Amended Transcript

REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO PRE-TRIAL DISCLOSURE

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At Sydney on Monday 7 June 2004

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The Committee met at 11.00 a.m.

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PRESENT

The Hon. C. M. Robertson (Chair)

The Hon. D. Clarke
The Hon. A. R. Fazio
The Hon. G. S. Pearce
Ms L. Rhiannon

NICHOLAS RICHARD COWDERY, Director of Public Prosecutions, New South Wales, and

MARK TEDESCHI, Senior Crown Prosecutor, New South Wales Crown Prosecutions, affirmed and examined:

CHAIR: In what capacity are you appearing before the Committee?

Mr COWDERY: As Director of Public Prosecutions.

Mr TEDESCHI: As Senior Crown Prosecutor.

CHAIR: Would either of you like to make an opening statement?

Mr COWDERY: Not for my part. We have made a written submission to the Committee, and that is the principal material that we wish to place before the Committee. I am, of course, happy to answer any questions, but I do not think there is anything further by way of an opening statement to be made.

CHAIR: Have further pre-trial disclosure orders been made since the Committee received your submission?

Mr COWDERY: No.

CHAIR: What are your views as to why pre-trial disclosure orders have not been more frequently utilized?

Mr COWDERY: The terms of the legislation restrict their availability to complex criminal trials, and the section provides three criteria, one of which at least has to be satisfied. That is the first limiting factor that restricts availability of those orders to a small part of the work that we do. I interpolate that, on the figures for last year, 2003, my office prosecuted about 2,115 trials in the District Court and about 80 trials in the Supreme Court. The vast majority of those trials do not qualify as complex criminal trials under the criteria in the Act, so there is only a small field to which they could apply in any event.

The second matter, I think, that is relevant to your question is that there is a reluctance on the part of judges, particularly in the District Court, to invoke the regime that applies to complex criminal trials. The reason for that is that there is the potential for delay, and for the creation of a great deal more work for everybody concerned, and perhaps not for major benefits in the conduct of the trial in the vast majority of cases.

A third factor, which I think is worth mentioning, is that in the Supreme Court arraignments are conducted normally by Justice Barr, who has developed very effective techniques and approaches for having the parties identify issues, in having the evidence limited, to the extent that it can be, and in gaining efficiencies in that way, without having to invoke the regime of the Act. So he, as the arraignments judge, is very effective in achieving many of the objectives of the Act in any event. Mr Tedeschi may have some other observations to make about that.

Mr TEDESCHI: The main advantage of an order declaring a trial a complex trial is that it places a compulsion on the defence to serve its expert reports on the Crown. The cases that have been declared complex trials, and where there has been a very substantial benefit, have been cases where the benefits have been in reduced trial length and reduced complexity of a trial because of the exchange of expert reports. In my view, there are a large number of cases that would not qualify as complex trials where there would be a substantial saving of time on the part of everyone if there was an obligation on the defence to serve its expert reports on the Crown prior to the commencement of the trial.

At the moment, it is quite common for the defence to announce the fact that it is going to call some expert evidence as it calls the witness. In that circumstance there is no advance warning at all to anybody. The defence gains a certain tactical advantage from that, but it will often mean that the Crown prosecutor has to ask for an adjournment to get his or her own expert to advise in order to

properly cross-examine, and then for the Crown to get its own expert qualified by looking at all of the evidence in order to give evidence in reply.

The real time-saving advantage of pre-trial disclosure has been in the early exchange of expert reports. The classic example is the trial that I did of Kathleen Folbigg last year. That was declared a complex trial by Justice Barr, and there was an exchange of expert reports from the defence to the Crown. The Crown had to present the reports of all its experts to the defence well prior to the trial. But, after the defence served its reports on us, we were able to respond to those reports using our experts. A vast amount of scientific evidence was disposed of before we even got before the jury. I think there are a lot of other trials, perhaps not as complex as that one, where there would be a considerable saving of time if the defence was prepared or required to provide its expert reports to the prosecution prior to the commencement of the trial.

CHAIR: If somebody else other than Justice Barr was in that position, do you think the pre-trial disclosure procedure would be used less or more? Is the personality of that judge making a difference in the use of the procedure?

Mr TEDESCHI: I do not think that the personality of the list judge in the Supreme Court has made a difference. There is a reluctance in the District Court to use the legislation.

CHAIR: We are aware of that.

Mr TEDESCHI: My personal view is that the main advantage of exchange of experts' reports could be very simply obtained without any vast resources of the court being required if there was a simple legislative requirement for the defence to provide its expert reports to the Crown prior to the commencement of the trial, or maybe a fortnight prior to the commencement of the trial. That would not require any substantial court resources at all, but it would require legislative amendment to compel that to be done. It is not so much the identity of the judges; it is more that there is this long history of the defence keeping to itself all of its evidence until it actually calls evidence, in order to get some tactical advantage. In this day and age, I do not think that makes much sense with expert evidence.

CHAIR: How does your office determine when it is appropriate to make an application to the court for a pre-trial disclosure order?

Mr COWDERY: That is a matter in the discretion of the Crown prosecutor who is briefed in the matter or in the arraignment Crown prosecutor who is dealing with the arraignments. So it is a matter for that prosecutor to assess the nature of the case, the issues and the evidence involved.

CHAIR: And the three criteria?

Mr COWDERY: Yes.

The Hon. AMANDA FAZIO: I have read the briefing paper on this issue and some of the other background material. I cannot quite understand why this system does not seem to have been taken up in New South Wales at the level anticipated, yet it seems to me that it works quite well in some overseas jurisdictions. Have you got any comments to make about why you think it works well overseas? Is it just a culture thing here in New South Wales within the legal fraternity, or what?

Mr COWDERY: If by saying "overseas jurisdictions" you are referring to England and Wales, for instance, as one such jurisdiction, that is a situation where the legislature has adopted a fairly robust attitude and simply legislated that certain things will happen. So it has been enforced, in the face of a lot of opposition from the private legal profession and some other sections of the community. There is some limited procedure of this kind at the Federal level in the United States, but it is probably developing over time. The American Bar Association is now in favour of a greater degree of mutual disclosure by prosecution and defence. It has taken a long time to come to that position.

If I can say, without using the term in any disparaging way at all, the defence culture which surrounds the conduct of contested criminal matters is a very strong culture, and there is a lot of

resistance from the legal profession and from some others to measures—which, for my own part, I think are sensible and practical—that require a greater degree of co-operation by the defence in the conduct of criminal proceedings, so that public and private resources can be used more economically. I think there is still a way to go before there is any infringement of the essential rights of an accused person. Mr Tedeschi has mentioned one area that would certainly be worthy of examination. So, yes, there is a lot of resistance from some quarters. But the way in which the legislation has been formulated actually restricts the availability of this particular regime because one of those criteria has to be met.

Mr TEDESCHI: I think a lot of the District Court judges are taking the view that all three of those criteria have to be met.

CHAIR: I was about to say it was either one or all.

Mr COWDERY: We have the problem of the interpretation of the word "and" in subsection (2) of section 136. There is an interpretation, on which we rely, by Justice O'Keefe in the matter that we have referred to. He interpreted the "and" as meaning "or". Judges are able to do these sorts of things! But, certainly, it is an issue, and I think the Law Society, for one, certainly still takes the view that "and" means "and" and that they are conjunctive rather than disjunctive requirements.

The Hon. GREG PEARCE: Mr Cowdery, I thought you said earlier that you thought declaring a trial a complex criminal trial actually caused delay and more work—I think those were the words you used—for not much benefit. Can you expand on that, please?

Mr COWDERY: That is certainly the view taken, I think, by a lot of judges in the District Court; that it requires, in the first place, a greater hands-on involvement by the trial judge in the pre-trial directions and management of the case. Because of the requirements of the Act itself, the prosecution is required to put resources into the particular exercise of the additional disclosure. That is not a great burden, because the prosecution already has a very high obligation of disclosure to the defence. It does put more work onto the defence, because it has to reply to that first notice by the prosecution. There is often the need to come back to court to get further orders about particular matters, or to have timetables adjusted because of unforeseen circumstances, and that kind of thing.

Then there is the prosecution response that has to be made to the defence response. So, there is more paper work, and there is more behind-the-scenes work that needs to be done in a more formal way than just preparing a matter for trial. There are resources issues here too, because in my office, and certainly in the Legal Aid Commission and in legally-aided defence work, which is around about 80 to 85 per cent of trials, it is often not possible to have the counsel who will actually appear in the matter briefed at an early stage in the proceedings, because they are tied up on other things and, in the case of the Legal Aid Commission, they cannot make a financial commitment at an earlier point because there are still uncertainties about how the matter will proceed, and so on. So there are resource issues too which make it difficult for the parties sometimes to comply.

We have had only a handful of matters—six matters in the Supreme Court and three in the District Court—and in two of those in the Supreme Court in fact the orders were not made after the declaration was made that they were complex trials. So it is only a very small handful of matters where it has been applied in full and there have been benefits in at least two or three of those matters. But we are talking about very small numbers.

The Hon. GREG PEARCE: What were the benefits?

Mr COWDERY: Mr Tedeschi had at least one of those.

Mr TEDESCHI: I had two.

Mr COWDERY: Two of them where there have been benefits. He has been directly involved, perhaps he would be best placed to answer that.

Mr TEDESCHI: I think there are a lot of benefits to case management by judges but there is a culture against it amongst the judges and amongst some counsel, and the advantages are not only in

the complex Supreme Court trials, there are some very complex District Court trials which would benefit enormously from case management. I am thinking in particular of multiple accused drug cases, for instance, or multiple accused sexual assault cases. Case management in those cases can streamline a whole lot of things, not just the production of expert reports but the whole preparation of a matter and identifying what the real issues are. It can have a benefit also in terms of encouraging an accused person to confront the possibility of a plea at an earlier stage. Those advantages are just as applicable to the District Court as they are to the Supreme Court. Where cases have been declared complex trials the main advantage has really been in terms of the exchange of expert reports.

The Hon. GREG PEARCE: Are the judges trained sufficiently to use case management procedures in the way that you are anticipating?

Mr TEDESCHI: I cannot see any reason why a judge would not have the capacity to effectively case manage a trial before the trial. It does not take all that much time. What it requires is for a judge to call all of the counsel before him or her for maybe a quarter of an hour, half an hour, every now and again—probably before normal court times, so it would be before 10 o'clock when the judge is probably sitting in another case—to find out where the parties are to set timetables for giving the other side documents and giving the other side notice of what the issues are. It requires timetables to be set and short hearings to be held at various points prior to the commencement of the trial. So it does not require all that much on the part of the judges, it is more on our part and the defence part that requires somebody to sit down and prepare a summary of what the case is all about and what evidence is going to be led, and for the defence to consider in a meaningful way which parts of that evidence are really in dispute.

The Hon. GREG PEARCE: What is the current state of court waiting lists?

Mr COWDERY: The situation is pretty good at present. It has been improving steadily over the past year or two and now trials are coming on in the District Court within about three or four months of arraignment and in the Supreme Court about six months. Historically that is pretty good, but I do not think that this legislation can claim the credit for that; there are a lot of initiatives that are in place to improve the waiting times and reduce backlogs.

The Hon. GREG PEARCE: From the number of instances where the legislation has been applied you would not think that.

Mr COWDERY: No, there are other things operating which have produced efficiencies.

The Hon. GREG PEARCE: What are they?

Mr COWDERY: A number of things: one is the centralised committal initiative whereby my office and the Legal Aid Commission agreed to centralise the committal proceedings in the local court at certain key courts in the metropolitan area and in the major country centres so that it would be possible for people facing committal for trial to have access to legal advice at that point, because legal aid is not available for representation in committal proceedings except in exceptional cases. But it was possible, by reducing the number of people required on the ground at all of the courts, to bring them into central locations and have them available to give advice, and that has resulted in a great many more pleas of guilty and charge negotiations and agreements between the parties at that stage so that matters then go forward as pleas of guilty rather than trials.

The Hon. GREG PEARCE: So you have sort of plugged a bit of a gap there in defendant legal advice?

Mr COWDERY: It has, certainly. Another aspect of it is another part of this legislation that requires the Crown to have its indictment in a final form within 28 days of committal. We were successful in obtaining some additional resources to establish trial preparation units in the office: Crown Prosecutors devoted to assessing matters that have been committed for trial, identifying the appropriate charges and settling the indictments within the time limit allowed. That has helped in focusing the defence mind on the charges that are going to be brought and on the possibility of pleas of guilty to one or some or all of the charges that are on the indictment. So, again, we have increased the number of pleas of guilty that way, which in turn reduces the number of trials and reduces the

backlog. We still have problems, of course. We have a lot of late pleas of guilty still being entered, and there are a number of reasons for that, but my office and the Legal Aid Commission are in discussions at present trying to work out ways of improving that.

Mr TEDESCHI: Ironically one of the problems that has arisen there is that a trial preparation unit Crown Prosecutor will appear at all of the District Court arraignments. The trials are being set down so soon after that that often an accused person does not have the opportunity of getting proper advice whether or not to plead guilty until the trial. So in a sense the lack of a backlog is resulting in more trials being pleas on the day of trial because they are so soon after the arraignment.

CHAIR: And legal aid has expressed a concern. The legal aid submission says:

> Although there is a requirement to settle the indictment in a matter of 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.

So I know it is an extension of that., and legal aid is of the view that the timing of such amendments is a major concern because of the quickness.

Mr TEDESCHI: The vast majority of amended indictments are because there has been an offer of a plea by the accused to a lesser charge and the Crown Prosecutor has accepted that in full discharge of the indictment. So in fact the number of applications by the Crown to amend the charges in the indictment prior to a trial are very, very few and the vast majority of amended indictments that are handed up are by agreement because the accused is entering a plea of guilty. So they are not really cases where the charges are inappropriate in the original indictment, it is a situation where if the matter had gone to trial it would have gone to trial on that original indictment, but because there has been a plea negotiated to a lesser charge there is a new indictment that is handed up.

CHAIR: So it is not very common that it happens for a larger charge?

Mr TEDESCHI: No.

Mr COWDERY: No, not at all. But there is that one issue that you referred to; it is common enough in Sydney now for trials to be set down for hearing at the first mention of a matter in the District Court, and it might be within 10 days of the committal, so we are still within the 28 days that the Crown has to settle the indictment, and the indictment may not be settled but the matter has been set down for trial. When the prosecutor goes away and settles the indictment there can then be further discussions between the parties about which charges will proceed and whether they will proceed by way of a plea or by way of trial.

Mr TEDESCHI: The ideal way to improve on the existing system is to ensure that at that first arraignment the defence have a legal representative who can advise them then and there, because then some negotiations can take place between the defence representative and the Crown Prosecutor at the arraignment right at that very first hearing. But I think you would find that at that very early stage at the moment there are very few accused that have a legal representative there to advise them.

The Hon. GREG PEARCE: How do you, as prosecutors, justify what sounds like plea bargaining?

Mr COWDERY: For a start we do not call it plea bargaining. Following the Samuels' report in May of 2002 we changed the terminology, it is now referred to as charge negotiation and charge agreement. It is changing the words to fit in with what actually happens and with what actually has happened all along. What is being done is to try to identify the charge that is most appropriate to the criminality involved in the conduct and which gives the sentencing court an appropriate range of penalties to apply to that conduct. In his report Gordon Samuels referred at some length to the history of this kind of procedure in our system of criminal justice and identified the rationales for it and the benefits of it. It reflects the fact that the first charge that is put on by the police at a very early stage in the proceedings is not necessarily the most appropriate charge to address the criminality, to address what can be proved, and to enable the court to deal with the matter in the most expeditious fashion.

So there needs to be this discretion to adjust the proceedings as we go along and as we learn more about it, and that is really what it is. There are some jurisdictions in the world where there can be no negotiation at all, where if the police charge you with something that is it, that charge will proceed all the way through, and prosecutors have no discretion, the court has no discretion, it must go to the bitter end. It is an awfully inefficient process, in my view at least. Could I commend Gordon Samuels' report? There is a good history of it in there.

Mr TEDESCHI: The negotiations might also include what evidence is going to be presented to the sentencing judge. It is not necessarily only about the appropriate charge but about what evidence the Crown feels that it can prove on sentence.

Mr COWDERY: And we have provision now in the prosecution guidelines not just for charge negotiation and agreement but also for the settling of agreed statements of facts, and there are procedures set out there that have to be gone through, particularly involving consultation with everybody involved—the victims of crime, the witnesses, the police and so—leading to a statement that can then go to the sentencing judge and the matter proceed on that basis.

The Hon. DAVID CLARKE: Mr Cowdery, does the pre-trial disclosure system work well in England and Wales, in your view?

Mr COWDERY: I am not an expert on it. From what I have been told, yes, it does seem to work quite well.

The Hon. DAVID CLARKE: Is the main difference to the system in New South Wales that it is mandatory?

Mr COWDERY: Yes, it applies in a much wider range of cases than in our complex criminal trials.

The Hon. DAVID CLARKE: Can you give us an idea of in which other areas it does apply?

Mr COWDERY: Not off the top of my head I am afraid. There is some useful material in the Law Reform Commission's report on the right to silence, report No. 95. There is a bit of a survey of these regimes in other jurisdictions from about page 85 of that report, but I have not researched that issue for the purpose of this evidence.

The Hon. DAVID CLARKE: Are you aware of any exceptions to the system being mandatory in England and Wales?

Mr COWDERY: No, I am not familiar with that sort of detail, I am sorry.

The Hon. DAVID CLARKE: Is there any evidence that the system in England and Wales has worked to the detriment of offenders in any way?

Mr COWDERY: That will depend very much on who you ask, I suppose, but you are asking me from the prosecutor's point of view. No, I am not aware of any instances of unfairness or improper prejudice to the accused by reason of that regime.

The Hon. DAVID CLARKE: Is the system in England and Wales generally accepted as having reduced trial delays over there?

Mr COWDERY: Yes, it has certainly contributed to it.

The Hon. DAVID CLARKE: In a major way?

Mr COWDERY: I believe so. But, again, I do not have precise figures.

The Hon. DAVID CLARKE: Do you believe that delays are a major problem in the New South Wales court system at the moment?

Mr COWDERY: As I said earlier in my evidence, I think it is less of a problem now than it was, say, three or four years ago. And I think, certainly in the District Court, we have reached a position where the delay is now acceptable by general standards. In the Supreme Court they are a bit further behind, but it is not outrageous by any means. I think it is, again, quite acceptable by the standards of systems like ours and bearing in mind the requirements of our system to ensure fairness to all parties.

Ms LEE RHIANNON: What is your experience with police disclosure to your office of relevant information pursuant to the new provisions? Have you experienced any problems?

Mr COWDERY: The new provisions have been very beneficial, flowing from section 15A of the Director of Public Prosecutions Act, the amendment that was made and directions that have been given internally in the New South Wales Police. There are still a large number of cases where the requirements are not fully satisfied, where the disclosure certificate does not accompany the brief of evidence or where the disclosure certificate is incomplete. I can only speculate about the reasons for that. One might be a training issue in the police, another might be a resource issue in the police. They simply have not been able to conduct the necessary investigations to enable them to comply and sign off on the certificate. But we certainly get a large number of matters where the disclosure certificate is either not there or not complete. When that happens we follow it up, of course, and we keep hounding them until those requirements are complied with. It is an ongoing issue. Hopefully, it will become less of a problem over time.

Ms LEE RHIANNON: Earlier you spoke about a defence culture. You left me with the impression that sometimes defence lawyers are not so co-operative. Is there a prosecution culture, too? Is it about equal?

Mr COWDERY: I would like to think that the prosecution culture has changed a little over the last 9½ years.

Mr TEDESCHI: There is a prosecution culture and it is we disclose everything because we are required by law to do so, and if you do not disclose you run the most terrible risks. It would be a very, very rare prosecutor or instructing solicitor who does not disclose what we know about that might become relevant.

Mr COWDERY: I started criminal practice about 35 years ago, so my memory is impeded by some of those of experiences. In those days it used to be the prosecution in this camp and the defence in that camp and the twain would meet only in court. There would be nothing by way of preparation or anything done in advance, or very little. Progressively, over time, that has changed. It has been a combination of legislation, of the practices of the courts and, I think, also the change of culture within the prosecution and, to an extent, within the private profession. It is patchy now in the private profession. There are some people following the old-time line where they do not co-operate in anything. They do not tell you anything. But there are others who are very modern and progressive, and who see the benefits for their clients in a degree of co-operation at an early stage.

Ms LEE RHIANNON: Referring to my question about prosecution culture, probably because of my non-legal background I was thinking of the police within that.

