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**Pre-Trial Defence Disclosure:  
Background to the Criminal  
Procedure Amendment (Pre-  
trial Disclosure) Bill 2000**

by

**Gareth Griffith**

**Briefing Paper No 12/2000**

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## EXECUTIVE SUMMARY

The purpose of this paper is to present a commentary upon the background to the Criminal Procedure (Pre-trial Disclosure) Bill 2000 and the draft copy of the Criminal Procedure Amendment (Pre-trial Disclosure) Regulation 2000. Its main findings are as follows:

- In the Second Reading speech for the Bill it was said that its purpose ‘is to introduce a process where courts, on a case-by-case basis, may impose pre-trial disclosure requirements on both the prosecution and the defence to reduce delays and complexities in criminal trials’. This makes it clear that the debate about pre-trial disclosure is part of the wider discussion about court delays and the general efficiency of the criminal justice system (page 1).
- The debate about pre-trial disclosure generally, and the compulsory defence disclosure in particular, has a long history in NSW, stretching at least as far back as the mid-1980s. It has been considered on a number of occasions by the NSW Law Reform Commission, most recently in relation to its inquiry into the right to silence. In its discussion paper of May 1998 the Commission said that it ‘is presently minded to accept’ the arguments supporting compulsory defence pre-trial disclosure (page 22) .
- In the run-up to the general election of March 1999, the Labor Government promised it would introduce pre-trial defence disclosure. The President of the NSW Law Society, Mr John North, was among those who criticised the proposed reform, saying: ‘It is another attempt to attack one of the great principles of justice; that is, it is up to the Crown to prove guilt beyond reasonable doubt and not the responsibility of the defence to prove innocence’. The NSW Law Society’s spokesman on criminal law, Trevor Nyman, argued that the problem it was intended to cure was ‘more perceived than real’. ‘More than 95 per cent of criminal cases involve pleas of guilty’, he stated, adding that ‘Of those that do go to jury trial, more than 90 per cent are straightforward and speedy. If cases are unduly lengthy, it is almost always because the prosecution witnesses are numerous and detailed’ (pages 23-24).
- Between September 1999 and June 2000 the Working Group of the Australian Standing Committee of Attorneys-General (SCAG) on Criminal Trial Procedure, the SCAG Deliberative Forum on Criminal Trial Reform and the Law Reform Commission of Western Australia released reports recommending reciprocal pre-trial disclosure for the defence and prosecution (pages 27-29).
- At present in NSW barristers’ and Solicitors’ Rules, DPP guidelines and Supreme Court Standard Directions are all relevant to the issue of pre-trial disclosure by either the prosecution and/or the defence in criminal cases. However, the actual statutory modification of the common law position as far as defence disclosure is concerned is relatively marginal, being limited to giving notice of an alibi and, in murder trials, the defendant is required to give notice of an intention to raise the defence that he/she is not guilty due to substantial impairment by abnormality of mind (pages 1-2).

