W, WEAVER G, ZDRAVKOVIC R, LITTLE T, ROBERTS B, SCHUMACHER K, and TAYLOR B. 2120701 2120707 Supreme Court	Crown before Howie J on 19.12.03	Richard Herps, Steve Higgins and Lisa Viney	Supply and manufacture large commercial quantities of prohibited drugs and firearms offences. Application in this matter was delayed until 19.12.03 because the accused had not been formally arraigned (indictment had been filed). Application was based on length of trial (estimated between 3 and 5 months; nature of the evidence to be adduced and legal issues likely to arise). The application, although not granted, was never refused. The application became a non-issue because the two main accused pleaded guilty; and the trial judge questioned counsel for the remaining accused as to whether they intended to make any pre-trial applications; and was advised that they did not.

APPENDIX 3

CASE STUDIES RE IMPACT OF PRE-TRIAL DISCLOSURE ORDERS

1. Prosecution of Kathleen Folbigg (CASES 2114320)

(a) Background

The trial of Kathleen Folbigg commenced on 1 April 2003. The jury delivered verdicts of guilty on 21 May 2003 in relation to three counts of murder, one count of manslaughter and one count of maliciously inflict grievous bodily harm. Folbigg was charged in connection with the deaths of her four young children which occurred on separate occasions between 1989 and 1997. The trial involved complex issues of causation. Folbigg was sentenced on 24 October 2003 to 40 years imprisonment in total with a non-parole period of 30 years to expire on 21 April 2033. A conviction and sentence appeal has been lodged in the Court of Criminal Appeal.

(b) Nature of Pre-Trial Disclosure Orders

The Supreme Court made orders on 13 September 2002, declaring the matter a complex trial. The Court also ordered: that the Crown serve notice of its case by 1 November 2002; that the defence serve a response by 15 November 2002; and that the Crown serve its reply to the defence response by 29 November 2002. The Crown and defence were given liberty to restore the matter on 48 hours notice if either wished to seek variation of these dates.

The orders were complied with by both the prosecution and the defence.

(c) Impact of the Orders

The orders resulted in the exchange of a large amount of scientific expert reports and a vast reduction in the court time necessary to resolve complex issues of medical science. This exchange of expert reports prior to the trial resulted in a more efficient use of court time and the time of counsel.

The defence initially intended to run five causes of death in the defence case. As a result of the pre-trial disclosure orders the defence was compelled to serve all of the medical experts' reports upon which the defence proposed to rely. This gave the Crown an opportunity to have its own medical experts review and critique the reports and prepare further statements. These statements were then served on the defence. As a result the defence abandoned four of the proposed causes of death prior to commencement of the trial. The defence abandoned the fifth cause of death at the end of the Crown case.

This abandonment of the fifth cause was also attributable (in the Crown's view) to the making of the pre-trial disclosure orders in that the defence intended to rely for the fifth matter upon the evidence of a particular witness, Dr D. After the Crown received Dr D's statement, it conducted extensive inquiries in relation to the matters which were the subject of his report. It is probable that at least some of these inquiries became known

to Dr D and/or the defence; and the Crown infers that, as a result, Dr D. decided not to give evidence in the matter, or alternately the defence decided not to call him.

The result of the exclusion of the five causes of death initially to be relied upon by the defence was that the defence instead relied only on some incidental findings during the post mortem examinations of the four children as explaining their causes of death. The Crown was able to exclude these as a reasonable explanation for the four deaths.

If the pre-trial disclosure orders had not been made, the Crown would not have been served with the experts' reports upon which the defence intended to rely prior to the trial. The Crown would then have been unable to engage its own experts to examine and critique these reports prior to the trial and to prepare reports which were in turn served on the defence prior to the trial (and which caused the defence to decide not to advance the four causes of death initially relied upon).

The Crown Prosecutor involved estimates that the elimination of the five causes of death which the defence were initially going to rely upon shortened the trial considerably. He estimates that the medical evidence related to these issues would have required three weeks of court hearing time; and that had the evidence been called, the addresses of both counsel would have been extended by about half a day each. Similarly the trial judge's summing-up to the jury would also have been extended by about half a day if the judge had been required to give directions in relation to this medical evidence. There was also the possibility that the extensive medical evidence may have confused the jury and obscured the issues in the case.

The use of the orders reduced inconvenience to witnesses and associated witness expenses. Had the five causes of death been litigated, the Crown would have needed to call several expert witnesses to rebut the defence case. Some of these witnesses resided interstate and some overseas. The pre-trial disclosure orders therefore saved these witnesses giving evidence and consequentially saved considerable public money in witness expenses.

The use of the orders minimised adjournments in response to unexpected developments in the course of the trial. Had this matter proceeded in the absence of pre-trial disclosure orders and the defence served experts' reports as to its five alleged causes of death during the trial, the Crown would have been obliged to seek an adjournment of proceedings in order to have its own experts investigate the contents of the defence experts' reports and prepare statements in response, and in order for the prosecutor to prepare the cross examination of these medical experts. Given the complexity of the issues and the need to consult interstate and overseas witnesses, the Crown would have been forced to seek a lengthy adjournment of the trial for this purpose. It is also possible that the trial may have been aborted.

