POLICE ASSOCIATION OF NEW SOUTH WALES

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Director
Standing Committee on Law and Justice
Legislative Council
Parliament House
SYDNEY NSW 2000

Dear Hon Christine Robertson MLC,

Re: Inquiry into Pre-Trial Disclosure

In 2002 the Committee on Law and Justice conducted an inquiry into the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*, to which the Police Association contributed in the form of a submission.

As your letter dated 12 February 2004 explained, the Attorney General referred the matter back to the Committee and only recently has the public consultation stage of the new inquiry commenced.

The Association thanks the Committee for the invitation it has extended to us to contribute another submission to the inquiry. Following consultation with our members and taking into consideration the fact that the terms of reference have remained largely unchanged, the Association has decided to re-submit its original submission to your new inquiry.

The Association asks that the Committee grant due consideration to the issues as raised in our submission.

Yours sincerely,

Greg Chilvers
Director
Research & Resource Centre
Police Association of NSW

The Police Association of New South Wales
Submission To the
Legislative Council's Standing Committee on Law and Justice
Inquiry into
Pre-Trial Disclosure

Background

The *Criminal Procedure Amendment (Pre-Trial Disclosure) Act* was assented to on 18 April 2001. Its purpose, as stated clearly in Section 47A of the Act is to "enable the court, on a case by case basis, to impose pre-trial disclosure requirements on both the prosecution and the defence in order to reduce delays in complex criminal trials."

The general pre-trial disclosure requirements are set out in section 47D(1) of the Act and are as follows:

(a) *the prosecuting authority is to give the accused person notice of the case for the prosecution,*
(b) *after the accused person has been given notice of the case for the prosecution, the accused person is to give the prosecuting authority of the defence response to the case for the prosecution,*
(c) *after the prosecuting authority has been given notice of the defence response, the prosecuting authority is to give the accused person notice of the prosecution response to the defence response.*

The impact this legislation has had on our members, particularly police investigators, can be best seen in Schedule 2 of the Act which inserts a new section in the *Director of Public Prosecutions Act 1986.*

The new Section 15A reads as follows:

> *(1) Police officers investigating alleged indictable offences have a duty to disclose to the Director 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.*
>
> *(2) The duty of disclosure continues until one of the following happens:*
>
> *(a) the Director decides that the accused person will not be prosecuted for the alleged offence,*
> *(b) the prosecution is terminated,*
> *(c) the accused person is convicted or acquitted.*
>
> (3) *Police officers investigating alleged indictable offences also have a duty to retain any such documents or other things for so long as the duty to disclose them continues under this section. This subsection does not affect any other legal obligations with the respect to the possession of the documents or other things.*

Infrequent Use of Pre-Trial Disclosure

The responses we received from our members regarding this inquiry into the Act would indicate that pre-trial disclosure is not in frequent use. Some members have stated that they are aware of only a handful of cases which have been dealt with by the Office of the DPP as being deemed 'complex'.

Section 47C(2) of the Act states that the court may order pre-trial disclosure only if it 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 addressed at the trial, and*
> *(c) the legal issues likely to arise at the trial.*

As pre-trial disclosure is not generally used for every single criminal court trial, but rather for 'complex' trials, it appears that the legislation has hardly been used to date.

The use of police resources

A prevalent view amongst the responses we received from investigating police officers, is that the requirements of pre-trial disclosure makes the prosecution role even more onerous with all the material which is required to

be supplied to the defence, including the crown's notes of witness conferencing etc.

One needs only to refer to section 47E of the Act which sets out the information the notice of the case for the prosecution must contain, to gain an insight into the magnitude of information police must supply to the prosecution:

(a) *a copy of the indictment*
(b) *an outline of the prosecution case*
(c) *copies of statements of witnesses proposed to be called at the trial of the prosecuting authority*
(d) *copies of any documents or other exhibits proposed to be tendered at the trial by the prosecuting authority*
(e) *if any expert witnesses are proposed to be called at the trial by the prosecuting authority, copies of any reports by them that are relevant to the case,*
(f) *a copy of any information in the possession of the prosecuting authority that is relevant to the reliability or credibility of a prosecution witness*
(g) *a copy of any information, document or other thing provided provided by police officers to the prosecuting authority, or otherwise in the possession of the prosecuting authority, that may be relevant to the case of the prosecuting authority or the accused person, and that has not otherwise been disclosed to the accused person,*
(h) *a copy of any information , document, or other thing in the possession of the prosecuting authority that is adverse to the credit or credibility of the accused person.*

It is the view of many members that in the lead up to any major criminal case which is declared 'complex' hence requiring pre-trial disclosure, the pressure being placed on scant police resources to reply to the disclosure will be further increased. It is the view of our members that the purpose of the Act does not seem to necessarily have any beneficial effect for the victims and the prosecution.