- In Victoria a detailed regime of compulsory, reciprocal pre-trial disclosure has been established, originally in 1993, and more recently under the *Crimes (Criminal Trials) Act 1999*. Under the Victorian scheme, the requirements associated with the pre-trial ‘directions hearings’ are set out in the 1999 Act, whereas in NSW much of the detail of the proposed pre-trial disclosure regime is found in the Regulations (pages 4-7).
- To a large extent the argument against defence disclosure focuses on issues of principle, in particular on the bundle of rights associated with the presumption of innocence, the right to silence and the protection against self-incrimination. On the other side, the case for defence disclosure focuses more on practical issues, especially as these relate to the efficiency of the criminal justice system. However, the case for defence disclosure can also be presented in theoretical terms. For example, it can be said that such disclosure facilitated the fundamental purpose of a criminal trial which is to discover ‘the truth’. Alternatively, arguments against defence disclosure can also take a practical turn, especially when countering the empirical claims made about what are called ‘ambush
- Among other things, the Criminal Procedure (Pre-trial Disclosure) Bill 2000 would establish: a case-management model of reciprocal pre-trial disclosure on a compulsory basis, much of the detail of which is set out in the draft Regulations; a regime of sanctions for non-compliance with pre-trial disclosure requirements; an incentive-based penalty reduction scheme for pre-trial disclosure; statutory provisions to facilitate voluntary pre-trial disclosure; and the amendment of the *Director of Public Prosecutions Act 1986* to impose a general duty of disclosure upon police officers involved in the investigation of an offence (pages 29-34).
- Most commentators agree that the issue of sanctions is the most difficult where defence disclosure is concerned. Both the SCAG Working Group and the SCAG Deliberative Forum opposed the introduction of formal sanctions for breaches of disclosure obligations, preferring to rely instead on a sentencing discount scheme as an incentive for co-operation. This option is also available under the Pre-trial Disclosure Bill 2000. However, the Bill provides the court, in addition, with an extensive range of sanctions where a party has failed to comply with the requirements of compulsory disclosure (page 35).
- Both the SCAG Working Group and the Pre-trial Disclosure Bill 2000 would require the defence to disclose such specific defences as self-defence and automatism. On the other hand, the SCAG Deliberative Forum report commented that other pre-trial procedures would adequately indicate if these kinds of specific defences were going to be raised by the defence. ‘Thus’, the report concluded, ‘the requirements on the defence may not realise any benefits of real significance and may only serve to upset the balance between prosecutor and defence’ (pages 38-39).
- It can be argued that, after the issues relating to the efficiency of the court system have been addressed, it is the question of the fairness of the criminal justice system which must ultimately be answered in the debate about compulsory pre-trial defence disclosure.



## 1. INTRODUCTION

On 16 August 2000 the NSW Attorney General, the Hon RJ Debus MP, introduced the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000 [**the Pre-trial Disclosure Bill 2000**] into the NSW Legislative Assembly. In the Second Reading speech it was said that ‘The purpose for the Bill is to introduce a process where courts, on a case-by-case basis, may impose pre-trial disclosure requirements on both the prosecution and the defence to reduce delays and complexities in criminal trials’.<sup>1</sup> The pre-trial disclosure model proposed under the Bill was described as ‘a case management model’. The Attorney General went on to say that, alongside and in addition to this scheme for case-managed pre-trial disclosure, the Bill also provides ‘other amendments designed to enhance further the efficiency and fairness of the criminal justice system’, including, in the case of alleged indictable offences, the introduction of a general duty of disclosure of all relevant information by investigating police officers to the DPP. Members were advised that the Bill must be read in conjunction with the draft regulations that were to be made available before the Bill is debated in October. These draft regulations, together with additional proposed amendments to the *Criminal Procedure Act 1986*, were released for comment in early September.

The purpose of this paper is to discuss the Pre-trial Disclosure Bill 2000 in relation to the wider debate concerning the arguments for and against pre-trial disclosure by the defence in criminal cases. It begins by outlining the present legal position in this and other selected jurisdictions. The paper then presents an account of the key issues arising from this general debate. Having identified the main points of contention and concern, the paper then presents a survey of the recent debate in NSW and beyond, before discussing the Pre-trial Disclosure Bill 2000.

## 2. DEFENCE DISCLOSURE – THE CURRENT POSITION IN NSW AND OTHER SELECTED JURISDICTIONS

The current legal position in NSW and other selected jurisdictions, including the other Australian states, is set out in detail in the NSW Law Reform Commission’s [NSWLRC] discussion paper of May 1998, *The Right to Silence*. This paper confines itself to a comment on the NSW position; a note on Victoria where recent changes have been made to the relevant law; and a brief note is made of the contrasting approaches to the issue in the United Kingdom and Canada.