From the Crown's perspective the making of the pre-trial disclosure orders had a very beneficial impact on the case. In addition to the matters mentioned above, the making of the orders resulted in the issues in dispute being narrowed considerably. This meant that from the outset the prosecutor could make clear to the jury the nature of the issues in dispute. This enabled the jury to focus from the outset on the relevant issues when assessing the witnesses called to give evidence.

2. Prosecution of James Monroe (CASES NO. 2020499)

(a) Background

The accused was charged with the manslaughter of his three month old son. The case was a baby-shaking case in which the Crown alleged non-accidental injury. The defence case was that the baby had suffered a re-bleed of a chronic sub-dural haemorrhage, which had nothing to do with trauma to the child. The accused was found guilty of manslaughter by a jury on 3 March 2003 and sentenced on 22 August 2003 to imprisonment for seven and a half years with a non-parole period of four years to date from 28 March 2003.

(b) Nature of Orders

Pre-trial disclosure orders were made by O'Keefe J on 14 February 2003 as follows:

1. DPP to serve on accused's solicitor copies of all medical reports obtained by the Crown that are relevant to the case by 17.2.03;
2. DPP to serve on accused's solicitor copies of any further medical reports hereafter obtained by the Crown that are relevant to the case, within 24 hours of receipt;
3. Accused to serve on DPP's solicitor any reports of Professor Whitewall that he has obtained by 17.2.03;
4. Accused to serve on DPP's solicitor any reports hereafter obtained on his behalf from any expert medical practitioner proposed to be relied on by the accused, service to be effected within 48 hours of receipt of such reports;
5. Liberty to both parties to apply on 3 days notice.

The orders were complied with by both the prosecution and the defence.

(c) Impact of the Orders

The pre-trial disclosure orders obliged the defence to serve the Crown with the reports of Professor Whitewall, a Forensic Pathologist, and Ms Adams, a Consultant Ophthalmic Surgeon. Both witnesses were from the UK. Pre-trial disclosure of the medical evidence allowed the issues to be narrowed with the result that much of the non-contentious evidence was allowed to be read onto the record. It meant that non-contentious witnesses could be called at their convenience. It also reduced the length of the trial by focusing the jury's attention on the issues and on a select number of witnesses who gave evidence as to the issues in dispute.

Had pre-trial disclosure not been ordered, the Crown would effectively have been ambushed on the chronic re-bleed theory. The nominated experts were the defence case: the accused was not called in the trial and his defence relied totally on the expert witnesses.

After the defence disclosed their reports, the Crown obtained further reports from its experts and these reports were served on the defence by way of reply.

The making of the orders clarified the defence so that the jury were told in the Crown opening what the issue was going to be. That allowed the jury to focus their attention on those issues from the outset.

The use of the orders reduced the hearing time for the matter. Because the Crown was not ambushed with the defence re-bleed theory, the Crown Prosecutor did not need to seek adjournments during the running of the trial in order to prepare the cross-examination of the defence expert witnesses. This was because, having received the defence experts' reports, the Crown Prosecutor had already arranged for the Crown's experts to critique the reports and provide the Crown Prosecutor with a series of relevant questions.

This was particularly important for the cross-examination of Ms Adams. She was unable to travel to Sydney for the trial and so gave evidence by way of video-link from the United Kingdom. She attended Bent Street Police Station at 11.00pm in order to give evidence before the New South Wales Court at 9.00am. Had the Crown Prosecutor not received Ms Adam's report in advance, Ms Adams would have had to come back on a second night for cross-examination – not necessarily a consecutive night, in order to allow the Crown Prosecutor time to prepare the cross-examination and fit in with Ms Adam's schedule. This would have disrupted the smooth flow of the trial.

The trial lasted between three and four weeks. The Crown Prosecutor who conducted the matter estimates that the use of the pre-trial disclosure orders reduced the overall time taken for the trial by at least one week i.e. it reduced the length of the trial by about 20%. The prosecutor also estimates that use of the orders saved a total of 1 ½ days in addresses by the prosecutor and defence counsel and summing-up.

3. Prosecution of Ian Styman, Shannon Styman, Peter Taber and Leonie Ravell (CASES NO. 2113411)

(a) Background

The Crown alleged that three male accused entered the home of a seventy year old victim with intent to rob her of money which they knew she kept on the premises. The victim was left bound and gagged which resulted in her death by asphyxia and dehydration associated with restraint. One accused made a triple 0 call alerting authorities to the victim's situation, but it was clumsily done and regarded by the operator as a hoax and so not acted upon. The trial commenced on 9 September 2002 and on 11 December 2002 a jury convicted two of the males of murder; one male of manslaughter; and Ravell, of being an accessory after the fact. Ian Styman and Peter Taber were sentenced to life imprisonment for murder and 20 years imprisonment for aggravated break and enter. The trial judge declined to specify a non-parole period. Shannon Styman was sentenced to 14 years imprisonment from 26.03.03 with a non-parole period of 9 years for manslaughter and imprisonment for 8 years for aggravated break and enter. Ravell was sentenced to a Section 9 bond to be of good behaviour for two years from 8.02.03.