The doctrine of the right to silence

In relation to the Act, our members have raised the issue that at the time of arrest, the suspect should inform police of their defence, otherwise it should not be admissible at a later date, that is, during court proceedings.

In New South Wales, once a suspect is identified and questioned by investigating police, the suspect is generally under no obligation to say anything to investigators. The suspect must be warned – cautioned – on arrest and prior to interview that he or she is not required to say anything, but anything said may be given in evidence. Following this, the suspect may

refuse to speak. At any stage in the prosecution process, there is no penalty or adverse consequences if the suspect has elected not to speak. Many of our members have voiced their dissatisfaction with this process.

In NSW, the right of silence while being questioned by the police allows "that it is not an offence to refuse to answer questions, including incriminating questions, asked by persons or bodies" (NSW LRC, 22). In criminal trials, neither the judge or the prosecution are permitted to comment on this silence. The judge is not permitted to suggest to the jury that inferences might be drawn against a defendant if he or she had declined to answer some or all questions during their interview with police. The Criminal Evidence Act 1995 prohibits a trial judge from directing the jury to believe that the silence can be equated guilt. The judicial comment may begin with a reminder that the defendant is entitled to remain silent. After that the judge should point out that the prosecution bears the onus of proof and above all, that the silence of the accused cannot be regarded as a sign of guilt.

It is our understanding that this differs from the process in the United Kingdom. In 1995 the new *Criminal Justice and Public Order Act* came into being, bringing with it in sections 36 and 37 the introduction of the 'special warning' and the court's ability to draw inferences from suspects exercising their right to silence in certain circumstances. Section 10.5A of the revised Codes of Practice made under the provisions of the *Police and Criminal Evidence Act 1984* states;

> "when a suspect who is interviewed after arrest fails or refuses to answer certain questions, or to answer them satisfactorily, after due warning, a court or jury may draw such inferences as appear proper under sections 36 and 37 of the Criminal Justice and Public Order Act 1994".

The caution is a warning that whatever the person says, or the fact that he or she says nothing, may be taken into account adversely in later criminal proceedings and harm their defence. The caution read to suspects is as follows:

> "You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence".

The new statutory provisions have made inroads towards softening the pre-existing rules by enabling proper inferences to be drawn in respect of an accused's failure to give evidence at his trial; his refusal to answer questions put to him by the police when questioned or charged; the failure or refusal to account for objects, substances or marks; and failure to account for his presence at a particular place. These provisions were introduced to eliminate the 'ambush' defence which occurs when a person introduces for the first time at his trial, some sort of explanation which could have been divulged during the investigative stage.

As discussed previously, as the situation is somewhat different in NSW, our members are of the view that having a right to silence serves only to allow the offender the opportunity to conjure up a defence after arrest, therefore not allowing police to investigate their defence, in order to find any truth in it. Our investigators need to be afforded the opportunity to turn the interview with a suspect into the search for the truth. This means listening to what suspects actually say and then checking to discover if it is the truth. This is made all the more difficult when the suspect uses a wall of silence in the line of questioning, as is their lawful right to currently do so.

The need for clear legislation

Our members have voiced the opinion that the legislation in the form of the Act needs to be clear on when statements and evidence can be withheld. This should include where witnesses, victims or police officers are in danger and matters of public interest immunity.

Section 47P(6) states that any immunity that applies by law is not affected by the pre-trial disclosure regime, including for example,

> "legal professional or client legal privilege, public interest immunity and sexual assault communications privilege".

A recent problem experienced by some police investigators with the current legislation is highlighted in the following example. It involved a registered informant who would be providing a statement regarding an upcoming trial. He did not want to disclose that he was acting for the police as the statement would clearly have indicated, yet it was unclear as to whether or not they could withhold the statement on this basis. They decided to withhold the statement on the basis of public interest immunity and will supply it at a later date. The legislation needs to be clear in order for investigating police to know what their rights and obligations are.

Recommendations:

In light of the issues raised above, the Police Association of NSW makes the following recommendations:

- Amendments to legislation in the form of the Act be made in relation to the 'right of silence' along the lines of the current model being used in the United Kingdom.

- Legislation in the form of the Act needs to be made clearer for investigating police in relation to their obligations concerning when statements and evidence can be withheld.