### New South Wales

Barristers’ and Solicitors’ Rules, DPP guidelines and Supreme Court Standard Directions are all relevant to the issue of pre-trial disclosure by either the prosecution and/or the defence in criminal cases. However, the actual statutory modification of the common law position as far as defence disclosure is concerned is relatively marginal. According to the

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<sup>1</sup> NSWPD (Hansard Proof, Legislative Assembly), 16 August 2000, p 72.

NSWLRC's discussion paper, *The Right to Silence*, it is confined primarily to the following circumstances: (a) under section 405A of the *Crimes Act 1900*, on a trial on indictment the defendant must give notice of any alibi, otherwise he or she can only adduce evidence in support of the alibi by leave of the Court; (b) in murder trials, the defendant is required to give notice of an intention to raise the defence that he/she is not guilty due to substantial impairment by abnormality of mind.<sup>2</sup> Further to the recent consolidation of sentencing legislation, these same provisions are now found in the *Criminal Procedures Act 1986*, under sections 48 and 49 respectively.<sup>3</sup>

The NSWLRC mentioned one other statutory requirement for defence disclosure: namely, that under the *Evidence Act 1995* if either party intends to lead evidence of tendency or coincidence, or first-hand hearsay evidence, that party must generally give advance notice of that intention.<sup>4</sup>

**Disclosure of alibi evidence:**<sup>5</sup> The exception relating to the disclosure of alibi evidence was enacted in 1974. In its 1987 discussion paper on criminal procedure the NSWLRC discussed the arguments for and against this exception, citing the view of the future Attorney General, the Hon DP Landa MLC, who described it at the time as an 'inroad' into the 'ancient right' of an accused to remain silent.<sup>6</sup> In its discussion paper the Commission said that it was divided on its view on the requirement to disclose an alibi defence.<sup>7</sup> But there appears to have been agreement on the point that, whatever view is taken of defence disclosure generally, it should be borne in mind that 'alibi evidence is not sufficiently different from other forms of defence to justify a special rule for disclosure'.<sup>8</sup>

In 1987, in its detailed analysis of the issue, the NSWLRC observed that in fact trial judges rarely excluded alibi evidence even though notice had not been given:

Under the legislation requiring the disclosure of a defence of alibi, the sanction established to enforce disclosure is the right of the trial judge to disallow, in the exercise of his or her discretion, the alibi

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<sup>2</sup> Section 23A and 405AB(1), *Crimes Act 1900*.

<sup>3</sup> *Crimes Legislation Amendment (Sentencing) Act 1999*, Schedule 2 [26] which commenced on 1 January 2000.

<sup>4</sup> Sections 67, 97 and 98. Under section 100 the court may dispense with notice requirements.

<sup>5</sup> Disclosure of intended alibi evidence is required in all other Australian States -NSWLRC, *The Right to Silence*, Discussion Paper 41, May 1998, paras 4.28, 4.29, 4.33 and 4.34.

<sup>6</sup> NSW Law Reform Commission, *Criminal Procedure: Procedure from Charge to Trial: Specific problems and Proposals, Volume 1*, Discussion Paper 14/1987, para 5.38; NSWPD, 27 March 1974, pp 1991-1992 (Hon DP Landa).

<sup>7</sup> NSWLRC, Criminal Procedure discussion paper, n 6 para 5.41.

<sup>8</sup> *Ibid*, para 5.65.

evidence sought to be introduced by the accused person. In our view, and this is consistent with current practice, this is a sanction which should only be used rarely since it effectively prevents the accused person from presenting evidence in defence of the charge. We consider that the sanctions available to a court should remain a matter of discretion in order to meet the circumstances of the particular case. We also consider that the range of sanctions available to the trial judge, and specified in relevant legislation, should be extended to include greater use of the power to allow the prosecution to call a case in reply and the power to grant adjournments to the prosecution if it is unfairly disadvantaged.<sup>9</sup>

In relation to the timing of the alibi notice (within 10 days of the committal), in 1987 the Law Reform Commission stated that:

In our view, this is unrealistic. Accused people who are not represented at their committal proceedings may take some time to engage the services of a lawyer and some further time may elapse before the lawyer receives complete instructions. Although this would certainly be a factor taken into account by a court in deciding whether to admit evidence of an alibi where the required notice has not been given within time, we consider it preferable that the time within which the notice must be given should be a nominated period prior to the date of the trial and that this date for giving notice should be specified by the prospective court of trial in each case, thus enabling the circumstances of the particular case to be taken into account and a more realistic time within which notice must be given to be fixed.<sup>10</sup>

Note that under the Pre-trial Disclosure Bill 2000 defence disclosure of alibi evidence would be required in the period ‘commencing at the time of the accused person’s committal for trial and ending 21 days before the trial is listed (either for mention or hearing)’.

**Defence disclosure of a substantial impairment defence:** Defence disclosure in cases involving a defence of substantial impairment by abnormality of mind (formerly diminished responsibility) was introduced in NSW in 1997. This reform followed close on the release of a NSWLRC report on diminished responsibility where it was indicated that there are strong arguments for considering a substantial impairment defence to be a special case justifying pre-trial disclosure:

...we make no recommendations in this Report in relation to procedures for compulsory disclosure and assessment in

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<sup>9</sup> Ibid, para 5.59.

<sup>10</sup> Ibid, para 5.61.

diminished responsibility cases. However, we do note that there are special considerations in this type of case which support a legal requirement for the accused to give advance notice of an intention to plead diminished responsibility, to serve those medical reports intended to be relied on, and, perhaps, to submit to a psychiatric or psychological assessment. First, evidence of diminished responsibility is generally a matter which is wholly within the accused's knowledge. Secondly, the integral role of expert evidence in relation to the defence means that the prosecution encounters particular difficulties in rebutting diminished responsibility without adequate notice and provision to examine the accused. Thirdly, it may be argued that in such cases, the accused's right to silence and presumption of innocence are not infringed, since admission of having committed the act in question is implicit in reliance on the defence. Lastly, we consider that it is necessary to balance the interests of the accused with the interests of the general community in ensuring that adequate time is allowed for the accused's case to be properly tested by the prosecution. While we recognise that there is a risk of compromising an accused's right to silence by any form of compulsory disclosure and assessment, we consider that the special circumstances of pleading diminished responsibility justify such a requirement in relation to that defence.<sup>11</sup>

At present the defence of diminished responsibility is only available in three other Australian jurisdictions, namely, Queensland,<sup>12</sup> the ACT<sup>13</sup> and the Northern Territory.<sup>14</sup>

## Victoria

The NSWLRC discussion paper on the right to silence outlined the reciprocal and compulsory pre-trial disclosure scheme in Victoria under the *Crimes (Criminal Trials) Act 1993*.<sup>15</sup> A substantially similar scheme is now in place under the *Crimes (Criminal Trials)*

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<sup>11</sup> NSWLRC, Report on Diminished Responsibility, n 99, para 3.102.

<sup>12</sup> Section 304A, *Criminal Code Act 1899* (Qn). The Act does not appear to require defence disclosure in respect to diminished responsibility. It does, however, require advanced notice of expert evidence –section 590B.

<sup>13</sup> Section 14, *Crimes Act 1914* (ACT). Again, as with the relevant Northern Territory statute, this Act does not appear to require defence disclosure in respect to diminished responsibility.

<sup>14</sup> Section 37, *Criminal Code* (NT).

<sup>15</sup> This 1993 model was the subject of considerable criticism –NSWLRC, *The Right to Silence*, n 102, para 4.28; it is also outlined in JD Heydon, *Cross on Evidence*, 6<sup>th</sup> Australian Edition, Butterworths 2000, pp 148-149.

*Act 1999*.<sup>16</sup> As with its 1993 predecessor, this new regime is based on mutual compulsory disclosure for both prosecution and defence, but the requirements of that regime are now placed within a comprehensive system of pre-trial procedures, the introduction of which corresponded with reforms to the committal process.