Mr COWDERY: No.

Ms LEE RHIANNON: From your earlier answer it seems as though there is a problem.

Mr COWDERY: We are quite different. The essential role of the police is to investigate. The essential role of the prosecutor is to prosecute, and we do so on the basis of the material provided to us by the investigators. We see ourselves as occupying a very different part in the process of criminal justice.

Ms LEE RHIANNON: I will change my attitudes. The Legal Aid submission notes that, although there is a requirement to settle the indictment in a matter of 28 days after the committal, there is no defence incentive to object to non-compliance when Crowns usually seek leave to amend

charges on the day of, or just prior to, trial. Legal Aid is of the view that the timing of such amendments is a matter of concern. Do you have any comments on that?

Mr COWDERY: That goes back to Mr Tedeschi's comments. He might follow that up.

Mr TEDESCHI: As I said earlier, the vast majority of cases where there is an alteration to the indictment on the first day of the trial is because there have been discussions between the counsel on that day that have resulted in the accused offering up a plea to a lesser offence and the Crown accepting it in full discharge of the indictment, so that there is no trial. The number of applications by the Crown to amend an indictment in anticipation of a trial running are very, very few and that is because we have the pre-trial preparation units, which look at matters when they first come into the Office of the Director of Public Prosecutions and ensure at that very early stage that the charges that are in the indictment that is presented to court on arraignment are correct. It is a very, very small percentage of cases where there is an amendment made and the trial that runs. Most of the amendments are because there has been a plea, and the indictment is handed up and the accused, by agreement, enters a plea of guilty to that lesser offence.

CHAIR: I will follow up on the police question. The Police Association submission states that many of its members are dissatisfied with the fact that an arrested person has a right to silence while being questioned by police, and there is no penalty in subsequent court proceedings if the person elected not to speak. The submission recommends the legislation be amended along the line of the current model used in the United Kingdom where the courts are able to draw inferences from suspects exercising their right to silence in certain circumstances. What are your views on this issue? We are not here to be nice, I suppose.

Mr COWDERY: The whole issue of the right to silence, of course, is a very big issue and, as I have indicated, there is a Law Reform Commission report on the subject, which draws the various matters together. My own view is that the English provisions are balanced and do not go too far in the sense of overriding the rights and privileges that an accused person has. If you infringe upon or remove rights that have been enjoyed by people for a long time then you have to do it cautiously and you have to do it with the right checks and balances in place to ensure that it will happen in an appropriate way. But there are probably some non-negotiable matters, in my view. For example, it should never be permissible for investigators to be able to attempt to force a person to say something or to produce something, a person who is suspected of crime. That is an invitation to go back to the days of torture. But where you draw the line is a matter of great debate.

I think where the English have drawn the line is probably appropriate, and it seems to be working well enough in practice. The police submission could be answered, perhaps, by giving a discretion to a trial judge to make comment on the way in which an accused person has responded to allegations at various stages of the proceedings, perhaps going back to the point of first confrontation by the police, perhaps not. Perhaps only going back to some later stage pre-trial, perhaps only enabling comment on the failure of an accused person to give evidence in a trial. It is a matter of where you draw the line and how much you enable to be done whether by way of comment or by way of some penalty in relation to the tender of evidence or something of that kind. It is a very complex matter. I can understand the police being frustrated when confronted by a suspect's refusal to co-operate in any way, but at present that is the entitlement of any person suspected of a crime.

Mr TEDESCHI: The right to silence has many, many aspects to it and Mr Cowdery has referred to some of them, namely, the right of a person not to have to answer questions at a police station, the right of an accused person not to give evidence if he or she so chooses in a trial. The English approach, in my view, represents a commonsense approach that, I think, juries in the New South Wales are using that process of reasoning in any event. For instance, if an accused person is offered an interview at a police station and declines to be interviewed and then at the trial, for the very first time, advances, say, an alibi, says, "Well, actually, at the time of the crime I was with these people at that place."

The English approach is, you cannot directly infer guilt from the fact that you did not disclose your defence at that early stage. But the jury are told that they are entitled to consider the credibility of that defence by whether or not it was disclosed at an early stage, or when it was first disclosed. And I think that juries, in any event, would adopt that process of thought because it is a

logical process of thought. If you have a child who comes to you and tells you some story very late in the peace and the child had an opportunity to present that account much earlier you would think to yourself, "Well, why didn't you tell me that earlier?" The problem with our present system is that juries are not given any guidance at all at the moment, or no proper guidance on what the appropriate processes of thought are.

Often they are just told, "An accused has a right to silence. The accused is entitled not to say anything at the police station" and that is all they are told. Then they go into the jury room and I suspect that a lot of them are saying, "Well, if he really had nothing to hide he would have given that defence to the police at the first opportunity, so he must be guilty." That is an impermissible process of thought. We are not providing the jury with guidance. The English system is to say to the jury, "You are entitled to use the failure to advance the defence at an early stage only in assessing the credibility of the defence that is now raised. You are not allowed to directly infer guilt from the failure to advance that defence."

This whole area was raised in a well-known case called *The Queen v Maiden and Petty*. It was a trial that I did before Justice Hunt, who was then the most senior criminal law judge in New South Wales. He gave a direction to the jury along the lines of the law in England; namely, you can only use it to assess credibility. It went to the Court of Criminal Appeal under that same name—*The Queen v Maiden and Petty*—and the Court of Criminal Appeal in New South Wales held that it was an appropriate and proper direction. It then went to the High Court under the name of Petty and Maiden and the High Court said, "No." The right to silence gives the accused a right not to have that silence considered at all against him and that includes on the issue of guilt and on the issue of credibility.

The right to silence means that the jury cannot consider it at all. That is where the law stands at the moment. So it would require legislative intervention to change that to allow an approach, which in my view is a commonsense approach, along the English lines. The difference between the situation in England and the situation here is that in England all people who are charged have access to a lawyer at the police station—a lawyer provided by the State. So they can get advice at the police station. Here we do not have that facility. But by the time of committal most people have some access to lawyers. I think what Mr Cowdery is suggesting is that perhaps the consideration of the credibility of an offence could be taken back perhaps to the committal stage, not necessarily all the way back to the police station where an accused is invited to be questioned by the police.

CHAIR: My next question seeks statistical information. Do you think that this relates more to complex trials or to minor misdemeanours?

Mr TEDESCHI: It is across the board.

CHAIR: Would you recommend that legislation be introduced to allow these jury directions in the long term?

Mr TEDESCHI: It would require legislation to change the law.

CHAIR: And do you perceive that to be a good thing?

Mr COWDERY: Yes, I think it would be valuable. We have addressed these sorts of issues in submissions to the Law Reform Commission in relation to its reference on the right to silence. So the position has been expressed formally.

The Hon. AMANDA FAZIO: This inquiry received a submission from the Public Defenders in which they said:

> The improvement in the backlog of cases being heard was really due to the case management approach adopted by list judges and followed as a matter of course in lengthy and factually complex trials. The low frequency of formal pre-trial disclosures ordered does not fully reflect what is in reality a general and manifest willingness by parties to refine trial issues pre-trial.

I would like your comments to establish whether you thought that accurately reflected your views on these matters, or whether you thought that they had drawn an overly optimistic conclusion?

Mr TEDESCHI: I think it is overly optimistic, but I think it should be said that there is a difference between the approach taken by many of the Public Defenders and the approach taken by many private barristers who represent accused people. Private barristers represent the majority of accused people, even if it is legal aid that is footing the bill. The Public Defenders perhaps have more of an incentive to have a matter dealt with expeditiously. Their approach is perhaps more guided by principles that are of advantage to the whole criminal justice system, whereas a private barrister is perhaps more focused on the individual interests of his or her client. On the whole I do not think that there is the kind of co-operative approach that is described in that comment.

Mr COWDERY: As Mr Tedeschi said, the Public Defenders are in a special category. Those comments might generally apply to them but not more broadly across the whole defence bar.

The Hon. GREG PEARCE: What is your relationship with the police prosecutors?

Mr COWDERY: The police prosecutors are an entirely separate organisation. They are in the legal services branch of the NSW Police. They are administered, appraised and supervised quite independently of my office. I have nothing to do with them. We communicate from time to time, essentially in relation to appeals or bail reviews from the Local Court. If the police prosecutors are appearing in a matter—and they appear only in the Local Court—and they take the view that the sentence is inadequate and needs to be appealed, or that an order granting bail needs to be reviewed, those matters are referred to my office for the conduct of any further proceedings. But apart from that they run their own race. While we communicate, we do not have any direct involvement in each other's activities. Mind you, I think that is bad thing. I think that my office should conduct all prosecutions, but that is an argument for another day.

The Hon. DAVID CLARKE: You state in your submission:

> In three of the nine matters in which pre-trial disclosures were made the Crown prosecutors reported that the pre-trial disclosure orders had a positive effect.

Are you referring only to pre-trial disclosures having a positive effect in relation to waiting times, or were there other positive effects?

Mr COWDERY: In relation to the conduct of the matters themselves—the identification of issues, the identification of evidence that would be required to address those issues, concessions that were able to be made in relation to that evidence and the shortening of the actual hearing time.

The Hon. DAVID CLARKE: What about the other two-thirds of cases? Were there no effects one way or the other, or were there negative effects?

Mr COWDERY: No, it can be summarised as saying that there were no effects one way or the other, for various reasons. In some cases, for example, there was a plea of guilty so there was not a trial at all, and in other cases there was no benefit but no particular detriment.

The Hon. DAVID CLARKE: So we have had nine cases where pre-trial disclosures have been ordered. Over what period of time are we talking about?

Mr COWDERY: Since the introduction of the legislation. The earliest, I think, was in September 2002, which was the Folbigg case in which Mr Tedeschi appeared. The latest was in February 2004.

Ms LEE RHIANNON: Your submission points out:

> A court may only order pre-trial disclosure if it is satisfied that the accused person will be legally represented.

In light of that provision could you see any way in which the new pre-trial disclosure requirements would impact on unrepresented defendants?

Mr COWDERY: The legislation requires that there be legal representation for this regime to apply. I think it would impose an unfair burden on an unrepresented accused person. It would be very

difficult to ensure compliance with an unrepresented person, unless he or she had special skills in the area. It means, I suppose, that some of the pre-trial management of a matter is not available in the case of an unrepresented accused person, but then it would be very unusual to find a trial that complied with these criteria in which the accused person was not represented.

Ms LEE RHIANNON: What is the likelihood of a defendant in a complex criminal case being unrepresented?

Mr COWDERY: Very small.

CHAIR: I refer again to the Public Defenders submission. They noted:

> In terms of defence response to prosecution disclosure the new section 139 (2) (f) inserted into the Criminal Procedure Act 1986 is unduly onerous.

The submission stated:

> To disclose all objections that will be taken to evidence prior to the trial is unrealistic in the extreme.

Mr COWDERY: I do not agree with that submission. It does not require the defence to identify all possible objections that might be taken to evidence. It is a regime that requires, in the first place, the prosecution to disclose evidence in various categories to which the legislation applies that the Crown will be relying upon and for the defence then to indicate its approach to that evidence which has been identified. There will always be things that come up in the course of a trial that cannot be predicted in advance and there may be objections taken by the defence to particular questions or the admission of particular evidence in the course of the running of the trial. It does not preclude that, but that can still happen. So I do not agree with the submission. I think it might be overstating the problems somewhat.

CHAIR: So the information that is given by both sides in pre-trial disclosure does not infer in any way that there is an agreement between both sides that that information is correct?

Mr COWDERY: Not that it is correct.

CHAIR: Or agreed to?

Mr COWDERY: No. The defence may admit certain evidence in the course of this procedure or otherwise. It might say that it is not going to contest what witness A says about an event or about some conclusion if it is an expert witness. But there is no obligation on the defence to do that.

Mr TEDESCHI: The fact that the defence has no objection to the admissibility of some evidence does not mean that it agrees to it factually.

The Hon. AMANDA FAZIO: I refer to the difference between public defenders, private solicitors and barristers who might be working with these sorts of cases. Does the issue of financial incentives, or legal fees, come into this equation at all? I know that a judge has to determine whether it is a complex legal matter and, therefore, whether pre-trial disclosures should apply. Maybe I am being naive but is it the case that the longer you draw out a case and the more complex it is the more legal fees you will get? If you had a rich client there would be no incentive at all for a barrister, a QC, or whatever, to want to contract the amount of time that was spent on a case?

Mr COWDERY: There is certainly an element of truth in what you have to say. The public defenders are in a different situation. They are salaried. Public defenders are on an annual salary. There is no fee incentive one way or another for their conduct. They are statutory officers who are there to serve the public interest. So far as the private profession is concerned, yes, the more that a private lawyer has to do in the conduct of a matter, then potentially the more that lawyer can charge. Professional ethics require that whatever that lawyer does should be consistent with that lawyer's duties as an officer of the court and for the advancement of the interests of the client. So there are those ethical constraints. But, nevertheless, I suppose it is possible that there may be some unscrupulous practitioners who would spin out the proceeds for the purpose of increasing their fees.

The Hon. GREG PEARCE: What are the prospects of their getting paid?

Mr COWDERY: That depends on who the client is, I suppose. The Legal Aid Commission is looking at the way in which it funds private representation when it engages private barristers to appear in the legally aided matters. Sometimes they pay a lump sum and they say, "We think this trial will take about this long, and we think this is a suitable fee for that. If you have to do more work, too bad, do the work but you will not get extra money." There is that kind of arrangement sometimes, too.

Mr TEDESCHI: At the moment, the Legal Aid Commission is looking at one particular aspect: at present, they perceive that there is an incentive for private counsel to get to the first day of a trial, even if there is going to be a plea, because a larger payment is made if there is a plea on the morning of the trial rather than a plea at an earlier stage. What they are considering at the moment is trying to remove that financial incentive so that for private counsel there will be the same financial consequence if there is an early plea as there is for a plea on the first day of the trial.

Mr COWDERY: In fact, we are meeting with the senior people in the Legal Aid Commission on 17 June to discuss those sorts of issues and the question of late guilty pleas as well.

CHAIR: This question is somewhat complex. The submission is the opinion of an experienced Crown prosecutor who commented that, although the legislation provides for various sanctions for parties who fail to disclose evidence in accordance with pretrial requirements, it is difficult to envisage appropriate sanctions applying to defaulting accused persons in murder trials and that such sanctions may significantly affect the right of the accused to have a fair trial. There is quite a bit of comment about sanctions and their usefulness or otherwise in the submissions.

Mr COWDERY: The comment is a valid one, I think, but I think it is important to have sanctions prescribed to show that the legislation is intended to be complied with, that it is intended that there will be penalties for not doing so, even if, when push comes to shove, the sanctions are not enforced in any meaningful or in any punitive way. The difficulty about the question of sanctions is that the court has an overriding duty in the interests of justice to ensure that any trial is fair. For example, take a murder case where there was a failure to notify under the regime a particular piece of evidence: One of the sanctions available is that that evidence not be allowed to be led at the trial, but that may be very pertinent evidence going to a significant issue in the conduct of the trial, and the trial judge, faced with that option, may be very reluctant to say, "No, you cannot lead that evidence", and that may lead to what might be a tainted conviction which would then probably be overturned on appeal. I think it is important to have the sanctions in place to show that this is a serious attempt to try to ensure compliance with the legislation, but the enforcement of the sanctions may be another matter.

CHAIR: There is another issue and we will switch to somewhere else. The amendment Act continued a saving of any immunity that presently applies to the disclosure of information, documents or other things including client legal privilege, public interest immunity and sexual assault communications privilege. The Police Association submission expressed some concern that there was uncertainty among its members about the application of this actual provision.

Mr COWDERY: So far as my office is concerned, we have not encountered any problems. If the police are having difficulty, then it may be a matter of education of the police involved. I do not see the need for any change on that account. As I say, we do not have any difficulty with that.

Mr TEDESCHI: I am not aware of any difficulty.

CHAIR: Would it be excluding information that they think they should have, do you think?

Mr COWDERY: I think there may need to be a better education campaign to equip the police to address issues of that kind or evidence that falls into that category so that they can identify it and know how to deal with it.

CHAIR: Finally, do you think there is a need for ongoing monitoring of the use of pretrial disclosure orders? If so, what aspects of the new regime or its impact should be monitored? I want your opinion about whether or not we continue with that.

Mr COWDERY: My very short answer to that question is no, I do not think so. That is based on the number of matters that have so far been subjected to this regime and the likelihood of that number remaining small in the foreseeable future, unless there is legislative change, in which case then, yes, there may be a greater need for review. So far as other aspects of legislation are concerned, like settling an indictment within 28 days and so on, we are addressing that. So far we seem to be running without any great difficulty and we are not disrupting the business of the courts. I think there is a very limited need, if at all, for future monitoring.

CHAIR: Do you think the implementation of this particular piece of legislation has affected the culture within the courts, such as the case management culture? Do you think it has had anything to do with influencing that, or would it have happened anyway?

Mr TEDESCHI: I think because it has been used so seldom that it has not really changed the culture in the court. I think there are still some further changes in culture to be made, and hopefully that will come.

Mr COWDERY: From a prosecutor's point of view, we take the view that the legislation has imposed a further obligation on the prosecution with very little additional burden on the defence, except in the area of the complex criminal trials, but then that has been implemented only on those nine occasions.

CHAIR: Thank you very much. You have certainly helped us a lot to work through the issues.

Mr COWDERY: If there are any follow-up matters, we would be happy to address any other questions you might like to send.

CHAIR: Thank you.

(The witnesses withdrew)

(Short adjournment)

CHRISTOPHER BRUCE CRAIGIE, Deputy Senior Public Defender, New South Wales Public Defenders, 175 Liverpool Street, Sydney, and

PETER ZAHRA, Senior Public Defender, New South Wales Public Defender, 175 Liverpool Street, Sydney sworn and examined:

CHAIR: In what official capacity are you appearing before the Committee?

Mr CRAIGIE: I am here as Mr Zahra's deputy to assist him in giving evidence.

Mr ZAHRA: I am appearing as the Senior Public Defender.

CHAIR: If you consider at any stage during your evidence that certain evidence or documents you may wish to present should be heard or seen in private by the Committee, the Committee will consider your request. However, the Committee or the Legislative Council may subsequently publish the evidence if they decide it is in the public interest to do so. Do either of you wish to make an opening statement?

Mr CRAIGIE: No.

Mr ZAHRA: No.

CHAIR: With these questions, you can decide who answers them unless there is a specifically directed question.

Mr CRAIGIE: Mr Zahra and I have discussed this, and I think he is best equipped to deliver our joint responses.

CHAIR: Are you aware of any further pretrial disclosure orders that have been made since your submission was written?

Mr ZAHRA: No.

CHAIR: Your submission points out that other pretrial processes have been adopted by the Supreme Court and the district court to achieve efficiency and clarification of issues. Can you elaborate on these processes and their effectiveness in reducing court waiting times?

Mr ZAHRA: Our written submission refers to some of these processes. I refer first to the Supreme Court. There is in fact an arraignment process. Arraignments occur once a month. In fact, the last arraignment was last Friday. Mr Justice Barr is the judge who presides over those arraignments. Each matter is called over, usually within about four weeks of committal. The arraignment process offers a type of case management. Much of the matters that are referred to in the disclosure provisions are touched upon. The pleas are usually taken before the judge. He is provided with an outline of the Crown case. He has, as I understand it, also the depositions from the Local Court.

There is some discussion particularly about the length that the matter is likely to take. He asks defence counsel what the issues are and whether there are any pretrial issues. So this firstly acts as a type of case management, and obviously defence counsel there are required to disclose the general issues in the trial. What has been occurring in recent times is that prior to the trials commencing the trial judges who are allocated those hearings now have a tendency to call them up before them, usually about 9.30 before normal court sitting times, again to confirm the length of time, the readiness of the trial, and whether there are any other pretrial issues that need to be canvassed prior to the trials commencing.

So in the Supreme Court prior to trial there is effectively the arraignment process. Sometimes the arraignment process occurs over more than one sitting day. If there are particular issues that need to be attended to, Mr Justice Barr has a tendency of setting the hearing date at one arraignment and taking the pleas but listing the matter for further mention at another time, also if there are matters that

need to be followed up. In the District Court there is an arraignment process as well. In our written submission we refer to particularly some of the larger suburban courts where individual judges also exercise a degree of case management. Essentially, they are the matters that we have referred to.

