Legal Aid NEW SOUTH WALES

facsimile

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Date:	2 April 2004	**Pages:** (including coversheet)	7

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The Hon Christine Robertson MLC
Committee Chair of the Standing
Committee on Law and Justice
Parliament House
Macquarie Street
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- 2 APR 2004

Dear Chair

RE: INQUIRY INTO PRE-TRIAL DISCLOSURE

Thank you for the opportunity to make a submission to the further inquiry into pre-trial disclosure. I note the terms of reference and the main issues to be examined as outlined in your letter of 12 February 2004.

Frequency/Type of Pre-Trial Disclosure Orders.

- There have been relatively few orders made since the legislation was introduced. In order to put this in perspective, only two pre-trial disclosure orders have been made in the District Court and seven have been made in the Supreme Court.

- The Legal Aid Commission has acted in-house in some of the orders made in the Supreme Court. The reality is that the kinds of matters dealt with in the Supreme Court are more likely to fall into the "complex" category which is the trigger for this legislation to be used. Complexity is determined by reference to length of trial, nature of evidence to be adduced and legal issues likely to arise.

- The figures available from District Court and Supreme Court Annual Reviews indicate that the average length of trials in both jurisdictions is increasing. In the District Court in Sydney, the average duration of a trial had increased to 14.11 days by December 2002. The Statewide average length of criminal trials finalised in 2002 was significantly less namely 6 days. In Sydney the average duration was 8.3 days for the full year. Figures are not yet available for 2003 but the annual report for the District Court is due to be released shortly. In the Supreme Court, the average length of trials heard in Sydney during 2002 was 14.8 sitting days. This figure has been relatively stable for the previous 2 years. However, anecdotal evidence suggests that there is greater complexity in Supreme Court trials and that the kinds of matters now being heard in the jurisdiction will impact significantly on the average length of

trials. Statistics for 2003 are also not yet available. The general trend is towards increased length and complexity in both jurisdictions.

- This suggests that more pre-trial disclosure orders are likely to be made in the future and that it can be anticipated that more of these orders will be made in the Supreme Court than the District Court.

- The type of orders to be made is governed by Sections 138, 139 and 140 of the Criminal Procedure Act, 1986. The number of orders made to date is still too small to draw any definite conclusions about the type of orders being made.

- In complex trials there may be a number of issues that could be regarded as peripheral to the central factual dispute. Some of these issues can be clarified pre-trial by effective case management from the bench, by interlocutory pre-trial applications or be determined in the absence of the jury during the course of a trial. Some issues may be the subject of disclosure requirements by other legislation, eg Notice of Intention to Rely on Hearsay Evidence, etc.

- It is thus impossible to be any more definite than to say that the type of pre-trial disclosure orders made, may in many cases simply confirm that a defence is to be relied on which is obvious from the evidence already available, eg that a client was mentally ill. There is also a requirement to serve copies of experts' reports to be relied on by the defence in the pre-trial disclosure legislation. In many cases, this is the kind of exchange of information that is already done in the lead up to a trial by both prosecution and defence. However, the fact that the pre-trial disclosure regime requires timely service of this expert material means that complex issues can be clarified before, rather than during a trial. This should reduce trial time and reduce the need for adjournments.

The Rate of Compliance by Legally Aided Defendants.

- The Legal Aid Commission is not aware of any cases in which it has acted in-house where there has been a failure to comply with pre-trial disclosure orders. Sanctions are available in the legislation (Section 148). The willingness of the Court to apply the sanctions, and hence the effect of non-compliance is not yet able to be determined. It does seem to be the case that the courts would be reluctant to impose the more severe sanctions for fear of jeopardising the right to a fair trial. This may be particularly so in a multi-accused trial where one party does not comply, but all other accused do.

- In general terms, the Legal Aid Commission remains concerned about the impact of these sanctions on both unrepresented defendants and those represented by the Legal Aid Commission or whose defence is funded by the Legal Aid Commission. The impact on the outcome of a trial as a result of failure to comply and sanctions being imposed is however a matter yet to be

litigated and by virtue of the small numbers of orders made to date yet to be determined.