Three procedures for regulating disclosure are in operation in Victoria, although one of these is non-statutory in nature. First, following the laying of a charge and committal, there is an optional post-committal conference scheme. However, it seems this option is rarely, if ever, used and is, in effect, 'a dead letter'.<sup>17</sup>

Secondly, there is a case conference scheme which operates under Practice Direction No 1 of 1999 issued by the Chief Justice of the County Court. Three judges have been assigned to this scheme. These conferences are informal, public in nature and held off the record. Their purpose is to permit the prosecution and defence to explore the issues in the case and, by doing so, hopefully shorten the criminal trial process. At this early stage it is reported that the scheme has a 40 to 50% success rate in producing early guilty pleas.<sup>18</sup>

Thirdly, for those cases which remain at issue after the case conference stage, the 1999 Act provides for a system of 'directions hearings'. In practice, the same three judges are involved in these hearings as at the case conference stage of the process. Under the directions hearings scheme, the prosecution must outline its case 28 days before the listed trial date; the defence must respond by identifying the matters in the prosecution summary with which it takes issue, and the basis on which issue is taken, 14 days before the trial date. However, the accused is not required to disclose the identity of any defence witness other than an expert witness, or whether the accused will give evidence.<sup>19</sup> One feature of the scheme is that the court may determine questions of law and fact, as well as mixed questions of law and fact, at the 'directions hearing'.<sup>20</sup> Further, questions of law can be determined in the 14 day period before the trial is due to begin by an exchange of written arguments.<sup>21</sup> In fact, a wide discretion is given to the judge in charge of a 'directions hearing' to dispense with any of the standard disclosure requirements if it is in the interests

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<sup>16</sup> This account of that scheme is based on M Weinberg, *Criminal Trial Process and the Problem of Delay*, Paper presented at the AIJA/SCAG Conference on Criminal Trial Reform, Melbourne, 24-25 March 2000.

<sup>17</sup> Ibid; and telephone advice from Dr Chris Corns of the School of Law and Legal Studies, La Trobe University.

<sup>18</sup> M Weinberg, n 16.

<sup>19</sup> Section 7 (4), *Crimes (Criminal Trials) Act 1999* (Vic).

<sup>20</sup> Section 5 (5). But note Weinberg's comment that, 'Although the Act permits the listing judges to resolve preliminary questions, those judges sensibly have taken the view that this is not normally appropriate' M Weinberg, n 16.

<sup>21</sup> Section 10 (3).

of justice to do so.<sup>22</sup> Leave is required by either the prosecution or the defence if evidence is sought to be led in the trial which represents a substantial departure from an agreement reached in a post-committal conference, or from written openings.<sup>23</sup>

The 1999 Act provides for sanctions where there has been a failure on the part of the defence to adhere to the disclosure requirements. The judge will be able to make an award of costs,<sup>24</sup> comment to the jury on the failure to comply,<sup>25</sup> as well as take such failure into account when sentencing.<sup>26</sup> The trial judge may also grant leave to a party to comment on a departure or failure from the disclosure requirements, but only if he/she is satisfied that the proposed comment is relevant and is not likely to produce a miscarriage of justice.<sup>27</sup> Further provision is made concerning comments made by either the trial judge or a party as this relates to the drawing of an inference of guilt or the weighing of the probative value of the prosecution's evidence. Basically, the rule is that the 1999 Act is not intended to alter the pre-existing arrangements.<sup>28</sup> An order to pay costs may also be made against a defendant's lawyer where there has been an 'unreasonable failure' to comply with the disclosure requirements.<sup>29</sup>

These reforms also had an effect on the provisions of the *Sentencing Act 1991* (Vic), in as much as, when considering the conduct of the offender under section 5 (2C) of that Act, the court may take into account the extent to which he or she complied with a requirement of the 1999 disclosure scheme.