CHAIR: Earlier today Mark Tedeschi raised the issue of the defence notifying the court of its intention to submit expert evidence when they introduce their witness, rather than at any time sooner. He indicated that this practice causes delays because the prosecution is likely to request an adjournment to consider the expert's report. He tentatively proposed a legislative amendment, not necessarily attached to pretrial disclosure, to require the defence to disclose the expert evidence within a suitable time frame. What are your views about that?

Mr ZAHRA: We have been concerned from time to time about expert evidence, particularly when we are served with material very much at the last moment. For example, the matter of Folbigg, which you would be familiar with. In fact, Mr Tedeschi prosecuted the matter. We were very much concerned about being provided with information relating to expert witnesses and obviously the detail of the evidence that they proposed to be given. So it was certainly a matter that we expressed a great deal of concern in Folbigg of the need obviously to understand the parameters of the expert evidence, bearing in mind that the expert evidence is of a very highly and specialised nature.

If obviously the matter falls within that definition, then it is certainly caught by the legislation. So I would think that the provision is already there. This is one of the interesting aspects about disclosure and the Crown's view about it. The Crown certainly has a power to make a request, and the power is there that you obviously would be familiar with. That power can no doubt be exercised. I take you to section 136 (3), "the court may order pretrial disclosure on application of any party at the court's own initiative." The power is already there.

CHAIR: What about outside pretrial disclosure conditions?

Mr ZAHRA: The provision is there already if the evidence is likely to be complex for them to seek those orders. but we would find at arraignment that those questions are already resolved. Another thing is that there is a perception that defence counsel are there to thwart the proceedings. Regrettably, people forme those views and have those expectations when the reality is far from it. Clearly, there is no point in ambushing the Crown because it would only delay the proceedings, and it is most unprofessional. You may be aware of the Law Reform Commission report on the right to silence. One aspect that the Law Reform Commission considered was whether defence counsel were prone to ambush-type tactics in order to seek some advantage, and the conclusion was that there was no evidence of that, and it was highly speculative that that was the case.

Defence counsel by and large produce the reports and provide them mainly because it is best that the Crown does not split their case. It is important for us to notify the Crown of the expert witnesses because to do so would no doubt give the Crown an opportunity to split their case and to call evidence in reply. There is no tactical advantage in ambush trials. It does not mean to say that it does not happen, but it is not the common approach of defence counsel, and the Law Reform Commission report bears that out.

I suggest a certain caution should be exercised by the Committee whenever there is a suggestion that defence counsel are there to ambush the trial, that it would need to consult widely with the judges. It is not to say that it does not happen but it would be wrong to introduce legislation when in fact there is no particular need for it because by and large defence counsel would see no forensic advantage. In fact, there would be a disadvantage.

CHAIR: I did not get the impression there was a complex issue involved. It was just the issue of the complexity of the expert witness information requiring a longer period of time for assessment.

Mr ZAHRA: It is a matter that we are also concerned about because we are also served with reports from the Crown. Regrettably, there is a tendency for the Crown to have conferences with its experts relatively late, during the course of a trial or during a luncheon adjournment and we are then served with fresh material that causes us a great deal of concern. It is a concern we have because we would need to meet the evidence and, bearing in mind the range of forensic evidence, it is important

for us to be able to consult our own experts before we embark on cross-examining witnesses. So it is a particular concern of ours also that there is not only at times late service of expert witness statements but there is usually additional material that is gleaned from a conference, usually at the last moment from an expert witness.

CHAIR: Apart from the successes of other pre-trial processes that have been structured into the system, what are the reasons for pre-trial disclosure orders not being utilised more frequently?

Mr ZAHRA: By and large because in the greater majority of trials it is not warranted. If one were to look at the greater bulk of trials, for example in the District Court, one must balance the need to have case management by judges and to make orders and to supervise those orders with the time that that would take in listing and relisting matters, as compared to what is occurring now—that is, wide consultation between Crown and defence counsel to resolve the issue. I presume the court is looking at the balance between continually listing a matter and the effect that would ultimately have on the court lists and whether in a particular case it is warranted. It is a concern that there might be some knee-jerk reaction to disclosure in every case and that there should be supervision by the court, firstly in making orders and then supervising compliance. I sense that the courts have realised that that may place a considerable additional burden upon then, when the greater bulk of cases are quite smoothly run, obviously because the Crown and defence counsel discuss the issues.

Mr CRAIGIE: I think you will see from our written submission that the thrust of our observation is that a fairly complex mechanism is set up in the pre-trial disclosure regime. Once you interject that into the system, it can be an added source of delay if you promote it and provoke it unnecessarily. If you have a co-operative regime in place already, in the vast majority of cases you will not need to turn to that, although it is perhaps handy to have it either as a deterrent or an encouragement for people to co-operate. The major cause of it not being utilised is, quite simply, that it is not found necessary in most cases.

Mr ZAHRA: This is in the background of quite a cultural change. In my experience there has been a cultural change, and there is quite a deal more discussion with Crown Prosecutors and the issues are resolved. Obviously the disclosure provisions are quite important, but it would be wrong to suggest that they should be implemented in every case when, in a sense, they are not warranted and the by-product of more closer supervision would be quite an extension in court delays, because of the need to mention and remention matters.

CHAIR: Have you come across any parties who are unwilling to participate in the process?

Mr ZAHRA: I am not aware of any. I can speak only on behalf of the Public Defenders. The Crown Prosecutors are probably in a better position than we are, because apart from the relatively rare occasions where we are in joint trials, we do not see other defence counsel in court.

The Hon. GREG PEARCE: What percentage of defendants would you act for?

Mr ZAHRA: Probably we appear in 30 or 40 per cent of criminal trials.

Mr CRAIGIE: We cover about 80 per cent of the State's courts; we are certainly across all jurisdictions. We do not hear any loud screams of objection from other parties.

The Hon. GREG PEARCE: Do you appear in the Local Court or only the District Court?

Mr CRAIGIE: In committal proceedings, in the main.

Mr ZAHRA: Sometimes in committal proceedings, but largely in the District Court and now more predominately in the Supreme Court, Court of Criminal Appeal and High Court. We do not sense a lot of concern, because we do not know of any case where a Crown has made objection, but that does not mean to say that they have not done that. Maybe Mr Tedeschi was able to assist you there as to whether the Crown has made applications for orders in the past.

The Hon. GREG PEARCE: It was a very limited number.

Mr ZAHRA: Yes. That is what we understood.

The Hon. AMANDA FAZIO: Of the cases that have pre-trial disclosure orders, have you represented defendants in all cases?

Mr ZAHRA: In our written submissions we have referred to them. Certainly some of the significant ones were mentioned, including Munroe and Folbigg. We indicated in our written submission that all the cases mentioned involved the appearance of a Public Defender.

The Hon. DAVID CLARKE: Do you believe the pre-trial disclosure system operating in New South Wales is operating quite satisfactorily?

Mr ZAHRA: Yes. It has an effect in the sense that it is part of a whole process of case management. It certainly has not taken over to be the only form of case management. If one were to look at it merely in terms of its application in every matter, if that were the measure, then it is not successful. We say that it has to be looked at in the light of every other method of case management. In other words it is at the pinnacle when an application can be made or a judge makes an order, and it is available at the application of a party to the proceedings. It is there and available. If one were to ask what is the measure of success, and if you implement a measure saying the percentage of cases where an order is made and that is the measure of success, then it has been unsuccessful.

But if the measure of success is to effect a reduction in court waiting times, it operates at the pinnacle of a number of different processes of case management. It is there, no doubt, as a facility for orders to be made in giving cases. It appears that judges obviously balance the need to make an order with the effect that making orders in every case would have on the list. In other words, it may have a negative effect if it were to be implemented in every case, because of the need to mention matters quite frequently.

The Hon. DAVID CLARKE: So you do not believe there is any purpose to be gained in going down the pathway of England and Wales in making pre-trial disclosure mandatory?

Mr ZAHRA: As I understand English provisions, they apply in all indictable matters. I really do not know what effect they have on the courts listing and procedure. I cannot comment on that. In a sense, when you ask why are all orders not made, those questions are probably better asked of judges who have the power, or questions asked of the Crown; obviously if they believe that it is underutilised why have they not made applications? I sense the reason in New South Wales is that judges balance the need for a pre-trial order to be made in the light of the fact that there appears to be some compliance in the sentiment of the legislation as compared to the need of listing the matter. I can only infer they are the reasons. If they were to adopt the English model in every indictable matter no doubt the court were to make orders and then supervise compliance of the orders, that may have a negative effect on listing.

The Hon. DAVID CLARKE: To take that a step further, in New South Wales pre-trial disclosure has not been ordered in many situations. Is that because not many applications have been made? Other any statistics to show how many applications have been made by either side, and how many had been refused all accepted by judges?

Mr ZAHRA: I understand a very small number. When applications are made, some form of order is made, but the numbers are very small. Certainly we have inquired and we are members of user groups of both the District Court and the Supreme Court. From time to time this has been discussed and there has been a very small number.

The Hon. DAVID CLARKE: Would more applications be made if judges were interpreting the legislation to mean "or" instead of "and"?

Mr ZAHRA: That is the interpretation, there is a decision of Justice O'Keefe, in Monroe.

CHAIR: The Committee is aware of that.

Mr ZAHRA: That is the interpretation.

The Hon. DAVID CLARKE: By him or by all judges?

Mr ZAHRA: In these days of rapid technology of reporting, I suspect through the Judicial Commission all judges would be aware of that.

The Hon. AMANDA FAZIO: Is that what is called a "notifiable precedence"?

Mr ZAHRA: I would have expected that most judges of the District Court and Supreme Court would know that.

The Hon. DAVID CLARKE: Before Justice O'Keefe interpreted the legislation that way, what was the interpretation on this section?

Mr ZAHRA: I think that was the first time that that issue had been raised. I was of the understanding that it was given quite a wide interpretation to implicitly mean "or". That is the way I read it, but I do not believe it was subject to any judicial consideration until Monroe.

Mr CRAIGIE: We get no sense of judges being deterred from making orders. If anything, if the margin of success in that regime is reducing delay, whether there is a causal connection between the two, is highly successful given what we know about the virtual disappearance of delay, particularly in the District Court.

The Hon. DAVID CLARKE: Would you agree other benefits arise from pre-trial disclosure, apart from shortening court delays?

Mr ZAHRA: You have to go underneath what might be the pre-conception of defence counsel. Defence counsel want to present a credible case, not that we bear an onus. Research studies of jurors in New Zealand suggest that defence counsel do not assist themselves by poor preparation, poor planning, failing to be focused. There was a recent study by Professor Warren Young in New Zealand; quite clearly defence counsel do not do themselves any favour in not being focused, not being prepared; apart from some proportions of any profession that may be largely incompetent. The greater bulk of the defence profession realises there is no utility in not being prepared, not being focused on the issues. And that manifests itself.

After all, this is an effective tool that judges and the Crown have been given to obtain disclosure from the defence. If it were such a huge problem, why have they not even attempted to use the legislation? Why do we not see any challenges to that under various provisions, 5F and others, in the Court of Criminal Appeal, if obviously it were interpreted wrongly? It is a tool that has not been used. We say from that it may be inferred from that it has not been found necessary to use it as a tool when by and large the delays are coming down and there is some communication and resolution of the issues. After all, one might have expected that the tool may have attempted to be used and tested in other jurisdictions. The fact that it has not indicates that there have been significant inroads in reducing court delays, there has been a change in culture, and the courts have not seen any necessity to use it as a stick, to use that quality of it. I do not sense that judges or Crown prosecutors have found it necessary in these circumstances, and that is why they have not used it

The Hon. DAVID CLARKE: If that is a self-evident result and it is so apparent, why would the Director of Public Prosecutions be pushing for the provisions to be widened?

Mr ZAHRA: In the sense of the interpretation of 136?

CHAIR: Yes.

Mr ZAHRA: I do not think he is asking for it to be widened. I think he is seeking some clarity of that. We say that is probably the interpretation anyway, on reading it, and we say there is now authority for that. I do not sense they are seeking for the powers to be widened. They have powers there that they have not used yet.

CHAIR: There is a perception that the District Court may utilise the Act more often if it was most definitely "or" without the "and".

Mr ZAHRA: We do not have any problem with "and" being changed to "or" and we will see how it goes. We are not here to wager bets but I do not think on the present trends we would see any significant change in that, but we have no problem with that being amended to "or". I do not get any sense that judges have felt frustrated by the provisions or thought it is badly drafted. No-one has challenged this in superior courts. No-one has suggested until now it is too limiting. They just have not used it.

Mr CRAIGIE: They have to have someone make an application. I do not think Mr Tedeschi was telling you that he made multiple applications that have been knocked back just for the want of "or".

CHAIR: There was no conflict on this issue. It was a discussion as to why perhaps the District Court is not involved in the process, and maybe there are times when it does not need to be so complex for it to be involved, when it would be useful. That is the discussion.

Mr CRAIGIE: Yes, but as far as we are concerned "or" is not a die in the ditch issue. We doubt whether it would make much difference but we certainly see no harm in doing it if it makes everyone more comfortable.

The Hon. AMANDA FAZIO: Of the nine pre-trial disclosure orders that have been granted to date, six have been in the Supreme Court and three in the District Court. Do you think that is a reflection of the way the two different courts operate or do you think the Supreme Court is more likely to get more complex cases that would attract pre-trial disclosures?

Mr ZAHRA: By and large matters in the Supreme Court are homicide matters and there is a higher proportion of witnesses being forensic witnesses, and certainly those matters by large come within the definition of complex. I think it may be because of the forensic evidence in homicide matters.

Ms LEE RHIANNON: Are there circumstances where the pre-trial disclosure process prolongs criminal cases?

Mr ZAHRA: They are too small a number to say that, and in the matters I have been involved in it has not. The only way it may prolong matters is, in effect, for example, if we adopted the United Kingdom model and in every indictable matter in the District Court, presumably there are judges who have to make the orders and there are judges who presumably follow-up if there are sanctions to be imposed. I imagine that would be a substantial increase on the court's workload and that would impact on delay consequently.

Ms LEE RHIANNON: Do you see the Act erodes the fundamental right to silence, which protects accused people by requiring police to make out the case entirely without the assistance of the accused person? Do you see that is an area of weakness?

Mr ZAHRA: You would have to look at that on a case-by-case basis. It is very hard to generalise. There is this misconception that defence counsel by and large have a tool of ambush and that is the way they run most criminal trials. That is really not the case. Crowns have a very good view of defence counsel's case before it starts because of the conversations they have had with them. As I say, there is a cultural change. Certainly, in advocacy courses I have had occasion to teach to colleges of law, to solicitors and counsel looking at trial procedures and advocacy, there is quite an undercurrent of the need to be focused and the need to be prepared.

Opening addresses are now more frequently used than they ever have been. Obviously the case could be presented to the jury as soon as possible. I do not get a sense that there is a widely held perception that there is a forensic advantage in keeping the cards close to your chest; in fact, quite the opposite, that juries should be assisted. Studies of juries and the criticisms of defence counsel are usually on the basis that they are unfocused, that we do not know what they are saying, we do not know what the case is until the end. These are messages that are clearly coming through now and all

the best advocacy courses, and obviously solicitors and barristers have CLE and CPD, every advocacy course that you attend is very much the antithesis of this ambush or buckshot approach.

Ms LEE RHIANNON: So that applies to prosecution and defence, no ambush tactics?

Mr ZAHRA: As most of the studies reveal, even the Law Reform Commission report, by and large there has been quite good compliance by the Crown and the DPP in relation to disclosure. Obviously, sometimes some statements are not received by them when they should be but you are never going to change the human element of this, but by and large there is compliance. That is our experience also, that there is compliance with disclosure by the Crown. Sometimes, obviously just before a trial, we are usually handed statements but, by and large, that is a product of the fact that the DPP does not have unlimited resources. Nicolas Cowdery spoke at our last conference only a few weeks ago and he expressed the view that they do not have unlimited resources. In an ideal world it would be wonderful to have a Crown prosecutor to look at a matter months in advance and be able to sit in his room and consider everything.

The reality is that resources are not like that and by and large a Crown is allocated later rather than earlier. That is a resource issue and that is the reality of the situation. By and large, when the Crown prosecutor looks at it, maybe three or four weeks before the trial, or perhaps even less, he may have the view that certain other investigations are needed and may call for further statements. That is the reality. We do not live in an ideal world where there are unlimited resources and we can understand that the Crown and the DPP are in that position. That is not to say we are happy having to wait by the fax machine after 4 o'clock on a Friday afternoon before a trial starts so there is a chance of getting further statements. We do not like that, but understand it is a product of the fact that Crown prosecutors are at times briefed relatively late and sometimes through their own perspective see the need to obtain further statements or investigations.

Ms LEE RHIANNON: In your submission you set out how cases these days are more complex and longer than they were a decade ago. Can you elaborate on the reasons for this trend as set out in your submission?

Mr ZAHRA: Yes. As I say, we are user groups of both the District Court and the Supreme Court. At the most recent meeting of the common law division of the Supreme Court, Justice Wood and Justice Barr, once again it was something everyone reflects on. It is a matter we discuss quite frequently to try to understand why that is the case, because the reality is that trials are longer. The best intelligence as to why that is, is the amount of expert evidence, the amount of forensic evidence, that cases are becoming quite complex. It is difficult to understand why, but certainly the briefs that we get these days have many statements, a lot more forensic evidence, and also, as we say in our submission, in the Evidence Act itself there are a lot of provisions that require leave and the exercise of judicial discretion. These matters are usually the subject of legal argument before the trial commences. So, that has an effect.

I think the Evidence Act has had the effect of increasing the length of trials because of the many discretions required in the Act, the many warnings required, so there usually quite some discussion before a jury is directed as to the appropriate directions. There are a number of reasons. That is not just our say so, it is also the view of the user groups and the common law division of the Supreme Court. The judges there will tell you that it is their experience also, that trials are much, much longer, quite significantly so. Judges will say to you it was not all that long ago before there was a murder trial that would take two weeks. That would be very much unheard of these days. I have been running murder trials since 1993 and many murder trials I did around that time were one and two weeks long. That is just unheard of these days—the complexity of the directions, the complexity of the warnings.

CHAIR: Is that because of increased openness and technology, that information moves so fast so you have to prove, and assumptions are not as easy to make? I am just interested.

Mr ZAHRA: Really, you get very little time to get off the bus to contemplate and think these days. It is all so fast and everything is seemingly more complex than it used to be. It is a combination of a number of different factors. As I say, in the past, matters of an evidentiary nature in relation to hearsay were straightforward. Now there are many provisions in the Evidence Act that require, firstly,

notices to be given, leave, and then discretion to be exercised before it is attempted to be led. Then there are a whole host of warnings and directions in relation to those matters of evidence. It is more than a perception that life is more complex.

Mr CRAIGIE: There are some simple factors. One is that there has been quite a substantial jurisdictional adjustment, and the former typical three-day break, enter and steal trial is no longer in the District Court, it has gone off to the Local Court. So, that pushes up your average for a start. Technology is already considered. The sheer fact that now nearly every interview with the suspect is videoed means in most cases that will be played to the jury. The jury has to hear a lot of telephone interception and other surveillance evidence, rather than simply summarising it. The Evidence Act, matters that Mr Zahra has mentioned, a simple requirement that police be much more thorough than in former times would have been tolerated, the importance of making sure connecting evidence, that something has been delivered to a laboratory or something of that nature, is there at least even in brief form. These people have to be ready to give evidence even if they are not tested.

My experience, and I have been practising now for nearly a quarter of the century, is that we used to have lots of three-day or four-day trials. It is now very unusual to knock them over in under two weeks, even in the District Court. A lot of that has to do with heightened professionalism, heightened thoroughness, heightened protective measures built into the Evidence Act, police procedures and, I hope, in the competence and care that defence counsel and judges take in canvassing the facts and the law.

Mr ZAHRA: There is no doubt a real concern is that any party be responsible for appellable error. There is a high degree of concern about that. No-one would want a retrial, no-one would want a trial to be aborted.

Ms LEE RHIANNON: I was wondering whether you can comment on the rate of compliance by police officers? Have you come across any examples? You gave us one in your submission about a trial that had to be aborted.

Mr ZAHRA: By and large when the matters come to us they have passed through the stages of committal, and in the District Court they have usually been arraigned and a date has been set. So, by and large whatever frustration there is with compliance with police statements has been had with someone else rather than us. We tend to be briefed once the matter has a date and is given some direction. Certainly we know anecdotally that there are difficulties in the Local Court with statements being served but, by and large, we are somewhat immune from that. We are always served with statements late, and that is usually the result of a Crown prosecutor forming the view that more things need to be done. In some trials we had this year statements have been served upon us very late. Obviously from the date on the statements they have been around for many months. But I think that is largely the result of the fact that the police did not think it was relevant but someone else might have.