(b) Nature of the Orders

In June 2002 Barr J directed that:

1. the Crown serve all prosecution material including a copy of the indictment and outline of the Crown case by 12.7.02;

2. a defence response be served by 9.8.02; and

3. the Crown respond to the defence response by 16.8.02.

(c) Impact of the Orders

The orders made were complied with by both the prosecution and the defence although some of the defence responses were late.

In addition the defence served an alibi notice part way through the trial and there was late service of the defence experts' reports in relation to DNA and mobile phone evidence. The Crown was able to meet these late reports through the co-operation of counsel for the defence.

The making of the orders resulted in some more efficient use of court time and the time of counsel. This was limited due to a problem which arose during the course of the trial with the continuity of evidence. During the pre-trial disclosure process each of the defendants indicated that the continuity of evidence was not in issue. This was significant as there were a large number of potential exhibits including DNA material and listening device and telephone intercept product. One of the main pieces of evidence against the accused Taber was a piece of duct tape located in his motor vehicle. This duct tape was examined and was found to be stained with the deceased's blood. As the chain of evidence was not in issue the Crown shortened the potential list of Crown witnesses by about twelve police and three civilian witnesses. These witnesses, in the majority, came from the Nowra region.

The prosecution called the crime scene officer. During the course of cross-examination this officer indicated that one of the exhibit bags had gone missing. The missing exhibit bag contained the bag in which the piece of duct tape had been located. (The duct tape itself did not go missing.) The defence then focussed on the missing bag and extended its focus to the issue of how the entire police search of the accused's premises had been conducted and whether evidence had been planted.

To deal with this issue the Crown needed to call evidence as to the chain of possession of exhibits and the conduct of the relevant search. This necessitated the calling of all police involved in the search (approximately 12) and a number of bystander civilians (3). About a week's hearing time was added to the trial as a result. The Crown had to focus on what originally was not to have been an issue and so the calling of these witnesses was done at short notice and inconvenienced some of the witnesses. (The missing bag was, in fact, after much continuity evidence had been given, located.)

As is evident from this case, the making of orders for pre-trial disclosure does not in practice preclude the defence from pursuing an issue which the defence had

indicated during pre-trial disclosure proceedings was not in dispute, in the light of fresh developments during the course of the trial itself.

On the whole during the trial there was agreement between counsel as to the evidence to be led with only some minor exceptions. This is inevitable in any long or complex trial.

The use of the pre-trial disclosure orders did reduce inconvenience to witnesses. The original prosecution brief contained statements from approximately one hundred and thirty-five witnesses. Through consultation between the parties and with the assistance of the pre-trial disclosure regime the parties were able to limit the list to approximately one hundred. However, as noted above, it became necessary to call a further 15 witnesses in relation to the search and continuity of exhibits when this emerged as an issue after the cross-examination of the crime scene officer.

The use of the orders did minimise adjournments in response to unexpected developments in the course of the trial. On the whole, the trial ran smoothly. There were no adjournments or delays attributable to pre-trial disclosure problems.

The pre-trial disclosure procedures helped the parties to focus on the issues in advance of the trial and during the trial counsel, in the main, confined themselves to these issues.

APPENDIX 4

Cost of Pre Trial Disclosure Unit

	Nov 01 - Jun 02	Jul 02 - Jun 03	Jul 03 - Dec 03
	7.5 months	12 Months	6 months
Employee Related Expenditure			
Crown Prosecutors	1,486,000	2,722,000	1,390,000
Prosecution Officers (Admin)	80,000	137,000	72,000
Prosecution Officers (Legal)	22,000	45,000	24,000
	1,588,000	2,904,000	1,486,000
Rent			
Crown Prosecutors	121,000	192,000	98,000
Prosecution Officers (Admin)	6,000	11,000	5,000
Prosecution Officers (Legal)	2,000	4,000	2,000
	129,000	207,000	105,000
Other Working Expenditure			
Crown Prosecutors	112,000	130,000	65,000
Prosecution Officers (Admin)	26,000	30,000	15,000
Prosecution Officers (Legal)	9,000	11,000	6,000
	147,000	171,000	86,000
Total Recurrent Expenditure	1,864,000	3,282,000	1,677,000
Capital Expenditure	330,000	-	-
Avg Staff No.s			
Crown Prosecutors	13	13	13
Prosecution Officers (Admin)	3	3	3
Prosecution Officers (Legal)	1	1	1