To date, the most substantial commentary on this 1999 scheme is that produced by the Hon Mark Weinberg of the Federal Court of Australia. He notes, for example, that there are 'many contentious matters dealt with in the 1999 Act, including in particular the requirement that both parties produce detailed written statements of their position'. Justice Weinberg continued:

The defence is required to identify not only what evidence the accused is prepared to admit, but also what evidence he is not prepared to admit, and the basis on which he takes issue with any

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<sup>22</sup> Section 5 (5)(h).

<sup>23</sup> Section 15.

<sup>24</sup> Section 24. This applies to all parties.

<sup>25</sup> Section 16.

<sup>26</sup> Section 5 (2D) of the *Sentencing Act 1991* (Vic) as amended by the *Crimes (Criminal Trials) Act 1999*.

<sup>27</sup> Section 16 (2), *Crimes (Criminal Trials) Act 1999*.

<sup>28</sup> Section 16 (3).

<sup>29</sup> Section 19 (1).

facts asserted by the prosecution. That approach fails to take account of the practical difficulty which many defence lawyers face in obtaining precise and meaningful instructions from their client at an early stage of the proceedings. The level of detail concerning the accused's position required by the Act may be thought to involve serious inroads into the principle that an accused should not be required to assist the prosecution in procuring a conviction.<sup>30</sup>

### **The United Kingdom**

The current legal position in other parts of the United Kingdom is set out in NSWLRC's discussion paper, *The Right to Silence*, where it is said that 'All alleged offences in England, Wales and Northern Ireland into which an investigation has commenced since 1 April 1997 are subject to a general, legislative pre-trial disclosure regime'.<sup>31</sup> Among other things, it is explained that:

In trials for indictable offences, where the prosecution undertakes primary disclosure, the defence is required to provide the court and the prosecution with a defence statement setting out the general nature of the defence and the matters which the defence will dispute, giving reasons. If the defence involves alibi evidence, particulars are required. The defence statement must be supplied within 14 days of the defence receiving primary disclosure from the prosecution, although the defence can apply to the court for an extension of this time limit.<sup>32</sup>

In Scotland the situation is somewhat different, as is the system of criminal justice generally. There, it seems, the principle of defence disclosure has been recognised for many years. Ten days before trial, the defence must disclose a plea of special defence (alibi, insanity, automatism, identification, self-defence). Three days before trial, the defence must provide the prosecution with a list of the defence witnesses. In addition, it is said that the accused may be required in serious cases to submit to an examination by the prosecutor, which suggests the extent to which the Scottish model of criminal law differs from our own.<sup>33</sup>

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<sup>30</sup> M Weinberg, n 16.

<sup>31</sup> See Appendix A.

<sup>32</sup> NSWLRC, *The Right to Silence*, n 5, para 4.37. In 1987 a separate scheme was established for serious and complex fraud cases (para 4.43).

<sup>33</sup> This account is based on –GD McKinnon, 'Accelerating defence disclosure: a time for *Canadian Criminal Law Review* 59 at 63. See also the account in NSWLRC, Criminal Procedure discussion paper 14/1987, n 6, paras 4.52-4.53.

## Canada

Since the decision of the Canadian Supreme Court in *Stinchcombe* in 1991 the prosecution has a legal duty to disclose all relevant information to an accused. Prosecution disclosure is to occur before the accused is called upon to elect a mode of trial or to plead.<sup>34</sup> However, against the trend in many other jurisdictions, this move towards formalising pre-trial disclosure by the prosecution does not seem to have been accompanied by the introduction of comparable requirements for the defence. As in NSW, the issue has been the subject of considerable debate in Canada<sup>35</sup> where, at present, defence disclosure is limited by law to the following situations: under the common law, timely and adequate disclosure of an alibi defence must be made;<sup>36</sup> under section 276 of the Canadian Criminal Code the defence is required to provide written notice of an intention to cross-examine a complainant on previous sexual activity; and there is also an obligation on the defence to give the Crown notice of any applications relating to the *Canadian Charter of Rights and Freedoms* that the defence will be making at trial.<sup>37</sup>