Ms LEE RHIANNON: Do you think that was a tactical decision or just poor process?

Mr ZAHRA: No, I do not think there is any evidence of any tactical withdrawal of statements.

Mr CRAIGIE: I would hesitate even to say that it is poor. What tends to happen is that the advocate who has to be on his or her feet has a mind concentrated in a slightly different way from the solicitor who has perhaps prepared the brief. The Crowns necessarily get the run-of-the-mill trials fairly late in the piece otherwise they are going to spend a lot of time waiting around doing nothing. I think it is probably an inevitable downside of efficiencies that they try to pursue that these things will sometimes happen late.

Mr ZAHRA: Obviously prosecution is a human exercise. You might hand one brief to two Crown prosecutors who have different views about the way they would run the case and what they would find important and necessary as part of the proof. The human element might be that a Crown prosecutor might receive a brief and then tell the officer in charge, "I think we need this or I think we need that" as a requisition after conference prior to trial. There is a human element in that, which I think is largely the result of people preparing cases differently or perceiving different things. I do not think that is a problem. It is frustrating when we get a statement right at the last moment—let me not

diminish that level of frustration. But there is a level of understanding that in an ideal world a Crown prosecutor would be briefed on the matter months and months in advance and have the opportunity to reflect and deliberate. But we do not work in that environment any more.

Mr CRAIGIE: Some of the late statements help us—a Crown prosecutor could say to the police, "Hang on, there's something relevant you should tell the defence".

Mr ZAHRA: We do not perceive that there is any—

CHAIR: Your submission suggests that the Committee should examine the extension of the section to investigate officers of statutory bodies, such as the Police Integrity Commission. Can you advise the Committee why the legislation should be extended?

Mr ZAHRA: It is just that we cannot see any difference in those bodies. They touch upon the same issues of a person having to meet these allegations and having to understand these allegations. We believe there should be conformity because we cannot see any difference.

Mr CRAIGIE: There would be substantial public benefit too in an inquisitorial body having that encouraging and deterrent power. We would have thought it could only advance its inquiries. I think our short answer is: Why not?

CHAIR: I wonder where it would lead. Your submission states that as a matter of policy the Crown solicitors and Crown authorities generally should not resist subpoenas to produce where on their face they disclose a reasonable connection with the matter at hand. Is it not in the public interest that an overly restrictive attitude be taken, resulting in unnecessary proceedings that incur public expenditure? I am quoting your submission.

Mr ZAHRA: The complexity of the law relating to production is such now that it is taking quite a deal of the court's time to resolve. It is causing quite a deal of difficulty. You issue a subpoena these days and by and large you expect some challenge to be made for access. For example, we have had experience where we issue a subpoena and the police are separately represented in an application. In one particular case we were aware that the information was not even provided to the Crown prosecutor. This was a trial in the Supreme Court that had started. Subpoenas had been issued. There was an application of public interest immunity informer privilege. Defence counsel was not given access. I do not know whether you are aware of the procedures when privilege is claimed. Defence counsel is not given access to the material; they make submissions blind. The documents are handed to the judge, who makes the determination.

In one particular case in the Supreme Court not even the Crown was aware of the material in relation to an informer, who was a witness at the trial. The Crown opened to the jury and the trial was proceeding. The argument took place during the body of the trial. The judge saw the material and realised that the information the police had sought to exclude was highly relevant to the cross-examination of one of the important Crown witnesses and the trial was aborted. So we had the unusual situation where the Crown defence did not know of any of the material, and in fact the Crown indicated that they would not have opened the way they did or wanted to call that witness if they were aware of the material that the police were attempting to deny access to. The laws and interpretation are such that it is now becoming a very complex area of the law. By and large there appears to be a real resistance to releasing material under subpoena.

CHAIR: On what grounds would they do that?

Mr ZAHRA: Public interest immunity in the sense of, I presume, the information that the informant has given—what it might touch upon, issues of the identity of informers, the nature of the other information they have given to assist police.

Mr CRAIGIE: A broad avenue is operational procedures or operational concerns. That is sometimes the category that is thrown up to throw a blanket over a whole area of evidence that the police or some other body might consider sensitive. Years ago instead of a knee-jerk response what commonly happened was that counsel vested with some responsibility would turn up at a court and would say to defence counsel, "This is the stuff that you're interested in. The stuff either side I would

press privilege" - and it would be settled. We tend to see more of a blanket response these days, and having to fight tooth and nail to get material in instances where either there is nothing that we should not see or stuff that we do not want to see and should not see is not really an issue at all.

CHAIR: Would a pre-trial disclosure order resolve this issue under the current legislation?

Mr ZAHRA: Pre-trial disclosures may be quite an effective tool in releasing the material or seeking some order for production.

CHAIR: Could your people use it?

Mr ZAHRA: Obviously if we were able to get access to material that is otherwise relevant, yes. That is the problem here: there is a balance between the material being relevant and the public interest in not disclosing that. Our perspective is obviously if it is relevant then it should be disclosed. But no doubt the other authorities are saying that we have the bigger picture in the sense that we have other operations that we need to protect. It is a delicate issue but we say that it should be more readily provided if it is relevant.

CHAIR: Turning to sanctions, some submissions to the Committee have been quite critical of the sanctions system. What are your views on that?

Mr ZAHRA: The first thing is obviously that they are not seeking orders. I do not know of cases where sanctions have been sought. I find it extraordinary when they are not using the power to say the sanctions are not effective. They have not really used the provisions to suggest that there is some difficulty with the provisions in the sense that sanctions are not effective.

CHAIR: Do you think they should be there?

Mr ZAHRA: I presume that if there were no sanctions there would be no reason to comply. That might necessarily follow as logic. But there are protections in the legislation. There is a balancing exercise, and clearly that should be retained.

Ms LEE RHIANNON: To clarify, are sanctions not linked to the outcome? The penalties for breaching are linked to the outcome of the case.

Mr ZAHRA: The ultimate sanction can be that the evidence will not be admitted. That is the ultimate sanction. So it obviously affects the outcome in that way.

Ms LEE RHIANNON: Do you think that is fair?

Mr ZAHRA: I expect that in some situations it may be fair if the parties are disadvantaged. For example, there may be an expert witness who cannot be met without engaging one's own expert. For example, if the Crown does not comply with that then in those circumstances really the only fair outcome is—bearing in mind that it is evidence you cannot address yourself—that a sanction may need to be imposed. Certainly it is a discretion, a balancing exercise, that the judge has to carry out and that would be effective in most cases. But the ultimate sanction obviously may need to be there because otherwise it may cause unfairness. For example, if you are acting for someone and a statement is served upon you but you cannot make any inquiries and cannot meet it and it is evidence of a highly prejudicial nature, that sanction may need to be there.

Mr CRAIGIE: But I take it your concern is also that a defence case should not be crippled by simply not being able to run the core of the defence because you did not comply.

Ms LEE RHIANNON: Yes.

Mr CRAIGIE: Obviously a judge will have to consider on a case-by-case basis whether, in balance of smoothing the trial, he or she is going to bring about a situation that ends up with either the Court of Criminal Appeal or, heaven forbid, the High Court saying, "Fundamentally, this trial failed". That has to be the ultimate filter through which the sanction must pass.

Mr ZAHRA: The filter is the judge's discretion. I notice from time to time, particularly with police association submissions—these are particularly in the Law Reform Commission report where the police talk about the need for a level playing field—we are talking about a criminal allegation where the onus has always remained with the Crown to prove a case. This is not a civil action. No doubt a discretion that is exercised by a judge where the defence has material that is produced contrary to an order may be one consideration compared with the Crown attempting to do the same. It would be silly to say that the same discretion would apply in both cases. There are different perspectives and different ways of looking at the unfairness. But the judge retains that discretion, which is the safety valve in these cases.

CHAIR: Legal Aid has brought up an issue—we asked the other witnesses about this—with regard to the requirement to settle the indictment in a matter 28 days after the 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, the trial. Legal Aid is of the view that the timing of such amendments is a matter of concern.

Mr ZAHRA: I would probably say that it is a fairly frustrating exercise. But you tend to accept these things occurring because, with the Crown prosecutor at times being briefed late, the ultimate decision as to how the indictment will be presented at trial may be quite different from who preferred the charges originally. One can understand how that can happen. In a real world I do not really know how that can be avoided. The ultimate question and paramount concern is the appropriate indictment needs to be presented at the trial. I share the frustration but I think the reality of the situation is that we are always going to get that. Again this boils down to the resource issue. It would be wonderful if a Crown Prosecutor received a brief months in advance but that is not the reality of the situation. A Crown may receive a brief with little time to reflect and consider. But the main concern obviously is that the appropriate indictment is the one that is presented before the jury.

Whilst there is an element of frustration in having to meet a different charge right at the last moment, obviously the benefit to everyone is that the appropriate indictment be the one that is placed before the jury. I think the reality is again we could design a protocol to say this is exactly what must occur but regrettably the bottom line is how you can brief effectively when you have got limited resources. We have the same difficulties that the Crown has. Obviously we have so many matters and so few people and obviously, at times, you have got to change things around at the last moment. I was due to start a trial in Wollongong today which was marked "not reached" and I was backing up a public defender who is now in Broken Hill because there was an overlapping in between the Dubbo District Court and the Broken Hill District Court and another person who would otherwise have covered Wollongong had a murder trial go longer. So none of that you could ever plan for and, no doubt, from time to time there is always a last minute shuffle here and there. The Crowns have that and we have that.

I guess the balance has got to be struck. We can design a protocol but you really have to take into account that it is a human exercise at the last moment in allocating matters. In an ideal world we would love to know everything that we were to meet well in advance, and certainly the disclosure provisions are such, and we know that the Crowns have quite some compliance with that. We have clearly stated that. We do not have any problem with that. But regrettably obviously with the different Crown Prosecutors different approaches might be obtained. We have indicated the day-to-day issues that are surely frustrating but the reality is that we do not live in an ideal world where people are given much time to deliberate.

CHAIR: Would you take questions 18, 19, 20 and 21 on notice and provide the answers to the secretariat within two weeks?

Mr ZAHRA: Yes. I do not think we can add much. In relation to question 18, alibi evidence, whether three weeks is sufficient time for the Crown to investigate alibis, we now have an extraordinary situation in that we are talking about most trials in the District Court come up within four months. In times past, three weeks may have not sounded like a great deal but we are talking about very small lag times now. Is it to be four or five weeks? It is very difficult to be so precise about some of these matters when we really are now talking about small delays.

For example, we regularly meet with Mr Rob Fornito, Registrar, District Court. Bear in mind, we allocate public defenders to various courts and we want to know where the trends are with the listings. There are many statistics that are kept. We can see the trends. For example, Newcastle court has 29 trials outstanding. If that balloons out to about 35 they put on extra judges. It was not all that long ago that there were 200 and 300 outstanding trials at Newcastle, so we are talking about very small tolerances. On the face of it three weeks does not sound like a long time but if you are talking about most District Court trials now coming on within four months, it is difficult to work out how long it should be.

But, as I say, the tolerances are so small. If you were to speak to Mr Fornito he will tell you that obviously if you have got a court that has an average of about 29 trials outstanding and it goes up about four or five they are focussing on it, so the tolerances are small, the delays are right. It is effective case management, no doubt, by the District Court and the Supreme Court and they are very mindful of it. Being a member of the user group meeting of the Common Law Division of the Supreme Court at the present time they are obviously a bit concerned about the lack of hearing dates between now and the end of the year, but that is largely because a handful of long Commonwealth prosecutions involving complex tax matters have now landed in the Supreme Court. If you get three or four of those and it can really affect the tolerances. The case management is such that really those tolerances are kept very low. Whenever it goes outside the tolerance these are matters that are discussed at these meetings. Certainly the courts are very well aware of the problem with delay and their tolerances are very small.

(The witnesses withdrew)

LLOYD BABB, Director, Criminal Law Review Division, level 20, Goodsell Building, Chifley Square Sydney, sworn and examined:

CHAIR: In what official capacity do you appear before the Committee?

Mr BABB: As a public servant.

CHAIR: Do you want to make an opening statement?

Mr BABB: No, but I have collected a bundle of documents that I make available to each member of the Committee that I hope is relevant to each of the issues.

Documents tabled.

CHAIR: What is the progress of the department's review of the pre-trial disclosure procedures that is required by section 6 of the Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001?

Mr BABB: The review is progressing well and is very close to completion. I think, it will be completed in the next few weeks to one month. Now we have submissions from the various parties from whom we have sought submissions and it is a matter of drawing the information together and completing the written document.

CHAIR: Will the technical review and this inquiry feed each other?

Mr BABB: Very much so. It seems that they are almost mirror images of each other of what we are looking into. I think both reviews or inquiries seem to be looking at how the legislation is functioning, whether it is being used as it was envisaged it would be used and what could be done to improve it?

CHAIR: When do you expect the review will be tabled in Parliament?

Mr BABB: It has to go through Cabinet so it is a little bit of an unknown as far as I am concerned as to when it would be available. It certainly would not be this session of Parliament.

The Hon. DAVID CLARKE: Is the process of pre-trial disclosure operating effectively, as it was intended to operate?

Mr BABB: Certainly the filing of indictments 28 days after committal is operating very effectively. I think that is one of the cornerstones of the legislation. In that regard that is very effective. The second important section of the Act is the pre-trial disclosures orders for complex criminal trials. As we all know, there have been few orders made. The question is whether it was envisaged that there would be more orders made, and more trials would have been deemed to have been complex criminal trials. I tend to think that perhaps the legislation would have thought that there would have been more criminal trials deemed complex and that in that regard perhaps it might have been envisaged that more orders would be made. Whether it is a negative that there have been so few orders I think you really need to look at the decreasing court waiting lists, the effectiveness of those cases where orders have been made and whether cases where orders have not been made have been lacking in some sort of case management.

The Hon. DAVID CLARKE: We have been told that trials are, in fact, becoming more complex and that is why they are taking longer but yet we do not have many orders for pre-trial disclosure which seems to be an anomaly. Could you offer any suggestion for that?

Mr BABB: One of the questions was: do I think there are going to be more orders in the future? I actually think that it will be a situation where orders will increase with time. One of the interesting things when you look at what cases orders have been made in, the names of the same Crown Prosecutors come up. For example, Mark Tedeschi has now had Gonzales and Folbigg trials where he has sought orders. Richard Herps got an order in Munroe and sought an order in a

complicated drug case that he has been running in the Supreme Court. I am a Crown Prosecutor on secondment as Director of the Criminal Law Review Division and I know that the discussions that Crown Prosecutors have about the benefits of getting the orders tends to filter through the organisation. I think that in time we will see more orders being sought by Crown Prosecutors and probably more orders being made by courts.

The Hon. DAVID CLARKE: There are fewer orders being made because there are few requests for such orders to be made at the moment?

Mr BABB: That is certainly partly the case, however the court also has a power to make orders of its own initiative. So, certainly the lack of requests would have played a part in it. But the court, of its own initiative, could be making such orders if it so chooses.

The Hon. DAVID CLARKE: In other words, the parties do not consider there is a need to request the orders, and the judges do not feel that there is a need to make an order of their own volition.

Mr BABB: As I say, I think it is an interesting trend that the same prosecutors are making multiple requests. So people who have used the procedure see the importance of it.

The Hon. DAVID CLARKE: We are talking about a total of nine requests.

Mr BABB: That is correct.

The Hon. DAVID CLARKE: One swallow does not make a summer.

The Hon. AMANDA FAZIO: Twelve have been applied for: nine were granted, and three were not granted.

The Hon. DAVID CLARKE: Even so, that is over a period of about two years. It is not many, is it? Out of the hundreds of trials that have been held, it is a very small number.

Mr BABB: Certainly.

The Hon. DAVID CLARKE: It was open to the prosecutor to ask for an order, and it was open to the judge to make an order.

Mr BABB: That is correct. On the number of trials, I have included attachment 1 for clarity. It details three Commonwealth trials where orders were made. So those can be added to the list. That was information that I was not aware of at the time the department's submission was put in, but it has since come to my attention.

The Hon. DAVID CLARKE: Can you think of any fine-tuning that the process of pre-trial disclosures requires?

Mr BABB: One amendment that may be required is to the gateway provision, section 136. It may be that some prosecutors and some judges consider all three of the criteria would need to be met before an order could be sought and made.

The Hon. DAVID CLARKE: But has not Justice O'Keefe clarified that by saying that it can be any one of the three, that all three are not required?

Mr BABB: He has certainly made that ruling. He is a single judge of the Supreme Court, so his judgment would be of great guidance to anyone who was looking at this issue, although it would not necessarily be binding or authoritative for the other Supreme Court judges who might be considering making similar determinations. But, yes, as you say, Justice O'Keefe interpreted the provision broadly, and in the case of Munroe—a trial which was not lengthy, so it did not fit within sub-subsection (a) of the provision—he held the gateway section was met.

The Hon. AMANDA FAZIO: In relation to judges and pre-trial disclosures, in the nine cases so far in New South Wales in which an order has been granted, Justice Wood declared the Folbigg matter complex on his motion, and Justice Barr has granted pre-trial disclosures three times. Do you think education of judges in relation to pre-trial disclosures has been adequate? Has the Attorney General's Department undertaken any formal training of judges in relation to this, or has it just been left up to judges using their own devices to keep abreast of changes in the legal system?

Mr BABB: I am not entirely sure. I would have to contact the Judicial Commission on that question, and I will certainly do that.

The Hon. AMANDA FAZIO: It seems to me if Justice Barr—on documents that we have from the DPP—at first arraignment, on own motion, has taken the initiative on three occasions to declare a case complex and ordered pre-trial disclosure, it may well be that other judges just do not know about the use of this procedure. Would you take that question on notice and let us know about that? That information might be very helpful, because there were only nine cases in which a disclosure application was granted, and three of those were by the one judge on his own initiative. Take that judge out of the picture, and it looks even less healthy.

Mr BABB: Interestingly, Justice Barr is the supervising criminal list judge, so that he is in effect the case manager of the criminal list. That is probably the reason there is an over-representation of decisions by Justice Barr, in that he is more often than not—unless he has a trial running—running the criminal list and organising, or managing, criminal trials.

The Hon. AMANDA FAZIO: So would the other judges, such as Justice Wood and Justice O'Keefe, have been the actual trial judges?

Mr BABB: They were the actual trial judges, yes, as opposed to the list judge. Justice Barr ended up being the trial judge in the matter of Styman, but in relation to the other two matters where he made orders, he made them as the list judge, as opposed to the trial judge.

CHAIR: That means he got the initial information, looked at it and decided either that there was or was not sufficient information on which to declare a trial complex.

Mr BABB: I am not sure how many of those were cases where the Crown made application to him for a declaration. I am pretty certain the Crown would have done that in at least some cases. I know that Justice Barr has—

The Hon. AMANDA FAZIO: The Barr ones were said to be made on his motion. But they were in a number of cases—Eleter, in which there were five accused; Styman, in which there were four accused; and Estera, in which there were also five accused. So maybe the judge was thinking along the lines: five accused, difficult matter, declare it complex.

Mr BABB: Lengthy trials, yes. I know from experience that Justice Barr is very inquisitive at call-overs in relation to matters in any event, and I think that in a lot of matters he would be getting all obtainable information regarding pre-trial disclosure orders in his general management of the Supreme Court list. One thing that the pre-trial disclosure provisions does provide is a means to compel where that has not been done voluntarily or at the request of the court, and one of those was the Munroe case, where the defence said point-blank: this is a case that involves a series of experts giving evidence about the cause of death; and we have medical experts who have given opinions, but we are just not going to give the prosecution the reports until the end of the Crown case. There, Justice O'Keefe made an order for the provision of the reports, knowing that the defence had failed to produce those reports voluntarily.

The Hon. DAVID CLARKE: Mr Babb, why should we not conclude that the reason for so few pre-trial disclosure orders being made is that the system is working perfectly satisfactorily now?

Mr BABB: The system is working at present. Perhaps there could be improvements. One can only really evaluate the system knowing that there is a regime for pre-trial disclosure in place and that parties know that, if they fail to voluntarily engage in case management, then that can be ordered. It is hard to determine how much impact the fact that a court can make the specific orders would have on

the willingness of parties to engage in conduct voluntarily. That is something that I think would be very hard to test for.