Effective Pre-Trial Requirements on Court Waiting Times.

- Given the number of orders made to date, it is impossible to say that these orders have had any impact on Court waiting times.

- The available evidence indicates that waiting times have significantly reduced in both the District Court and the Supreme Court in the last 5 years. The median delay between committal and outcome for finalised trials in the District Court was 188 days in 2002 compared with 329 days in 1998. In the Supreme Court, the median delay was 234 days in 2002 compared with 593 days in 1998. The impact of the pre-trial legislation in New South Wales on waiting times is yet to be felt as a result of the small number of orders made.

- There is however evidence available in other jurisdictions in Australia and overseas where pre-trial disclosure orders are firmly entrenched, and where the effect on Court waiting times might be able to be gauged. The Commission is aware of at least one study being done by Associate Professor Dale Ives from the University of London, Ontario, which looks at the impact of pre-trial orders in comparable jurisdictions. Professor Ives' report is still being compiled, but your Committee may be interested in her research to date.

- The Commission understands Professor Ives' research in some jurisdictions has revealed that pre-trial disclosure legislation has led to a tendency towards more contested pre-trial applications. This may ultimately reduce the length of the trial if these pre-trial applications narrow issues. The risk to a body such as the Legal Aid Commission which is responsible for funding a large amount of trial work is that this may still result in increased costs if the pre-trial activity outweighs the savings in trial time. From the Court's point of view, there is also the risk that it may lead to increased waiting times between committal for trial and finalisation. Again, the small number of pre-trial disclosure orders made to date in New South Wales means that the Commission is unable to provide this kind of analysis.

Effect on the Right to Silence.

- Although this may have been put forward as an argument against the introduction of this legislation, the Commission is not aware of any orders made to date which have been perceived to erode this fundamental right.

- The legislative framework is aimed at revealing broad defence categories such as self defence or provocation and providing for the service of expert evidence on the prosecution that may support such broad defence categories. It is thus aimed at clarifying issues that are likely to be contested at trial. As noted above, some of these issues such as a defence of mental illness or provocation may already be quite apparent from the available evidence.

- The fact that the pre-trial disclosure regime sits within an adversarial system will thus always ensure that a legislative scheme such as this will be approached with some degree of caution by the defence.

Effect on the Presumption of Innocence.

- Similar comments to those made above apply to the presumption of innocence. The concepts of presumption of innocence and defence disclosure can co-exist, even in the context of an adversarial system.

Effect on the Burden of Proof.

- Although the burden of proof at all times rests with the prosecution, there are some statutory and common law defences which lead to the prosecution having to rebut or negative the defence raised, eg self defence.

- The burden of proof remains on the Crown. However, once a defence such as self defence is raised, there is an evidentiary burden on the defendant to establish that defence. Disclosure of that defence pre-trial is more a matter of timing, than a changing of the burden of proof.

- Existing Bar and Solicitor Rules and DPP Guidelines already cover the issue of disclosure of evidence by the Police to the DPP and the DPP to defence counsel and the Court. These Rules together with legislation in relation to the service of the brief of evidence provide a framework for the release of all relevant evidence by the prosecution to the defence before trial. However, the fact that the Commission works within an adversarial system and that that involves human intervention, always means that the defence will have to do further investigations and subpoena further material from the Police and other sources in order to ensure that all relevant material is marshalled to prepare for cross examination and to mount a defence.

New Requirements for the Presentation and Amendment of Indictments by the Prosecution.

- Although there is a requirement to settle the Indictment in a matter 28 days after committal, there is no defence incentive to object to non-compliance when Crowns usually seek leave to amend charges down on the day of or just prior to trial. The timing of such amendments is a matter of some concern to the Legal Aid Commission because of the added financial burden of carrying a matter to trial which could have earlier been identified as a plea of guilty.

- The Legal Aid Commission would prefer clarification of the appropriate Indictment well out from trial so that unnecessary fees were not paid for the preparation of a trial that was always likely to be a plea. The issue is however complicated by the fact that Indictments prepared 28 days after committal are not necessarily settled by the Crown who will be running the trial. Trials are usually allocated to Crowns by the DPP except for large and complex matters