That apart there do not appear to be any formal, legislative requirements for defence disclosure in Canada.<sup>38</sup> A reciprocal duty to disclose has its advocates but they are yet to make an impression on the prevailing law. As the Supreme Court stated by way of obiter in *Stinchcombe*:

The defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role.<sup>39</sup>

Note that the debate in Canada is informed by the Charter guarantees of the presumption

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<sup>34</sup> G Ferguson, 'Recent developments in Canadian criminal law' (2000) 24 *Criminal Law Journal* 248 at 259-261.

<sup>35</sup> For an example of the case for defence disclosure see -DM Tanovich and L Crocker, 'Dancing with Stinchcombe's ghost: a model proposal for reciprocal defence disclosure' (1994) 26 *Criminal Reports* (4<sup>th</sup>) 333-351. For an example of the case against defence disclosure see -CB Davison, 'Putting ghosts to rest: a reply to the modest proposal for defence disclosure of Tanovich and Crocker' (1995) 43 *Criminal Reports* (4<sup>th</sup>) 105-122.

<sup>36</sup> For an account of this see -BE Maude, 'Reciprocal disclosure in criminal trials: stacking the deck against the accused, or calling defence counsels bluff?' (1999) 37 *Alberta Law Review* 715 at 717; S Costom, 'Disclosure by the defence: why should I tell?' (1996) 1 *Canadian Criminal Law Review* 73 at 85.

<sup>37</sup> MD Tochor and KD Kilback, 'Defence disclosure: is it written in Stone?' (2000) 43 *Criminal Law Quarterly* 393 at 407-408.

<sup>38</sup> For a discussion of more informal practices associated with pre-trial conferences see -CB Davison, n 35 at 106.

<sup>39</sup> [1991] 3 SCR 326, 8 CR (4<sup>th</sup>) 277 at 283.



of innocence<sup>40</sup> and against self-incrimination.<sup>41</sup> For defence disclosure to be introduced, presumably it would have to be shown to be the kind of reasonable limit as can be ‘demonstrably justified in a free and democratic society’ under section 1 of the Charter. Alternatively, the case may be made that a carefully formulated regime of defence disclosure would not impinge upon either guarantee, in which event the section 1 issue would not arise. It is worth noting in this context that, notwithstanding the Fifth Amendment’s prohibition against self-incrimination, mandatory defence disclosure is a feature of federal and State laws in the US.<sup>42</sup>

## 2. DEFENCE DISCLOSURE – KEY ISSUES AND QUESTIONS

From the foregoing debate it is clear that compulsory pre-trial defence disclosure is a longstanding, technically complex and normatively charged matter. To a large extent the argument against defence disclosure focuses on issues of principle, in particular on the bundle of rights associated with the presumption of innocence, the right to silence and the protection against self-incrimination. On the other side, the case for defence disclosure focuses more on practical issues, especially as these relate to the efficiency of the criminal justice system. It should be noted, however, that the case for defence disclosure can also be presented in theoretical terms. For example, it can be said that such disclosure facilitates the fundamental purpose of a criminal trial which is to discover ‘the truth’. Alternatively, arguments against defence disclosure can also take a practical turn, especially when countering the empirical claims made about what are called ‘ambush defences’. The following is a summary of the key questions and issues which emerge from this debate:

### Practical/procedural questions

As with so many issues, where defence disclosure is concerned the question of whether it does or does not transgress certain fundamental principles may come down to the detail of whatever regime is in place. Certainly, the efficiency of pre-trial disclosure will depend very largely on such matter of detail. Some relevant questions include:

- Should a regime of defence disclosure apply to all criminal cases or only to those of a complex kind? Perhaps another way of posing this question is to ask whether defence disclosure should only operate in relation to indictable offences, or more generally?
- Should the defence be compelled to disclose all its intended defences to the prosecution, or should this be limited in some way to what might be called ‘special defences’?
- If disclosure of alibi evidence is an acceptable exception to the principle of the right to silence, as with the defence of diminished responsibility, why isn’t disclosure acceptable for other defences? What makes these present exceptions to the rule against

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<sup>40</sup> Section 11 (d).