I would strongly suggest that the provision that requires the filing of an indictment 28 days after committal is having an enormous impact on the ability of courts to case manage the list in an orderly way, because the charges are known at an early stage and that front-end focusing of resources feeds in the additional resources of the Director of Public Prosecutions, and actually settling the indictment early has an impact. In my opinion, pre-trial disclosure is one of a number of initiatives that focus resources at the front end of the system. It goes hand in hand with centralised committals, the funding of legal aid in the committal system, and getting lawyers in at an earlier stage, with the possibility of negotiating pleas, reducing charges and settling issues.

The Hon. AMANDA FAZIO: You say it is one of the measures helping to concentrate resources at the front end of the legal system. Do you think, as an extension of that, it would be fair to say that it is actually providing for fairer trials and fairer outcomes for people—because if there is proper pre-trial disclosure and better resourcing at the beginning of the legal process, there is less likelihood that people will feel aggrieved and have to appeal to try to get justice?

Mr BABB: There are probably two questions there. One is the question of whether it is a fairer trial, and the other is whether it would reduce the number of people feeling aggrieved. It is hard to know exactly what leads people to lodge appeals. But I do think that it does result in fairer trials. My experience within the system, as a defence barrister who was doing legal aid briefs before becoming a Crown prosecutor, is that there is less late service of evidence now because someone had looked at the brief earlier and made requisitions earlier. I think, in terms of people feeling aggrieved, an accused person can feel aggrieved when additional statements and additional pieces of evidence appear at about the time the trial is happening, or in the middle of the trial. So, yes, more resources in the committal, and in the early stages reviewing the brief, does result in the brief that is served being more complete at an earlier time.

CHAIR: On the 28-day issue, Legal Aid sent the Committee some information in relation to the settling of the indictment in a matter of 28 days after the committal. Legal Aid is saying: there is no defence incentive to object to non-compliance when the Crown seeks leave to amend charges down on the day of, or just prior to, trial. Legal Aid is of the view that the timing of such amendments is a matter of concern. Do you agree or not?

Mr BABB: It is an interesting question in that I think Legal Aid is more involved in negotiations now at the time of settling the indictment. Because there are Crown prosecutors who work in what is called the Trial Preparation Unit, and they are specifically assigned to settling indictments, and are actually getting on the telephone to try to talk to defence lawyers and seeing whether they can get a plea at an early stage, it is far more common now to speak to at least the solicitor from Legal Aid about a matter, and to offer pleas for example to maliciously inflicting grievous bodily harm, as opposed to inflicting grievous bodily harm with intent. One carries 25 years, and one carries 7 years. In one case, one needs to exclude the effect of alcohol because the crime is one of specific intent. With maliciously inflicting grievous bodily harm, the legislature has excluded self-induced intoxication, and therefore you will be convicted even if you were heavily intoxicated and you seriously injured someone.

Those sorts of discussions are more likely to happen now, and if they are not acted upon my experience in settling indictments is that I will more often than not leave the more serious offence on the indictment as a question for the jury: Was this person too intoxicated to have formed the necessary intent? And then, quite often, when it comes down to it, either because counsel from the Legal Aid Commission is now involved, or because the accused starting to have concern about taking the risk of running a trial, a plea will end up being taken to the lesser charge, and the indictment will be reduced and a plea taken.

I can see Legal Aid's point that indictments are changing close to the event, but it is more likely to be in order to take a plea, and that is more likely to have been something that could have been discussed earlier if the resources of both sides had really come together and it had been nutted out. I disagree with Legal Aid in relation to that particular point. I think generally the Crowns are leaving proper charges that should and could go to the jury, leaving a little bit room for the actual Crown

Prosecutor who is going to run the trial to exercise his own discretion. Quite often an accused person needs the threat of the courtroom steps before his mind is focused and he accepts the plea to a lesser charge.

CHAIR: I want to tidy up the situation with the "or" and the "and". Do you think the legislation should be changed to deal with it?

Mr BABB: Yes, I personally do. I do not disagree with Justice O'Keefe's interpretation of legislation. I think it was legislation that was designed to have a broader effect than only long trials that are complex and may have complex legal issues. But it would put it beyond doubt, in my view, so I would not disagree with the change. I think that not each of those requirements must necessarily be met in order for it to be a complex trial.

CHAIR: I will change around the bit the next question in relation to court waiting times. We have heard evidence this morning that would indicate that there has been a fairly massive cultural change within the court system in relation to people working together beforehand and the waiting times. Do you believe that the amendment in the legislation had anything to do with the change in culture because it has not been used enough to actually say that it has made a difference in itself to the court waiting time?

Mr BABB: I think it has. I think that it is a combination of legislative changes and a combination of the results of those changes. The settling of indictments earlier is important. Centralised committals and funding of legal aid is important. I also think that the courts focus on reducing the waiting times and their not putting up with the continual adjournment of the cases has affected the culture. People now just realise that they will not get an adjournment when they ask for it. When I first started practising you could almost be certain that you would get an adjournment on the first time the trial was listed in the District Court.

CHAIR: So people actually knowing that work differently?

Mr BABB: I think so. I think barristers these days do not hold briefs for two trials on the same day. It used to be that some barristers would hold multiple briefs knowing that they could just request an adjournment in two of them, still get their first day's fee for those two and run one. You would be foolhardy to do that now. You would probably end up with some sort of professional misconduct charge against you if the listing judge got wind of it.

The Hon. AMANDA FAZIO: We heard from the DPP before lunch about this change in culture that they thought had occurred and then we heard just before you came along from the Public Defenders that they also felt there was this change in culture. We are not actually going to hear any evidence from solicitors or barristers in private practice because none of them made submissions and the Law Society submission basically said, "Refer to our last submission". Do you think there has been a change of culture in barristers and solicitors in private practice as well? You are probably the only person we can ask.

Mr BABB: I do. I certainly do. I think for those reasons that I have just outlined it is probably a mixture of the economy changing and the fact that work is not now just falling from solicitors. Solicitors, these days, will do their own local court appearances. They will not brief counsel. You need to provide good service if you are going to get more work. The Legal Aid Commission would simply not engage you to work for them again if you let them down. It is a change of culture that maybe has not only come about as a result of goodwill amongst men. It is an economic necessity and a change in the legal profession generally. It is a more competitive environment now. The workers comp lawyers are no longer able to practise workers comp and would like a share of criminal cases. I agree with the idea that there is a change of culture. If you are going to pinpoint why and how, it is somewhat difficult and it is a multitude of factors. But it is a pretty well-oiled machine these days, where people feel pressured to be ready to run their case.

The Hon. AMANDA FAZIO: But do you think that has a positive benefit for the people who are being prosecuted? Justice delayed is justice denied, but it is not healthy for anyone to have court cases hanging around forever. Do you think that there is not just some sort of morale benefit to them, but do you think it is costing them less if they have to pay for their own cases?

Mr BABB: Absolutely! People who were having multiple adjournments, some of their barristers may have been charging them for brief fees, charging them for every day that the trial was listed but did not run. I think it is a huge economic saving and also I agree with that proverb of justice delayed is justice denied. Witnesses have less recollections the longer the case is delayed. In terms of getting the best evidence the sooner you can get the trial on, in my view the better the quality of evidence is likely to be.

Ms LEE RHIANNON: I want to read to you from a submission that we received from Justice Action. They commented about the fact that it is the accused who suffer if there are problems with respect to pre-trial disclosure. They state, "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, et cetera. Typically, these same people are often represented by Legal Aid or community legal centre lawyers who do not have the resources to take the time to properly explain it to them either. Further, they often have a limited input into the preparation of the case. Then they ask, "Why should these people suffer when their lawyers do not meet all of the requirements of the Act?" I am interested in your comments on that, how you see that. Would it be preferable for the lawyers to be made responsible for their own work, including any unreasonable failure to comply with the Act?

CHAIR: These are the sanctions?

Ms LEE RHIANNON: Yes.

Mr BABB: It is an interesting point. Part of the material I have handed up today is the legislation from other jurisdictions and summaries from other jurisdictions. I notice at tab 5 point 3.29 that Victoria includes cost orders, including against a party's legal practitioner. The Act provides the court can institute professional complaints against legal practitioners for non-disclosure. I was quite interested in the light of the question raised in relation to sanctions to see that some other jurisdictions have aimed at sanctions more broadly, and not aimed them at the impact they might have on an accused person's case but at the question of costs, for example, and the question of professional misconduct complaints.

Ms LEE RHIANNON: Following on with this issue of sanctions and how they impact on the accused, do you think it is fair that substantial consequences, like the exclusion or admission of evidence or adverse comment to the jury, can flow from the non-observance of procedural requirements in ordinary cases? Should any sanctions for inadequate compliance with the rules be separate to the outcome of the principal case? Can you point to any other examples in other jurisdictions?

Mr BABB: The other jurisdictions tend to have similar sorts of sanctions to New South Wales, the ability to adjourn the trial, to dismiss the jury and to restart a trial, and to prevent the adducing of evidence by an accused person. I have yet to see any court that would refuse to allow an accused person to adduce evidence that was important for their defence, and I do not think that will happen in New South Wales. If it did then that would be an appellable ground. It would be a miscarriage of justice. That sanction could really only be invoked when the evidence was not going to be important in an accused person's defence. Of course, the adjournment is something that is invoked quite often with or without pre-trial disclosure orders. It is an important sanction, if you like, but an important avenue to correct the imbalance that may occur when some sort of expert evidence is given, for example.

I do agree that the Crown should be entitled to have time to brief his own expert to review that expert medical evidence rather than be forced to proceed that day with a lawyer's scant knowledge of the medicine that may be examined, for example. In extreme situations the trial might have to be aborted and restarted. That is one of the areas I am quite interested in, the Victorian avenue of, "Okay, if that's happened let's look at why it's happened" and if it can be sheeted home to the lawyers then perhaps costs may need to be awarded against the accused himself the accused if the accused has led to the delay or the lawyers. Costs are an important sanction that are used in civil trials. They are generally not used in criminal trials. If they are used, they are generally only awarded against prosecuting authorities.

CHAIR: Despite the fact I did not quite get a clear picture from the Public Defenders, the Public Defenders submission noted that in terms of defence response to prosecution disclosure the new section 139 (2) (f) inserted into the Criminal Procedure Act 1986 is unduly onerous. The submission stated that to disclose all objections that will be taken to evidence prior to the trial is unrealistic in the extreme. Do you share the Public Defender's concerns?

Mr BABB: I do not really. I think I can understand where the Public Defenders are coming from. There will no doubt be objections that you do not notify in advance that come up as a result of how the trial runs, or a change of heart. When you are really finetuning your view of how you are going to run the trial you realise, "I do want to either keep this evidence in or try to keep it out." But the Act provides that in section 140 (2) of the Criminal Procedure Act, which is part of the pre-trial disclosure legislation, a court may waive requirements. I would think that that would certainly be a requirement whether it was waived in advance or action would not be taken because you had decided to approach legal questions in a different way. I do not see any sanctions being sought to be invoked or any real problem arising from it being in.

It is very practical and it usually happens in most trials that before the trial begins counsel do discuss whatever is going to be objected to and you try to have those arguments prior to the empanelling of the jury. What it does stop is trials aborting because if you do not have the arguments before the evidence is led and it gets in only for an objection to then be taken, it is before the jury and the jury is prejudiced if it should not have gone in. Really, that is formalising what is currently happening. Defence notify the Crown Prosecutor that they object to these portions of the evidence. Many times the Crown Prosecutor says, "I agree. I wasn't going to lead it in any event", or "No, I do want to proceed. We better have that argument. Let's let the judge know that that will take the first two days of trial." I do not really share Mr Zahra's concern about the inclusion of that particular subsection.

The Hon. AMANDA FAZIO: Could it happen, though, that because of the flow of evidence and the way in which an expert witness might respond to questioning and go into more detail that that situation would arise inadvertently?

Mr BABB: Very much so, yes, and it happens all the time because no witness sticks to their statement verbatim and no witness remembers everything at the time that they are in a police station, trying their best to get it down in quite stressful circumstances. It is quite unfortunate. There is nothing more gut wrenching than when someone remembers something that you know is problematic at the time and it is usually a case of, "Oh, yes, I do remember that he told me that when he was in gaol and that I was visiting him." You just cannot bank on what people will do or say, even expert witnesses, so no judge would expect a defence counsel to have been able to advise in advance of every objection.

CHAIR: The DPP submission raised an issue concerning the timing of pretrial disclosure orders in relation to the presentation of an indictment and the arraignment of the accused. The DPP suggested that one way to overcome the problems created would be a legislative amendment. I am sorry to keep going on about these amendments, but they relate to a possible recommendation. Such an amendment to provide for pretrial 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. Do you have any views on that?

Mr BABB: I have. I think that that could be a worthwhile change. The DPP did not cite any examples where they thought that it had had any material effect, but they are probably correct in their interpretation of presenting the indictment at the arraignment. Again, it may be something that could have some effect and enable more orders to be made so in that regard I would probably support their recommendation.

CHAIR: They also had an interesting issue in relation to the questions about Ireland and England and the different ways that they deal with this issue in the hope that the police stations actually had a lawyer present. Can you imagine that we would ever have such resources available?

Mr BABB: No, I cannot, unfortunately. I think that without having such resources available—

CHAIR: In Tingha?

Mr CRAIGIE:—the change to the English caution concerns me.

CHAIR: This next question is in relation to the right to silence. The Police Association submission states that many of its members are dissatisfied that an arrested person has a right to silence while being questioned by police and that there is no penalty in subsequent court proceedings if the person elects not to speak. The submission recommends that the legislation be amended along the lines of the current model used in the UK where the courts are able to draw inferences from suspects insisting on the right to silence in certain circumstances. What are your views on that issue?

Mr BABB: I can see their argument. I disagree with it, though. My preference is for the existing system to remain. One of the handouts that I have provided—actually I have omitted to put it in but I will make it available to the Committee. It is a good article from Brown's 'Criminal Laws' and it quotes Stephen Odgers who published an article in 1985 stating that only 5 per cent of suspects ever invoke their right to remain silent and that the imbalance between the state and the suspect is such that most people do not feel that they really can invoke the right to remain silent and really hope that they might be able to beat any suspicion by talking. My view is that it would be quite perilous, without having lawyers present, to change the caution.

One of the things we tried in this State for a long time to do is stop the verbal. The way we do that now is we must tape-record an admission before it will go in. What is tape-recorded is among other things the police officer saying, "You have the right to remain silent." If we change the caution to, "You have the right to remain silent but ... " it really opens up again the opportunity for police officers to say things prior to the taping of interviews about "What I am going to be telling you in the interview is that you have to answer all my questions", and for people who have not had legal advice to accept that on face value and feel compelled to speak. I could see that there may be a way to introduce it if you did have for every person lawyers available who would be explaining it to them and giving them good legal advice, but under the current system that just does not happen. I think the English caution is something that would be something that would be quite difficult for an uneducated person or a person who was not an English-speaking person with English as their first language to comprehend. I think that a lot of people would feel that they are compelled to answer questions.

CHAIR: How would you answer this issue for persons who perceive that that is too bad. They have been picked up by the police and they should—

Mr BABB: They should have to talk?

CHAIR: Talk, yes.

Mr BABB: I would point out to them that this is the system in which the prosecution bears the onus to prove guilt beyond reasonable doubt and that it is not a system where we ask both parties to tell us everything they know and try to get to the bottom of it that way. That is more the civil system of justice. We just do not have it in this country. We have had a system enshrined where the power of the state and the added resources of the state have been acknowledged and it has been acknowledges that a person, when accused by the state, has nothing to say if they do not choose to, and that the state will have to prove the offence. Even the English caution does not fundamentally change the right to remain silent. It just has an impact if you remain silent initially and then choose to talk at a later stage. The Police Association—I think their submission in one way seems to look at it as if it is a contest between two parties who are equally armed and with some obligation to both explain themselves in full. That is just not our system.

CHAIR: I am still not sure I have the argument straight, but I am sure that between us we will sort it out. The amendment Act included the saving of any immunity that presently applies to the disclosure of information, documents or other things, including client legal privilege, public interest immunity and sexual assault communications privilege. The Police Association's submission indicates that there is some uncertainty among its members as to the application of this provision, for example, in understanding when the public interest immunity might apply to statements or evidence. Do you have any comments about the association's concerns? If there is a problem of greyness in this area, do

you have any ideas about how this could be tidied up so that it is no longer a problem—not to take it away, but to make it clear?

Mr BABB: It is a grey area and it is necessarily a grey area in that it is a balancing of the public interest in allowing some information to be withheld because it is important for the safety of undercover operatives, for example, and the interest of the accused in having all relevant material made available. In excerpt No. 4 of the documents that I have brought, I have photocopied the principles in relation to public interest immunity. It details the balancing test. I can well understand that many police officers do not know where the balance lies and that is because many lawyers do not know exactly where the balance lies. That is a decision for the judge to make in an individual case. But what we do is at present what I think is a pretty good system where the police have to disclose all relevant material.

They have to provide a notice outlining any material that they have held back because of, for example, public interest immunity. The defence then notifies them that they want to see that material. It is produced to a judge who alone looks at the material and hears arguments from the Crown Solicitor representing the police and raising the public interest immunity, and counsel for the defence, and a decision is made as to whether that material will go in. I think that is a system that works well at present. There is no clear delineation of what material must be produced and what material is privileged, but you will not get a clear delineation. It is a fine balancing act that a judge should make in each case and if he is wrong on where he determines the balance to lie, an appeal court can look at the sealed envelope and see what that material included. So I disagree with the Police Association there. I think it is a system that works well.

CHAIR: There are also issues that have been going on since this particular amendment first started to be discussed in relation to unrepresented defendants. It points out that the court may only order if it is satisfied that the accused person ought to be legally represented. In the light of this provision, can you see any way in which this pretrial disclosure requirement could impact on unrepresented defendants? Has there been any example of its attempted use in such a case?

Mr BABB: No, it simply cannot be used. The legislation provides that it cannot be used where you are an unrepresented defendant or an accused. The next part of the question about whether I can envisage an unrepresented accused in a complex trial is interesting. I can. I have seen one. Bob Ansett defended himself in an extremely complex criminal trial and did an admirable job, but that is an example where the pretrial disclosure provisions would not have been able to have been used. It is a provision that is going to apply to any unrepresented accused, whether that is a QC who is unrepresented and charged or an illiterate person. I think it is reasonable in the circumstances. You can never predict who will be unrepresented. The state bends over backwards to make sure that people are represented. They are means tested for legal aid but after the case of Dietrich and the problems that that can lead to in appellate courts if you are unrepresented and are being denied representation, generally Legal Aid tries to ensure representation. Those cases like the Khan brothers, for example, who refused all forms of representation that were offered to them and who chose to be unrepresented, there is not much you can do about that, but pretrial disclosure will not apply to them.

The Hon. AMANDA FAZIO: What would happen, hypothetically, in relation to the Khan brothers if they had been represented and pretrial disclosure was granted. It could well have happened because it was a complex case given the number of people who were accused. What would happen if they went a bit berserk and sacked their legal representation? Would the pretrial disclosure order become null, or what would happen?

Mr BABB: Interestingly the pretrial disclosure may already have taken place, so some of the material may have been disclosed, but I would think that they would not be held to be bound by any of the disclosures or undertakings that had been made as a result of it. The trial would continue on with the prosecution having some knowledge of those things that were disclosed but would not be able to enforce any undertakings.

The Hon. DAVID CLARKE: I have no questions but I compliment you on this very thorough portfolio of materials you have prepared. I have been browsing through it and I think I will find it very useful.

Mr BABB: Thank you. As I said, there is one document that I will send along which I think is a really interesting article on the right to silence. It talks about how few people actually invoke it and where some of the imbalances in resources and ability to resist may lie.

CHAIR: I thank you very much indeed for coming along and enlightening us. We have questions on alibi evidence. Do you think there is any need for ongoing monitoring of the use of pre-trial disclosure orders?

Mr BABB: I do, and whether it is this Committee, the Attorney General's Department or the registries of the various courts, there will be ongoing monitoring. It is very important, you really cannot evaluate any system that aims to improve the functioning of the court system without continuing to evaluate it.

CHAIR: Do you have any ideas on exactly what pieces should be evaluated?

Mr BABB: Continue to look at the number of orders made, the exact nature of the orders made and the type of cases to which the legislation is applied and compare it to those cases where it is not applied that may fit into the example of complex criminal trials and encourage people to use it to fine-tune the system in all complex trials.

CHAIR: Thank you. Would you take questions 17 and 18 on notice when you send your information to the Committee, in addition to the question on training of judges.

Mr BABB: Yes.

(The witnesses withdrew)

(Short adjournment)

SANDRA SOLDO, Research Officer, Police Association of New South Wales, 154 Elizabeth Street, Sydney

GREGORY THOMAS CHILVERS, Solicitor, Director, Research and Resource Centre, Police Association of New South Wales, Post Office Box A1097, Sydney South, and

LUKE HANNON, Sergeant of Police, Executive member, Police Association of New south Wales, 154 Elizabeth Street, Sydney, sworn and examined:

CHAIR: Thank you for attending to help the Committee with this inquiry, which is surprisingly complex despite the fact that this amendment to the Act has not been used all that often. Mr Chilvers, in what official capacity do you appear before the Committee?

Mr CHILVERS: As Director of the Research and Resource Centre, Police Association of New South Wales.

CHAIR: Mr Hannon, in what official capacity do you appear before the Committee?

Mr HANNON: As Executive Member of the Police Association of New South Wales.

CHAIR: Would any of you like to make an opening statement?

Mr CHILVERS: No, we will rely on our submission.

CHAIR: What are your views as to why pre-trial disclosure orders are not more frequently used?

Mr CHILVERS: Madam Chair, I state at this point that Mr Hannon is an operational police officer. We will defer a fair amount of questions to him and we will come in if he wants us to at any time.

CHAIR: People are welcome to answer, unless the Committee directs a question at someone.

Mr HANNON: Why pre-trial disclosures are not more widely used is mainly because of what we interpret them to be; and that is for more complex matters, more serious trials or trials in which evidence would be sorted out between the DPP and the defendant, or the defendant's barrister, which would be disputed evidence rather than with specialists, whether they be the doctors or of another specialist nature. Basically it is a matter of it having to be a complex trial. I do not think that there is a hell of a lot of it being ordered at the moment by the courts. Therefore, it is not widely used and not widely known by most police officers in the field.

CHAIR: The Director of Public Prosecutions Act 1986 was amended to formalise the general duty placed on police officers to disclose all relevant information and material obtained during the investigation of an alleged indictable offence to prosecuting authorities. How has police disclosure changed since the introduction of the amending Act?

Mr HANNON: I have researched a lot of police in relation to this. From what they are taught at the academy to what they actually do in the field all the way through to top investigators, is that basically they are there to investigate the matter and present all the evidence. I do not think it has changed a hell of a lot. It has put the onus on police officers to disclose all the information, whether it be for the defence or the prosecution. They know that they are only investigators. We investigate the matter, so irrespective of which way it goes we just present the evidence and then it is sorted out by either the prosecutor or the DPP to take it any further. It has not changed a hell of a lot, I think they have just formalised it by having 15A there.

The Hon. AMANDA FAZIO: Do you think that new police, who have been trained at the academy, and existing police have been adequately made aware of the new requirements?

Mr HANNON: In relation to the training, what comes out in a brand new probationary constable's head is mind boggling, as to what they have to learn. I suppose the more experienced you are, you start to see that legislation will either change or procedures will change or standard operating procedures will change on a daily basis. To grasp everything and look at something will only come with experience, with experienced police officers working with young police to show them what investigative skills they need and to disclose whatever information, no matter how they see it, basically to the brief handlers who in turn check the briefs and put it through to the prosecutor to look after the matter. When dealing with the DPP, we are dealing with experienced investigators; so, again, it would be something that junior police would not handle that often, but they would be guided by experienced investigators to do such.

Mr CHILVERS: I point out that this is an interesting point about the amount of information that Luke said that police receive in their initial training at the academy. It is quite substantial. Indeed, there are mandatory continuing police education programs going all the time. There is a certain amount of mandatory continuing education, the same as in the legal profession, that police have to undertake every year in order to literally get their next instalment in their pay rise, their increments, and things like that. A constant complaint that we get from Education Development Officers out in the field is the amount of information that has to be given to police officers to maintain their skills, just in changes to the law—every time Parliament sits there is a whole bank of new laws that have to be redone and often changes to police procedure and that sort of thing.

It is an enormous amount. I agree with Luke that police officers after their initial training come out after having been exposed to all this. It is certainly all there in the academy programs, but it is not until they have to deal with it that it really comes back, and then they have the guidance of senior investigators who deal with this on a daily basis. Yes, they have been made aware of it. If you asked a group of probationary officers or relatively young officers whether they were aware of it, you would probably get some blank looks initially.

The Hon. GREG PEARCE: Presumably those disclosure obligations are carried out at a higher level, by whoever the investigator is and who is putting the brief together.

Mr CHILVERS: That is right.

The Hon. GREG PEARCE: Or the prosecutor?

Mr CHILVERS: Yes.

Mr HANNON: You have to look at the checking mechanisms in place, that is why there was the invention, I suppose, of making brief handlers available. The brief handlers are experienced police, who check all the briefs prior to them being served on defendants or before they go off to the prosecutors. You have those basically at uniform level with smaller briefs, but the more serious indictable ones are the ones looking through at the investigations managers, which are in place to look after all the criminal investigation [CI] staff and those CI staff put their briefs through their investigations managers, who will check the briefs before they go again any further. Then again, it is the DPP who will come back with any questions in relation to whatever brief has been submitted.

The Hon. GREG PEARCE: You have resources in place that would look at the disclosure issue?

Mr HANNON: Yes.

The Hon. GREG PEARCE: There is a suggestion that you would need extra resources in pre-trial disclosure became more common.

Mr HANNON: With any brief. Why do young police join the job? I suppose the simple answer is if you put that question to any young copper who joins the job, "Why did you join the job?", he would reply, "To lock up crooks." But is that what it is all about? Or did we join the job to investigate, to make sure we put the right crooks behind bars? The initial answer will always remain until the get experience and are shown the experience through things that are put in place. By having these things in place comes about through failed prosecutions. What do we have in place for a failed

prosecutions? Yes, we have crime managers, we have prosecutors who will sit down. Do we punish our people for a failed prosecution? No, we have things in place in our retraining program. With all those training programs in place and monitoring systems through case management, through events, to looking at the whole brief in a picture, you are looking at making sure that everything is checked and double checked. Of course, if you can do that and have it 100 per cent correct it will be passed on to every other government department. Of course there will always be mistakes, and that is why we have these pickup training methods to go along with them.

CHAIR: Recognising all the educational requirements of any operational group of people, where would you perceive this issue in relation to all relevant information and material would fit in the educational hierarchy?

Mr CHILVERS: After initial training?

CHAIR: I am talking about the general police force, yes.

Mr CHILVERS: You have your brief handlers, your expert investigators who have done that investigation course. We went through a period, particularly after the Wood royal commission, where a significant amount of criticism was levelled at some of the police investigations, and there was a fairly high level of criticism from the DPP and the courts about the quality of some briefs put forward. That has been addressed by a massive education program, particularly for investigators and brief handlers. I think the organisation is, by and large, pretty much getting on top of that. That has been very resource intensive, of course. The real expert area, to answer your question, the emphasis should be at that level, investigators and brief handlers, and that level. Prosecution is an area of specific expertise in the organisation.

CHAIR: The quality of their information, though, will be affected by the understanding of this requirement by all of the police involved in a case, would it not, the quality of the output?

Mr CHILVERS: The people who control, if you like, the putting together of the brief, the brief handlers and the investigators specifically. They have a great supervisory and control role over the preparation of the brief. I would agree that they need to be made aware of this in the initial training and be constantly reminded, but it is the people who have the ultimate responsibility of putting it together who need to have the stronger training in this area.

The Hon. AMANDA FAZIO: Following on from that, in your submission you talk about the use of police resources and on page 3 you list from (a) to (h) all the things you have to provide in relation to section 47E of the Act. Would you not have put all that information together and give it to the prosecution anyway?

Mr CHILVERS: Yes. Part of the problem we are conscious of, and we have had fears expressed in the field, is that all this has to be done well in advance of any proceedings in the court. The risk has been in the past, and I do not know how often this has happened, the fear that the defence will use that prior to making a plea. In other words, they will wait until they get this and see what they have got against them and they will put their hand up. In the past that is not always been the case and pleas are entered. There has been the suggestion, and I have no evidence to support this, but the fear has been expressed that defence lawyers will use this as a delaying tactic to get everything before them before they start to advise on whether to plead or not. I am not aware of any particular cases, are you?

Mr HANNON: No, but I suppose it is widely accepted by the police out there. A 14-day service of brief, given the whole brief, I suppose it is the interviewing of anybody. At this stage they have the right to silence. You have your brief together and serve it on the defendant or give it to the defendant's solicitor. I suppose it is having that brief and then suddenly you may have to dig up further because they come back at you or you have nothing to prepare yourself for when you go to court, because suddenly a couple of people are produced at court, especially in the Local Court, who have just come out of the blue and you know nothing about them. Again, they are entitled to do it, or they will plead guilty, so no pleas will go in until suddenly they get the service of the brief and it just seems to be more so.

I suppose from a police perspective in the field you may as well say you are doing up the brief for every person who is charged rather than the old adage that there is a fact sheet that goes in, make up your mind on the facts, you either plead to what is on the fact sheet, no proof required. Now it is a full brief. Basically as soon as you lock somebody up you have a brief to prepare, and that is time-consuming depending on what it is and even how minor the offence may be.

The Hon. AMANDA FAZIO: Say you got all the stuff together and the defence got it and said we are going to raise issues of blah, blah, blah—the more recent the incident that you are prosecuting someone over, would it not be easier to go back and collect any supplementary evidence you needed? Secondly, even if you did get all the stuff together and they cop a plea, does that not save you time, when you do not have to go to court?

Mr HANNON: I suppose the way it is viewed by police in the field, is not so much saving them time, because all their time was saved by not having to put the brief together. They perceive it as saving the court time. It may take hours to get all the statements that maybe not needed on prior cases. You may get a victim statement, you may not get any witness statements, and you have to go to court in the first few weeks for a mention date. He may plead on that first date but now it is more so that the plea will be entered of not guilty, the service of brief, then suddenly you have a plea coming in of guilty because they have read the brief and there are no loopholes in it so it is a plea of guilty. Basically you have a plea to prepare every time you lock somebody up. Be prepared for it, do it and get it out of the road, but that is very time-consuming.

Mr CHILVERS: There needs to be a bit of discretion in relation to this and perhaps a bit more discretion for both the DPP and the police to be able to consult in relation to the requirements of section 37E.

CHAIR: Consult with whom?

Mr CHILVERS: With each other. A serious indictable matter may require this sort of information to be put together prior to any plea being entered, but given that just about everything in criminal law is an indictable matter you could get relatively minor, technical almost, assaults requiring this massive brief preparation, and that is one of the concerns the organisation has. It is mandatory preparation, there is no room to move, whereas commonsense may prevail.

CHAIR: This legislation has not been used that often but you are saying it is expected as mandatory anyway because of the change in the culture of the court system rather than under the legislation?

Mr CHILVERS: Yes.

The Hon. DAVID CLARKE: Mr Hannon, from your perspective, do you see any defect in the operation of the system of pre-trial disclosure?

Mr HANNON: I know it has been noted even from the New South Wales police in relation to when do you form from the judge's opinion as to ordering pre-trial disclosure. I think there have been suggestions that the word "and" in relation to (a), (b) and (c) are changed to "or". So, at least he has a choice and you know what is going to go on.

The Hon. DAVID CLARKE: Do you support that?

Mr HANNON: We would totally support it. To have all three there would cause total confusion on the judge's part in relation to making all three. You might have some disputed stuff there in relation to specialists' evidence but unless it encompasses at this stage all three you do not have much room to barter in relation to ordering a pre-trial disclosure on a certain aspect of it, rather than the whole lot. That is the way I am reading it at the moment

The Hon. DAVID CLARKE: So, you are saying the legislation should be "or" rather than "and"?

Mr HANNON: Yes. Definitely "or".

The Hon. DAVID CLARKE: That is what Justice O'Keefe has found already.

Mr HANNON: That is right. I do not think it has changed already but I think it is something that needs to change. It is easier for the judge to order pre-trial disclosure without encompassing those three parts of a complex matter. It would make it easier on what is being disclosed and the reasons beyond what they are talking about. But when they are talking about all three you are not pointing out what the judge is aiming at to have talks between the DPP and the defendant.

The Hon. DAVID CLARKE: His interpretation may well be followed but setting that question aside, do you see any other area where the legislation or the system needs to be changed or finetuned?

Mr HANNON: The way pre-trial disclosure is now it is really only dealing with the complex matters. If you combine that with your 15A and that basically combines back to your Local Court system and one just flows into the other. So you do have in all matters a pre-trial disclosure. Whether you want to call it pre-trial or pre-Local Court or pre-hearing matters, it is already there.

The Hon. DAVID CLARKE: So there is, in effect, widespread voluntary pre-trial disclosure without the necessity for orders being made in most instances?

Mr HANNON: No. That is what is made well aware especially by investigators. As we say, the knowledge of pre-trial disclosure at the moment amongst the rank and file is not widely known. Amongst the more experienced investigators who are dealing with complex matters, whether they be frauds or serious sexual assaults or homicides you can have pre-trial disclosure and they are the people who know all about it. As far as the rank and file are concerned, yes, they need all the evidence and whether that supports the defence or supports the prosecution they just get all the evidence together, wack it up before the brief handler or the crime manager to make a determination whether this person will be charged or not based on all the evidence and then we submit it up through the brief handler. So, really, your brief has been done and you are putting all the information there now. Is it going to add to it or detract from it, no. I think the onus has already been placed on police by all the procedures that are now in place.

The Hon. DAVID CLARKE: So, getting back to my earlier question, you do not see any need for any finetuning?

Mr HANNON: No. The only thing I could ever suggest in relation to this would be the UK model of right to silence. I think that would assist, having taken the right away, a right to silence would be more advantageous to preparing a brief and also ruling out anything that may come up at a later date. If you take out the right to silence on anybody, whatever it may be, and I am sure it will be interpreted by the judge that it comes before as giving away that right, I think you would cut out the worries of alibis coming up at a later date, where you had to go and interview them because of something that may be given from the defence to the DPP and then suddenly a few weeks before trial you go out there to this person you have never heard of to interview these people. I think if these were disclosed straightaway and interviewed it may help the defence as well as prosecution—either way. So, I think it is a 50-50 bet, but we are only talking about assisting the investigation to put the right people before court. If he has a good alibi he is not going before court at all, he will be walking out the front door. People do not disclose this now with this right to silence. I think it is something that needs to be seriously looked at to make better evidence and to put the right people in the dock to be charged rather than having the matter thrown out of court later on because suddenly someone comes up with something you are unaware of.

CHAIR: What do you think about the issue of balance of power in the police station? In Australia you have the State and the criminal person, the person who is being charged. In England they have a lawyer present at the police station.

Mr HANNON: I think in lots of cases nowadays—and I think there are so many people out there, we have our vulnerable people. Anybody is given that right that they can call in a friend and they can call in a solicitor now. It is all covered under section 10A. They have that right already. I think more people now are sitting in on interviews as a support person or as a legal adviser, or they

can get legal advice before they get interviewed. It is up to them nowadays whether they want to be interviewed and they want to have a legal person present or they want to contact somebody. We find in certain cases that that can sometimes be to the detriment of the defence of the person in the dock. A lot of advice goes out. People who ring up now just say, "Shut up, don't tell them anything. Just let them charge you and we'll deal with it later". That can go as far as juveniles, especially with Aborigines. That is the standard comment told to them across the telephone—"Don't say a word". That basically throws away the juvenile cautioning system. If they do not admit to it there is no caution in place and no conferencing so they are charged automatically. Then all of a sudden it goes before the juvenile courts and it becomes a case of, "Let's go back and caution this fellow because this is his story". Do we look at returning to the right to silence? If these people could come up with whatever the reasons may be I think it would not only protect the person being interviewed but look after both sides. You could present a fairer brief of evidence or conduct a fairer interview in relation to all sorts of matters. I think it would only be a positive rather than a negative if the right to silence were taken away from people.

The Hon. GREG PEARCE: Do you have any statistics to show how often it is used?

Mr HANNON: In relation to what?

The Hon. GREG PEARCE: The right to silence. Have you done any research?

Mr CHILVERS: It is very difficult to get information on that sort of thing. We have to be careful about these things. We are not advocating removing the right to silence. That is not what has happened in the United Kingdom either. There is a lot of debate about the impact of the Act. Some commentators have said that it shifts the burden of proof. I do not think that is right. I think it provides the opportunity, or emphasises the opportunity, for the accused person to give some explanations where it would be reasonable to do so. Specifically, the Act "allows the court to draw such inferences as appear proper from the accused's silence in four main areas: failure to mention facts when questioned by the police which the accused might reasonably have been expected to be able to answer; refusal to testify in his own defence in court or, having taken the oath, to answer questions without good reason; failure to account for objects, substances or marks found on his person; and failure to account for being in a particular place at a given time". I think they are quite reasonable points.

We face this difficulty all the time—even with our own members—where people are saying, "I would like to have been able to give an explanation for something but the advice I was given was, 'Don't say a thing because they've got to prove everything'". In balancing the rights of the individual to not self-incriminate there is also, I would suggest, a right in the public interest for investigators to be given a reasonable explanation for something. If that is not forthcoming it is a matter then for the courts to direct a jury or whatever to make such inferences as may appear proper. In those circumstances I think it would be absolutely essential to have a lawyer present to advise that person that such admissions or explanations were given in the course of an interview. That may please many lawyers, in terms of filling the gap left by the lack of personal injury litigation. But beyond that, it is a matter—

CHAIR: A bit of a reality check, I mentioned Tingha earlier. I can just see lawyers driving out to Tingha.

Mr CHILVERS: It has the potential—it is still early days—to speed up the process. I think that is in everyone's interests. As Luke said, you would not be running down alibi paths six months down the track because it has suddenly been brought up on the cusp of the hearing.

CHAIR: The Legal Aid people said in their submission that, despite the operation of new section 15A of the Director of Public Prosecutions Act 1896, some practitioners have noticed that statements prepared by investigating police are becoming more succinct and that there has been an increased need to subpoena material from the police and other sources in order to adequately prepare the client's case. Do you have any comments on that?

Mr HANNON: Unless Legal Aid can come up with something the only thing I can refer to is custody records. I know that a lot of subpoenas now go out for custody records to look at the custody records to see how people were booked in and the rest of it. The Attorney General's Department is

also looking at that at the moment in relation to 10A legislation and changes to certain other Acts that I think will be drawn into the Law Enforcement (Powers and Responsibilities) Act, when it is finalised. There are already checking mechanisms in place to look at statements. If they were succinct they would not be getting through the different supervisors or the brief handlers if they did not explain the full investigation. I do not know where Legal Aid is going with this point and I do not know what it is subpoenaing. It is very hard to answer that question unless they tell me exactly what they are talking about. We are not getting anything back from our prosecutors in relation to it. They would be raising the issue if there were problems with certain bits of material that were produced to Legal Aid. Again, I am fishing around to know exactly what they are talking about.

CHAIR: Perhaps we should not expect you to answer these questions.

Mr CHILVERS: I have received some anecdotal evidence to the contrary: briefs are getting bigger and bigger.

CHAIR: Yes, we just heard that. Nicholas Cowdery mentioned incomplete disclosure certificates. That is one of the reasons why we are asking all these questions about resources and training. It would probably be outside your experience of requests.

Mr HANNON: A lot of it is. It is widely known that there is a shortage of experienced detectives at the moment. That problem is being addressed through a detectives review that was only finished lately. The more you go into this issue the more you start looking into who wants to be a detective. They are dealing only in large briefs, they are on call and are tied up in court 365 days a year, except for weekends. They do not go on holidays because they might be back in court tomorrow—the Supreme Court overrides everything, or District Court. That causes problems with getting experienced investigators. You can see the pressure that they are under all the time. It has been raised—and I keep raising it—that the more assistance we can give our experienced investigators who deal with these trial and Supreme Court matters, the better the briefs will be and the less burden there will be on them to continue other investigations.

It would be great if they were doing just the one trial or investigation. But in local area commands some of them are sitting on 27 briefs or 27 different cases. In robberies or homicides if they are not sitting on between 10 and 15 cases apiece I would be a bad judge. It is very hard to put all your briefs together. Chopping and changing, perhaps we can assist them by doing things and not chasing up things at a later date. That is why I mentioned the right to silence, which, as Greg explained, does not prove anything. But at least the chase-up can be done immediately rather than at some time down the track when you have to look at our brief and start again as to what the alibi may be or what other evidence you may need and any disclosure certificates you might have to get. It is all done; it is out in the open. If it is not given freely it can be taken into account at a later stage when it gets to trial.

CHAIR: The amendment Act included the saving of any immunity that presently applies to the disclosure of information, documents or other things, including client legal privilege, public interest immunity and sexual assault communications privilege. Your submission indicates that there is some uncertainty as to the application of this provision—for example, when the public interest immunity might apply to statements of evidence. Can you tell us a bit about this issue, identify the level of detail that would be required to provide certainty and how this detail should be provided?

Mr CHILVERS: I do not know. On reflection, I am not sure whether you can put it in legislation.

CHAIR: So it relies on conscience.

Mr CHILVERS: It may require a lot more. There is a magazine that comes out every now and then—effectively practice notes. We need to expand the discussion about what might constitute public interest immunity and things like that. I think it is very difficult and often police at that level do not have the experience to make those sorts of judgement calls. It is fair to say that police often like to see those sorts of things—where they are withholding statements and stuff like that—fairly clearly defined for them. I am not quite sure how clearly it can be defined.

Mr HANNON: Our legal branch has defined what your procedures are. There is so much out there that mistakes can be made. For example, we might have a covert out there getting evidence, suddenly we slip up and let a video go through that shows the covert. If the defence and the defendant get hold of it what sort of pressure are we putting the covert under? Do we let statements get to him? There are procedures in place to let the Director of Public Prosecutions [DPP] know, through affidavits, to go to the judge to make suppression of orders in relation to not revealing all the facts, names, addresses and also material prior to disclosure in court. I suppose that is what the affidavits are all about. How do we make it more widely known out there?

CHAIR: Is the judge always the person who makes the order? Do you apply for an order for suppression and get the judge to make the order or do you make decisions yourselves?

Mr HANNON: No, it would have to go through the other way. Our channels say it openly. Whether that is a widely known practice it is difficult to say. I may know it through reading but do all the police handling these sorts of matters? It is the same for registered informants. The last thing you want to do is disclose the identity of any registered informants because you might as well put them in a shooting gallery. You have to take a lot into account. I do not know how you do this. At the moment the discretion comes through our legal services people, through our legal services manager, to the DPP, to the judge to make these decisions in relation to what can go out and what cannot and whether it should be suppressed. If someone forgets to suppress it could be dangerous. If an officer makes a mistake then he will be crucified for not suppressing the information in the first place. You can lose a lot of evidence or you can get a hostile witness in the box who will totally deny everything he ever said to you. I do not know how you get around that.

Mr CHILVERS: The bench will clearly understand in most circumstances what legal profession client-legal privilege is. But often public interest immunity must be raised with the judge and the difficulty is that the people who must raise it are the police. There are often not very clear guidelines about what constitutes public interest immunity particularly.

CHAIR: I understand that you have had some challenges.

Mr CHILVERS: Yes. I am not quite sure how you address this—on reflection, I am not sure whether it should be through legislation. But there certainly needs to be some recommendations about perhaps expanding internal guidelines for the police service about what might constitute raising the flag and ringing alarm bells where someone needs to check it out.

Mr HANNON: We do worry. We now video all our search warrants, but that is open as evidence for the defence. How far do we go with this in keeping stuff away? Do they know the way we search places? Yes, they do. Do we know the way they go into clandestine factories, what they look for and how they go about dismantling them? If the defence and the clients of the barristers or solicitors who are looking after the defence get hold of it, what sort of danger does that place our next clandestine factory into? Is it booby trapped? They are the worries that police confront us with, especially through the association. The last thing we want is this sort of stuff getting out—and it may affect our members and puts their lives in danger. Because if this evidence does get out—whereas at this stage it is not even mandatory—they can look at the video stuff. It is something that we have standard operating procedures for more so than legislation at this stage. But there are other cases where you do have our crime scene people and how they get their DNA and what they are looking at. I mean if all this is viewed—basically unless you watch *CSI*, I suppose—you would be looking at how our forensic science people go around obtaining all their evidence. So really you are giving them everything that we know on a platter.

CHAIR: The submission of the DPP suggests that where an accused 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 alibis should be admissible as evidence relevant to the credibility of the defence. Would you comment on that proposal?

Mr CHILVERS: This is really the effect of the British adjustment to the right of silence. It is really taking one element of that. We believe that that is very fair.

CHAIR: How many times do people keep silent when they have actually got a real alibi? Are they in relation to major or minor matters?

Mr HANNON: When they have a real alibi?

CHAIR: Yes, like "I have proof that I was at this place".

Mr CHILVERS: Straight away they will say that.

Mr HANNON: Straight away, even before you get them back at the station, they will give you who their alibi is or is not with. But anybody who comes up with an alibi later on after you have got a brief of evidence makes you start to question the reality of an alibi.

CHAIR: Do you believe if they refuse to speak they are going to be guilty?

Mr CHILVERS: No.

Mr HANNON: No, do not put words in our mouths. To assist everybody, the whole basis of all this is to assist the courts in the determination. We are the investigators. Let us investigate it and let us put everything up before, whether it is our prosecutors or the DPP. They are the controlling bodies who will prosecute the matters, pending on evidence available. They check before they get that far. If no evidence is available or there is not enough then it will not even get as far as the Police Prosecutors or the DPP. But when you are coming up with this sort of stuff three weeks before a trial date, it might be too short, depending on the amount of alibis you have got to do. I think three weeks at the moment definitely needs to be increased if it is going to be kept in. To give our investigators time, actually, number one, to peruse the brief that they may have had sitting on the desk for the past 12 months without it coming to trial or, at least give them time to go and chase up the alibis no matter where they may be. For all we know they may be interstate. If you only want to give three weeks then they will have to drop everything to get the alibi statements or whatever else they are going to produce.

Mr CHILVERS: In a nutshell, if someone has had the opportunity to present an alibi early in the investigation, does not do that and instead presents an alibi at trial the judge should be able to make a direction to the jury and say "This is what has happened. It is a matter for you to make your own determination as to what impact that has on the credibility of a person." That is all. It is not saying that the person is guilty but it is giving the jury the opportunity to understand what has happened. It is just part of the context of the evidence.

CHAIR: In relation to ongoing monitoring of the use of pre-trial disclosure orders, do you perceive it is necessary and, if so, what aspects of it should be monitored?

Mr HANNON: I think we have raised all the issues right across that in most of the answers we have given today. You have got to look at how the decisions are made through the courts in relation to alibis, what notification or what time were the alibis noticed and what decisions have been made in relation to the pre-trial disclosure as to why they have been made. Is it going to change the "and/or" is it being made on the "ands" or all three? So I think if things do change then it is par for the course that it is going to be monitored but if it is not I think it needs to be monitored to see if those changes that we have mentioned today—as far as we are concerned are required—whether they should be changed.

CHAIR: Who should do it?

Mr HANNON: If you want to give it to the Police Association we will tie up something quickly and we will do it for you.

(The witnesses withdrew)

BRIAN JOHN SANDLAND, Solicitor, level 1, 323 Castlereagh Street, Sydney, affirmed and examined:

CHAIR: In what official capacity do you appear before the Committee?

Mr SANDLAND: As Director, Criminal Law Division, Legal Aid Commission.

CHAIR: Do you want to make an opening statement?

Mr SANDLAND: No, but I may need to make a closing statement.

CHAIR: Have any pre-trial disclosure orders been made since your submission? If so, have any involved defendants with legal aid?

Mr SANDLAND: I am not aware. The Legal Aid Commission operates in two ways: through its in-house practise and through its assigned practices. So there is an outside possibility that a matter is going through the system at the moment that is being funded by the Legal Aid Commission but of which I have no direct knowledge that may involve a pre-trial disclosure order. But the ones that were basically listed, I think nine in all, were the ones that we had some awareness of and, in fact, in some cases some involvement in.

CHAIR: Why have the pre-trial disclosures not been more frequently used?

Mr SANDLAND: It is a new concept in the context of a legislative framework and I think the practitioners on both sides of the bar table are endeavouring to get used to it, coming to grips with it and seeing the extent to which it works for them and the interests that they serve. The legislation itself is couched in terms of being restricted to complex trials and you will probably get to a question about this. There are the three criteria that apply: length of trial, the nature of the evidence to be called and the legal issues involved. In the District Court it seems as though there has been less scope because I think there have only been two orders made there. In the Supreme Court, that is the jurisdiction where you would expect more complex matters to be dealt with, there have been more orders made there. Once the practitioners involved and the bench get used to the limits of the legislation, and how it may assist, we may find that it is used more than perhaps it has been used since it came in.

In the District Court you have far more matters pumping through the system. You might have on hand in the criminal jurisdiction in the Supreme Court in a 12-month period 100 or so and you would have up to 3,000 or in that vicinity in the District Court. You would expect, given those circumstances, that the matters being handled in the Supreme Court are the ones that attract the heavier penalties and are likely to be more complex. It has technology facilities available greater than in the District Court, and the Commonwealth DPP, I understand, is instituting more prosecutions now in the Supreme Court than used to be the case, pursuant to practise note 98. You have more complex fraud matters go up to the Supreme Court, you have matters that attract either life sentences or more serious sentences and as investigations become more sophisticated and the resources of the police are being utilised in that way, you are going to have more complex evidentiary matters put to the courts of higher jurisdiction. I anticipate that it has been slow to get a foothold, and that is not uncommon given the experience in other jurisdictions which have a pre-trial disclosure regime. However, I think there is scope for it getting a foothold and being sued to a greater extent in the future.

CHAIR: How does legal aid determine when it is appropriate to make an application for a pre-trial disclosure order?

Mr SANDLAND: We do not, as a matter of course, invite the making of pre-trial disclosure orders.

CHAIR: Do you not perceive that that would be helpful?

Mr SANDLAND: In some cases it may be. For instance, where the exchange of expert evidence will clarify an issue that will save time and clarify an issue at trial, then it could be utilised. We usually think that the prosecution is holding the aces and that because we, from the defence perspective, do not have to prove anything we simply have to test whether the evidence has been proven to the requisite standard beyond reasonable doubt. So it is not likely in that context that you would necessarily be volunteering your defence. However, in the course of a matter coming to finality there will be steps along the way where you participate in the case management of a matter.

In order to be able to give your client realistic advice you would certainly want to receive the expert evidence that is available, have it tested and perhaps exchange the expert evidence that you have available. If it is not of assistance to you that issue simply ends as an issue that is like a trial, hence one of the aims of the legislation is achieved. Trials would not be wasted on pursuing issues that could be resolved pre-trial by the exchange of that information. But in general terms, given that it is an adversarial system and given that the prosecution has the onus of proof, the defence is more likely to be responding to an application by the prosecution to have pre-trial disclosure orders made.

CHAIR: We have heard all this talk of a change of culture and how everyone sits down and talks about how they can work through issues, outside pre-trial disclosure.

Mr SANDLAND: I was thinking about this issue last night. I will give you an example of the way in which the culture has changed. When I started as a criminal solicitor in the mid-1980s I was practising in the Local Court. You really did not get anything from the police by way of information about your client's case, other than a charge sheet, unless you were pleading guilty. If you indicated that you were pleading guilty you got a fact sheet and that is what was handed up to the magistrate in any event. If you indicated that it was a plea of not guilty, you would not receive a fact sheet. You would set the matter down for hearing.

If it were a charge, say, of assault, you would get your client in for instruction. Your client would say, "I was not there", or "I did not do it", or "He or she is exaggerating", or "I was acting in self-defence." You would get your client's version of events. But when you got to the hearing everything that was presented by the police—unless the police prosecutor had given you some forewarning—was brand new to you. If, for instance, halfway through the matter there was a record of interview in which a client had made certain admissions, you might be turning around to get instructions on the run about the fact that an eyewitness to this matter had been called that you did not know about. Your client's instructions were, "I was not even there", yet here is a person who recognises him.

So we have come a long way since the mid-1980s. We gradually got statements being served in summary matters and then in committal matters, and now we have a regime for the service of briefs basically in all criminal prosecutions, together with that other framework that goes with disclosure, that is, the obligation of the police to disclose all relevant material to the Director of Public Prosecutions [DPP] and the obligation of the DPP to disclose all relevant material to the defence. When you understand the context of where we came—from having nothing to now being in the situation where we are asked to participate by actually playing our hand—you understand why some defence lawyers approach the notion of pre-trial defence disclosure with some degree of caution.

However, it is a regime that is in place in relation to complex matters. It is a regime that has been adopted by virtue of that gradual introduction of, "Here is the brief of evidence." You get that and then instead of there being records of interview, which were just typed and always prone to those allegations of "I did not say that" or, "They were standing over me", it is now all on recording. There is clarity of issues and a greater prospect of clarity around the instructions that you obtain. So the goalposts have shifted in that way. That is the changing culture. There are judges and magistrates who will also attempt to case-manage matters. In the Local Court, for instance, a matter will not be listed for hearing unless the brief has already been served. In the District Court and the Supreme Court you have senior judges imposing strict timetables in relation to the setting down of a matter for trial. Then by having a date to work to people have to attend to those pre-trial issues.

The Hon. DAVID CLARKE: We heard earlier that there is practice in some instances of the Legal Aid Commission giving a fixed overall fee to legal representatives of defendants regardless of whether the case unexpectedly requires further time and effort. Could the practice of paying in that

way work against the defendant being properly represented and, in effect, infringe on the capacity to pursue requests for pre-trial disclosures?

Mr SANDLAND: The setting of fees usually follows this format. If a matter is listed for trial we will set what amounts to a first-day fee, which is a calculation of what is necessary to prepare that matter. A formula applies to the setting of the first-day fee. We then receive information from the defence solicitor and the defence barrister, if represented privately but pursuant to a grant of legal aid, about the length of the trial. We then set a lump sum calculated on the length of the trial. The setting of the first-day fee does not have within its formulation pre-trial disclosure orders. It may, however, come to pass that we have to include that. It is covered in relation to appearances at court.

So if there are pre-trial appearances at court we will pay for them. I am aware, for instance, of a recent matter where there was a pre-trial disclosure order—this was a matter being handled in-house—where the prosecution provided an outline of its case. The defence had to put on its response, and that involved a considerable amount of extra work. That is not something that is within the contemplation of the setting of a first-day fee at this stage, but it could well be the subject of negotiations. If you are referring to a situation where the Legal Aid Commission simply did not enter into those negotiations, perhaps that is a matter that should have been pursued a bit more avidly by the solicitor and/or barrister involved.

I accept that, whilst there are advantages for the Legal Aid Commission in funding a trial that becomes shorter, there are also cost disadvantages in relation to having to fund the pre-trial aspects of clarifying those issues that lead to a shorter trial. So it is a bit of a swings and roundabout situation. It is a little too early for us to tell whether the Legal Aid Commission will have a bigger bill to pay by virtue of the pre-trial disclosure regime.

The Hon. DAVID CLARKE: Do legal representatives come to you and say, "Yes, we agreed on a particular fee package but the case has blown out. Instead of going for one week it will now go for two weeks." Do you readjust the fee package? Has that ever happened?

Mr SANDLAND: We would like to be in a position where we have ultimate control of our budget by knowing exactly how much each and every matter costs. Trials do blow out and, although a lump sum fee may have been set, counsel is always free to come back and negotiate. If that were as a result of something that was completely outside their control, the Legal Aid Commission would negotiate around that fee. It is a swings and roundabout situation though, because sometimes trials are much shorter than the amount of time that was calculated in relation to the lump sum.

In those circumstances, if a trial that was listed, say, for 10 days finished after two days, the barrister would have ruled out two weeks in his or her diary. We would then calculate that the barrister would be allowed 40 per cent of the difference, in other words, 40 per cent of the eight days left up to a maximum of five days. That is the way we deal with a situation where a trial ends earlier than the amount that is calculated in the lump sum. Where it takes longer, as I have said, it is a matter for negotiation.

The Hon. DAVID CLARKE: It is a swings and roundabout situation between the Legal Aid Commission and the legal representative, but what about the defendant? It could be very costly to him if his legal representative is required to put in time and effort for which he is not being paid. The defendant would not feel very confident about that.

Mr SANDLAND: The defendant may not like the situation if he or she receives advice from counsel that counsel is not being adequately funded to properly defend the matter. The difficulty is that it is taxpayers' money and there is only a limited amount of it to go around. There is an increasing demand, in particular, in the criminal area. As arrest rates go up, so does the pressure on our budget. The reality is that we have to keep matters under control as much as we can.

The Hon. DAVID CLARKE: The taxpayer may not be paying but the defendant may well be paying?

Mr SANDLAND: I do not necessarily agree with that proposition. If the defendant reached a situation where he or she said, "I cannot get a fair trial", he or she is entitled to approach the court to

make an application for a stay of proceedings until the situation is rectified. So I cannot concede to the proposition that you are putting to me. However, I understand what you are putting to me.

The Hon. DAVID CLARKE: Except most defendants would not be sophisticated enough to understand that that is what they could do in approaching the court.

Mr SANDLAND: If people were funding the matter themselves, their pockets would not be bottomless. They would have to negotiate with counsel around how they were going to pay to fund the conduct of their matter. It is a similar sort of situation. We work in a real world environment rather than one where there are simply endless resources. If there were, I would concede your point that defendants and accused persons could have access to whatever was required to pursue every angle or every technical point. They would require every witness to be present for cross-examination on the basis that maybe there was something that they did not think about when they were first going through the matter with their barrister or solicitor.

The Hon. DAVID CLARKE: Except that there may be further funding required that does not need to go to those extreme lengths of following through on every possible avenue.

Mr SANDLAND: Yes. In fact, the whole purpose of pre-trial disclosure and the new regime, or change in culture that we talked about earlier, was that resources are being put into the preparation of matters—both by the prosecution and the defence—at an earlier point of time, rather than just before a trial, which in the past was the way things would happen. If those resources are put in earlier, we identify where the real issues in a trial are, and we then set the matter down for trial, to argue about those limited agreed issues and hopefully bring the matter under some sort of control both as to time and as to cost.

The Hon. AMANDA FAZIO: In relation to the test that the pre-trial disclosure regime will apply only to a complex criminal trial, with three parts to the test, you would be aware that Justice O'Keefe said in the Munroe case that "and" should be read as "and/or".

Mr SANDLAND: Yes.

The Hon. AMANDA FAZIO: Do you think that ruling is correct? The Director of Public Prosecutions said in his submission that, in order to overcome any uncertainty about that, the section should be amended to state "or". Do you agree with that?

Mr SANDLAND: If the legislation says, firstly, that the court will make a pre-trial disclosure order in the case of a complex trial, and will consider length of trial, and evidence to be called, and legal issues involved, it means just that: that those three criteria have to be present. I can envisage a situation, probably posed by the Director of Public Prosecutions, where you could have a complex matter which was not all that long and where there may be some advantage in an exchange of experts' evidence in order to clarify issues pre-trial. But, if the Parliament had intended that result, presumably it would have drafted section 136 more clearly. I think the drafting is clear: that, in terms of identifying whether a trial is complex, one has to look at all three of those matters.

My view is that, given that the intent of the Parliament seems to be clear, with all due respect to the judge who determined the case of Munroe, it does not see to be apparent that the Parliament intended "or" to be placed between each of those criteria. That could be fixed up by the Parliament if that is the intention. At the moment, I do not think that is the intention. I think complex trials are ones that are long, legally complex and may involve kinds of evidence that is not normally encountered. But Parliament has not sought to prescribe what is a long trial. The average trial, in the Supreme Court, is one that runs for about 14 days, and in the District Court for a bit shorter than that. So one does not have to stray too far beyond that to be getting into the realms of a trial that may be regarded by the court as long.

The Hon. DAVID CLARKE: But if the courts do interpret the legislation in the way that it has been interpreted by Justice O'Keefe, would you agree with that?

Mr SANDLAND: My submission is that that is not the correct interpretation. I think all three factors have to be present in a complex trial. I can understand the argument put forward by the

Director of Public Prosecutions that you could have complex legal issues in a relatively short trial. But, if the Parliament had intended that to be the case, it would have legislated in a way that made it far clearer than it is. And I agree with the proposition that those are the three indicators of complexity and, taken together, they are the matters that should attract the formal pre-trial disclosure orders.

CHAIR: So you cannot see a lot of use for in the District Court?

Mr SANDLAND: Could I answer the question in this way. I think that trials in general are becoming longer and more complex. I think there is scope within the existing drafting for it to be utilised more in the District Court. That the court, through its own motion or by way of applications by the prosecution, is not making those orders at present is a matter which probably reflects the current trend. It may also reflect the fact that court delays have significantly reduced in any event, and the situation is perceived to be under control. In any event, District Court trials are not as long and complex, on average, as matters dealt with in the Supreme Court. However, I still think there is scope within the District Court for use of the existing legislation as drafted.

Ms LEE RHIANNON: I continue with your comments about the three factors. You explained your interpretation of the law as is. Do you think it should stay as it is, or are there grounds to change it so that it becomes "or"?

Mr SANDLAND: My position, on behalf of the Legal Aid Commission, is that the way the legislation as drafted at the moment is appropriate. I think responsible counsel, involved in say a shorter trial which nevertheless involves complex issues where experts' evidence is required, will have exchanged their experts' reports in any event. I know that is happening from the anecdotal evidence that I receive. It may not happen across the board, in every case, but my view is that responsible counsel are addressing issues, and are acting in the best interests of running only matters that are relevant to the defence case, and hence I do not see a need to extend this legislation by requiring only one of those criteria to be present.

Ms LEE RHIANNON: So do you regard the way it is working at the moment as not impeding the efficient running of the court in any way?

Mr SANDLAND: I do not see that it is impedes the efficient running of the court. Pre-trial orders, in the main, as I understand, have been complied with. You may get to sanction shortly, but the few pre-trial disclosure orders that have been made have basically been complied with. The overseas experience is perhaps less indicative of a bright future if you try to push it too far, because you have always got at the far end of the spectrum the right to a fair trial. So, if someone is penalised by not being allowed to call evidence that they did not declare, then they may be going off to a higher jurisdiction to test whether or not there has been some impact on their right to a fair trial. So it is a fine line of balance that both the courts and the practitioners are treading at the moment.

Ms LEE RHIANNON: Is not one of the problems that at the moment sanctions for inadequate compliance with the rules can result in an adverse impact on the accused, who will have to bear the brunt of any problems that occur?

Mr SANDLAND: The sanctions are certainly there. The ultimate sanction is that if you seek to call as part of your defence case evidence which you were asked to disclose, and you did not disclose it, you may be denied the opportunity of calling that. That, however, in a system that is aimed at getting to the truth by an adversarial process, where evidence on both sides is presented and tested, does seem ultimately to interfere with the right to a fair trial; and to the extent that it affects anyone, of course it affects the accused, but it affects the system as a whole. So I agree with your proposition. There are less serious sanctions that apply, and ultimately what might happen is that a matter will be adjourned so that the other side can properly prepare evidence in reply to what is being presented. And, of course, under section 22A of the Crimes (Sentencing Procedure) Act, co-operation in terms of participating in the making of pre-trial disclosure orders can be taken into account on sentence. So that is to the advantage of the accused person.

Ms LEE RHIANNON: I understand that some of your clients may not have English as a first language, or have education levels that are not so high, and I understand also that funding often

limits the work that solicitors can do. Can you envisage occasions on which a defendant would be in more vulnerable situations with regard to how this plays out?

Mr SANDLAND: An unrepresented defendant is not subject to pre-trial disclosure orders. An accused person who is represented and has language difficulties will have available to him or her the services of an interpreter. Those interpreters go through a form of accreditation, and that means that the message conveyed by their counsel or solicitor should be done so in an accurate way, in their language. So there should be no disadvantage to an accused person who has a language difficulty by virtue of the fact that sanctions are imposed, because of the availability of interpreters.

The Hon. AMANDA FAZIO: Mr Sandland, at the beginning I said that a question had been flick-passed earlier to Legal Aid. It is in the list of questions that we have for you. It is about the new requirements for disclosure by police to the Director of Public Prosecutions. In your submission you state that, despite the operation of section 15A of the Director of Public Prosecutions Act, and the existing framework for police disclosure to the DPP, some practitioners have noticed that statements prepared by investigating police are becoming more succinct and that there has been an increased need to subpoena material from the police and other sources in order to adequately prepare a client's case. We put this to the representatives of the Police Association, and they said they believe statements were getting longer, and that the information provided was of better quality due to the fact they have specialist brief checkers now. I would like your views on that. Could you give the Committee an idea of the length of time this problem has existed, and whether it is getting worse?

Mr SANDLAND: I took that view from a number of experienced senior criminal practitioners on the Criminal Law Committee of the Law Society. It was a view that was expressed in the context of there being a need for the defence to subpoena material in serious criminal matters because the material that you needed was not always there. I will give you an example but perhaps before I do, I should say that in general terms I think it would be fair to say that if you compared the situation as I outlined it 15 to 20 years ago to the way it is now, you would have to say overall there was an improvement in the material that you get from a defence perspective from the police. The bane of their life is probably typing out statements for matters identified as pleas of not guilty, whether they be summary hearings through to the more serious charges. The reason, however, that it should not be the bane of their existence is that by doing that preparation early, the defence side gets the brief and is able to discuss in a meaningful way what the strength of the prosecution case is. Sometimes you have a client who just says, "Well, look, I wasn't guilty". Either it is an outright denial or it is a situation where they are arguing that may be self-defence was appropriate.

But when you see the number of witnesses that are arrayed against them, the admissions that they make to the police, the fact that one of the eyewitnesses might be their best friend, their uncle, et cetera, then you have got a situation where you are able to talk meaningfully with your client about the chances, the prospects at trial or hearing and the advantages to them in an early plea of guilty. There are situation in relation to more complex matters where we know, from the defence perspective, that we do not get everything that the police have got. In a recent matter that was conducted in our office there were something like 100 extra statements served just prior to the commencement of the trial.

The Hon. AMANDA FAZIO: Was that a trial with one defendant or multiple defendants?

Mr SANDLAND: One defendant. Obviously, it was a serious matter where there had been a lengthy investigation. Also, I think we have got to take into account the reality that no matter how many systems you have got in place, it is at the time when you are at the barrier that your mind is really focused on what you have to do in order to either prove your case or to answer the prosecution's case. And in this case obviously material was uncovered by the police that they realised may be within the guidelines as being relevant and should be passed on to the police. The police realised that, having received it, it was required to be served on the defence. The defence on receiving it said, "Hang on, how can we be ready to commence this eight week trial, or whatever it was, when we have just been served on Friday with 100 statements", so the matter went over.

That was being conducted in house. It was delayed so that that evidence could be perused and the significance of it examined. If it was a private solicitor acting on legal aid, they would, I would think, be coming to us to say, "We need whatever amount of time is required to peruse these

documents, to take further instructions, to interview further witnesses, et cetera." So it impacts on the Legal Aid Commission, which is funding the defence, hence that analogy to it being the downstream agency. We really do pick up the costs of these things at the very end of the food chain.

The serving of those extra statements led to a concern that there might be expert material out there, so there was then a subpoena for extra material and then there was a discussion around, "Well, what actually do you have?" and there was material that was subject to public interest immunity that was not going to be relevant, but we would have wasted a lot of time arguing about whether we should have access to that. That is the context in which that statement was made. I think in recognition of what the police have said, that the view that statements have become more succinct may be the view of only a few defence practitioners, but given that we operating in an adversarial system, the defence will still be seeking to look to more material beyond that which has been disclosed to them. That is a bit of a roundabout way of answering your question, but I hope that has given you the context.

The Hon. AMANDA FAZIO: Can I ask you about another issue raised in the Police Association submission, which stated that many of their members are dissatisfied with the fact that an arrested person has a right to silence while being questioned by police and that there is no penalty in subsequent court proceedings if the person elects not to speak. They have recommended that the legislation be amended along the lines of the current model used in the United Kingdom where the courts are able to draw inferences from suspects exercising their right to silence in certain circumstances. We are aware that what happens in England is that a person is not interviewed unless either their own solicitor or a duty solicitor is brought in to sit in on the interview with them and that they are cautioned to the effect that if they do not say anything when they are first interviewed, it can be held against them when the matter is at trial. I think the Chair said that you can imagine all the duty solicitors rushing out to the back of the Bourke, Tingha or where ever. Do you any comments on that? Do you think it is fundamental to our legal system that people have the right to silence?

Mr SANDLAND: Yes, I have got that philosophical objection; that it is not really a right to silence if it is qualified in the way that you have put and that I have seen on *The Bill*. That is about my only experience of it.

The Hon. AMANDA FAZIO: Mine too.

Mr SANDLAND: I do not think it is then a right of silence. I know that in England they do provide solicitors from a very early stage of an investigation. I also know that per capita they spend a lot more in England than we do in New South Wales, per head of population, on legal aid in criminal matters. I see it as an area where, if it was introduced and was backed up by the requirement that a legal practitioner be present, extra funding would be required in order to support that system. I have another practical issue with it. That is, if you are present at an interview and if something untoward happens at that interview which becomes the subject of a challenge about the admissibility of that evidence at the trial, the solicitor who attended, who, in many cases would be an in-house solicitor, would be prevented then from appearing because that solicitor becomes a witness. The matter would have to be passed on to a private solicitor, so there would be further funding implications for the Legal Aid Commission in that our assignment costs are likely to increase. So I have both philosophical and practical issues with the proposal.

The Hon. AMANDA FAZIO: Do you think that such a proposal would actually impact on people who are least able to cope on their own in the legal system? I think that the Hon. Lee Rhiannon mentioned earlier people for whom English is a second language or whose education levels are not high. Also, we have an overrepresentation of people with intellectual disabilities within the prison system. Would not this system work against them as well?

Mr SANDLAND: Yes, it potentially could. In order to properly advise the person about the implications of not indicating to the police at that very early stage of an investigation something that they may later wish to rely on at the trial, you would have to have sufficient time to, first, absorb what the nature of the charge and the strength of the evidence against the person is and, second, then to obtain sufficient instructions to understand what the implications of not giving a full statement to the police at that stage were and if that person had a language difficulty, you would need to wait until there was an interpreter available.

If the person had an intellectual issue or a mental health problem, then the whole question is compounded by the difficulty of getting instructions, so I do agree with what you say. It is just a further complicating factor and if it were introduced, it would need to be accompanied by safeguards for the accused person, which would come at a cost. That cost would probably be administered, in the main, by the Legal Aid Commission and we would need to be very careful about the submission we made in order to be adequately funded to cover the extra cost.

The Hon. DAVID CLARKE: Do you believe that there needs to be any finetuning at all of the position relating to pre-trial disclosure?

Mr SANDLAND: The defence position in general would probably be that while it is restricted to complex matters as defined by section 136 of the Criminal Procedure Act, then that is as much intervention of that formal kind that we would desire. I have conceded that there are some advantages in terms of clarifying issues, restricting the number of experts to be called that benefit not only the accused but the system as a whole. So I make that concession in that context. If by "fine tuning", you mean extending it, then it could be said that in the future in the District Court it may be used more frequently.

However, there are alternatives to a formal pre-trial disclosure regime that exist in that jurisdiction and that of it being introduced to the system as a whole. The very fact that you get a brief of evidence enables you to clarify your instructions. If you get it in a timely manner, then you can clarify your instructions at an earlier point in time and hopefully cost the system a only a bit by not running all the way through to the bitter end of the criminal process, which does move on like a slow moving pageant, particularly in the higher jurisdictions. However, the time lines have become much sharper in both the District Court and the Supreme Court. The Local Court also has very strict time lines.

The concern of the Legal Aid Commission is that we see too many matters that are running through to the first day of the trial and then turning into pleas of guilty. Those matters, we believe, could have been identified as pleas of guilty earlier on and if they had have been sent up to the District Court as a sentence matter rather than a trial, resources could have been saved within the system itself and to the Legal Aid Commission, which then negotiates with a barrister and solicitor about the setting of the first day fee for a trial, which may involve considerable reading but ends up being a plea of guilty on the first day at that trial.

CHAIR: Why does it happen on the first day?

Mr SANDLAND: It is a little bit complex, but basically what happens is that, firstly, the Crown is not usually allocated in the District Court until only a few days out from the trial. The Crown will look at the chances of securing a conviction on the basis of the charges that he or she has. They will then look at the evidence available and then they will start the process of negotiating with the other side. Quite often you have a change of indictment, the indictment is amended to a lesser charge. Negotiations of that kind will happen on the day of the trial. In the meantime the Legal Aid Commission has been locked in to the payment of the first day's fee as if the matter were going to run to trial.

CHAIR: Is it is just because it has not been dealt with beforehand until the very end?

Mr SANDLAND: If I could finish that point, it is not only the fact that resources have not been allocated sufficiently early to the Crown. Often the time line is very tight. When I said the slow moving pageant, I really should formally withdraw that and say that one of the issues we have is that because time lines have significantly reduced between the time of committal and the time of trial, and because barristers and solicitors are busy people with lots and lots of clients, you have this difficulty of being able to negotiate your caseload within the limited time available. Often, from a defence perspective as well, unless you have had the brief early, unless a Crown has been allocated early and unless you have a realistic time line in terms of preparing your matter before the hearing date you are going to negotiate on the day of the trial. Also you have just that human nature issue that until your client is actually confronted with the empanelling of the jury and the fact that the witnesses all seem to be there, the ones he thought might drop away, suddenly instructions become far more realistic and the matter can resolve.

The Hon. DAVID CLARKE: Getting back to my question of finetuning, would it be fair to say that subject to the provisos that you have enunciated, the position regarding pre-trial disclosures is working satisfactorily and in the interests of the community and defendants?

Mr SANDLAND: Yes, I think with the limited experience we have available to date it has not disadvantaged clients that we have represented and that we have funded, and that there is scope in combination with those other factors that are referred to of it being part of the landscape of the criminal justice system, but at the top end—in other words, in relation to complex trials. And what is happening along the way with everything else is that you have preparation of briefs, case management by the District Court and an eye on the fact that if you set deadlines for people by and large they are going to meet them. Gone are the days when, if there was not one item of evidence available, we will put it over until next month until you get that item of evidence and then you turn up in a months time and it is still not there, and it goes over again. Now you will actually have a trial date and people are working towards that deadline. That is the way in which the court, by managing its lists far more effectively and working in combination with the DPP, the defence and pre-trial disclosure orders is achieving the sorts of success that it has in terms of reducing court delay times.

CHAIR: Earlier today Mark Tedeschi raised the issue of the defence notifying the court of its intention to submit expert evidence when they introduced their witness rather than at any time sooner. He indicated this practice causes delays because the then prosecutor is likely to request an adjournment to consider the expert's report. He tentatively proposed legislative amendment to require the defence to disclose its expert evidence within a suitable time frame in relation to all indictable offences not just complex ones.

Mr SANDLAND: That is a significant extension of pre-trial defence disclosure.

CHAIR: That is not really a pre-trial disclosure. It is related back to—

Mr SANDLAND: It is disclosure of expert evidence that you have from the defence perspective.

CHAIR: It is like the police.

Mr SANDLAND: You are not required to disclose unless a pre-trial disclosure has been made.

CHAIR: At the moment, that is right.

Mr SANDLAND: Mr Tedeshci has definitely got far greater experience than I in terms of what difficulties are presented by the late presentation of that evidence. But, again, bear in mind that, firstly, it is an adversarial system. Secondly, it is a system where the Crown bears the onus of proof. Thirdly, the Crown has arrayed behind it all the resources of the New South Wales Police Service. The defence does not have that onus and it does not have those resources. Bearing in mind what I indicated about the fact that responsible counsel will, in order to narrow issues and if it is in the interests of their client—and they make that call as to what is in the interests of their client—give prior notice of expert's evidence in criminal matters to the prosecution. That is as far as I am prepared to go in relation to the exchanging of expert evidence from a defence perspective. The question is one that has been raised today. I think it requires significant consultation within the defence side of the legal fraternity to answer that question adequately.

CHAIR: Do you think it has potential to hurt defence?

Mr SANDLAND: If disclosure occurred in circumstances where, for instance, you did not have sufficient instructions we did not have a full prosecution case to know what the strengths were, it is a way of playing the defence hand so that the prosecution is in a position to answer it, and answer it in advance perhaps to address any holes in the prosecution case.

CHAIR: You do not get the full information in the police disclosure?

Mr SANDLAND: No, I was about to say that their perspective is probably this, that they have now moved from that position where you did not get anything to it being a requirement that they serve on the defence a copy of the brief containing all relevant statements so that may conclude in those circumstances that they are declaring everything that they have, would it not be appropriate for the defence to do the same? My answer to that, at this stage, and it is a preliminary answer, is this, there is a different role for both prosecution and the defence and there are different resources available to the prosecution compared with the defence. In certain circumstances you have to take into account what is in the best interests of your client and it may well be that the withholding of that information of an expert nature until trial is something that is in the best interests of your client. Hence I would not concede that Mr Tedeschi's proposal is one that I could adopt or agree to even on a conditional basis without thinking it through and having it available for much wider consultation.

CHAIR: We are not going to get through all of your questions today. We talked a lot about problems with implementation in other countries. I want to know what the problems are.

Mr SANDLAND: In relation to that I emailed Professor Dale Ives, who is the Associate Professor from the University of London Western Ontario, I think, and she emailed made me back. I do not think it is material that I could tender to this Committee, but I can give you a bit of an outline of what she indicated and perhaps some references to studies that have been conducted in other jurisdictions. I only received this information today. In Western Australia there is a pre-trial disclosure regime. The general impression of Professor Ives is that there is little attempt made at this stage by prosecution counsel for the courts to enforce it. It does not seem to have worked in terms of reducing delay or narrowing issues. The Victorian experience is that they introduced a scheme in 1993. Professor Ives did not do her own research down there. There is no study relating to the current legislation. However, there was a study, "Anatomy of Long Criminal Trials" by Chris Corn in the 1997 edition of the Australian Institute of Judicial Administration. That is a paper that you may like to consider if you can get access to it.

In England and Wales she referred to two papers, one Joyce Plotnikov and Richard Wolfson A Fair Balance: Evaluation of the Operation of the Disclosure Law RDS occasional paper No. 61 of 2001. There is also Crown Prosecution Service Inspectorate the Thematic Review of the Disclosure of Unused Material, Thematic Report 2/2000. I will not go into the results of all of that research except to say that there appears in some jurisdictions to have been a lack of willingness on the part of the defence to disclose anything beyond an indication that their client is not guilty. There seems to have been a lack of effort on the part of the prosecution to seek more formal orders, and there seems to have been a lack of will or otherwise on the court to impose sanctions in the face of what appears to be a general lack of co-operation. The New South Wales regime, given that context, is an interesting experience because the kinds of disclosure that are sought seem to be more detailed and it seems as though it is fitting into an overall framework of disclosure, or at least resources being put into the preparation of trials at an earlier point in time with a view to achieving savings at a later point in time. I do not think it is appropriate for me to tender an email.

The Hon. AMANDA FAZIO: In relation to participation in pre-trial disclosure proceedings by trial counsel, the submission from the DPP noted that in the Styman matter one of the accused 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. The submission states that it appeared that this may have occurred because legal aid was unable to fund the participation of trial counsel at the earliest stage of the matter, and the submission concludes that if pre-trial disclosure is to be effective it is essential that counsel briefed in the trial participate in the pre-trial procedures. Apart from the obvious cost implications of adopting such a policy, do you agree with the conclusion that the DPP has drawn in this matter?

Mr SANDLAND: I thought that might have been what prompted your question earlier about what resources are put into these pre-trial disclosure orders. I actually made an inquiry of our grants section in relation to that matter and was not able to come up with a definitive answer in terms of there being a denial of a request for funding to cover counsel to run the pre-trial disclosure order. It does not seem, on the face of the file, that that request was made. In general terms, what we will do if a matter is being handled by a private practitioner on a grant of legal aid, at the committal stage we will fund solicitor only. If the matter is committed for trial we will fund counsel in appropriate cases instructed

by a solicitor. If the pre-trial orders can be caught up in the time that the counsel is involved in the matter, we would expect that counsel would include that as part of their first day fee.

The first day fee is calculated on how much material they must read, how many witnesses they have to interview, how many appearances they had to make at court of an interlocutory or preliminary kind, whether they had to go and do a view of the scene. Now that the pre-trial disclosure legislation is starting to be used more frequently I think we can expect requests in the setting of the first day fee for appearance at pre-trial disclosure orders and the preparation of a document by way of a defence answer to a prosecution pre-trial disclosure document.

Certainly, the one I have seen that has been handled in-house would have involved a significant amount of work in terms of working out what evidence was admissible, what evidence was going to be challenged, and putting the prosecution on notice of that. I understand that is something that was raised by the Public Defenders Office; they thought it was too onerous to be asked at that early stage to project all the objections you are going to have. And because a trial can take many twists and turns that you would not expect, then I would agree with that. But if counsel was involved in the matter then I would expect that counsel would be seeking in the future to have their fees in preparing an answer or participating in a pre-trial disclosure order covered by their first day fee.

CHAIR: Thank you for the information you have given us today. We had organised to ask you several questions but we have not got to them. I hope that you will be happy to take them on notice.

Mr SANDLAND: Yes.

(The witness withdrew)

(The Committee adjourned at 5.20 p.m.)