<sup>41</sup> Section 11 (c).

<sup>42</sup> See BE Maude, n 36 at 727-733.

defence disclosure really so exceptional?

- Should the defence be required to identify its case to the same depth and breadth as the prosecution? If not, how and where are the limits of defence disclosure to be drawn?
- If some form of defence disclosure is to be required, should there be any material or information (for example, the evidence the defence is not prepared to admit) which is exempt from disclosure? If so, should this exemption be expressed in absolute or qualified terms, or should it be made subject to the general discretion of a court?
- Should disclosure procedures contain an element of flexibility, so that parties are not 'locked in' to their pre-trial description of their case?<sup>43</sup> Should disclosure obligations continue up till the trial is at an end, or should they cease once the trial begins?
- On the other hand, should the prosecution at least be prevented from changing its case once the disclosure process has been concluded, as recommended by the SCAG Working Group on Criminal Trial Procedure?<sup>44</sup> If so, should such a prohibition be absolute or conditional in nature?
- What of the crucial question of timing? Should disclosure only take place after the prosecution has performed its obligations in any reciprocal regime?
- Should defence disclosure be compulsory or voluntary in nature. Alternatively, should provision be made for a combination of the two approaches? On this issue, Judge Sulan of the District Court of South Australia has commented that defence disclosure should not be compulsory, stating 'Quite apart from questions concerning the constitutionality of compulsory disclosure, such requirements involve a basic shift in conception of what amounts to a fair trial in Australian law...any moves toward compulsory defence disclosure must be tempered by the understanding that the defence both has the right to require the prosecution to prove its case, and that the defence need do nothing that would assist the prosecution to that end'.<sup>45</sup>
- Should defence disclosure be on a case by case basis, or should it be introduced as a rule of general application under a formal pre-trial disclosure regime? Alternatively, should separate options be available depending on the complexity of the case at hand?

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<sup>43</sup> C Corns, *Anatomy of Long Criminal Trials*, AIJA 1997, p 112.

<sup>44</sup> Standing Committee of Attorneys-General, *Working Group on Criminal Trial Report*, September 1999. Recommendation 27 would prevent the prosecution from adducing additional evidence after its final case statement has been provided to the court, unless a reasonable explanation is provided as to why earlier disclosure was not made or the interests of justice otherwise require that the prosecution should be permitted to lead the evidence.

<sup>45</sup> JR Sulan, *Defence co-operation in the trial process*, Paper presented at the AIJA/SCAG Conference on Criminal Trial Reform, Melbourne, 24-25 March 2000.

- Should the identity of all defence witnesses be made known to the prosecution,<sup>46</sup> or should such a requirement be limited to the disclosure of the identity of defence expert witnesses? Likewise, should the prosecution have a right to access to the evidence of all defence witnesses, or only to those expert witnesses the defence intends to call at the trial?
- What special arrangements, if any, are to be made for the unrepresented or self-represented accused?
- Should defence disclosure obligations be combined with statutory commitments to the availability and delivery of legal aid?

### Questions concerning sanctions

What sanctions should apply for a failure to comply with defence disclosure obligations? Conversely, should the emphasis be placed on encouraging compliance, perhaps by means of a sentencing discount scheme for those who cooperate with the defence disclosure regime? Moreover, should sanctions apply where previously disclosed evidence is not in the end used by the defence at trial? Should such a sanction be available against the defendant and/or the defendant's legal representative?

Finding a sanction for failure to disclose that does not overly infringe the rights of accused persons is perhaps the most difficult issue of all where defence disclosure is concerned. It is arguable that evidence which tends to exculpate an accused person should never be excluded from the evidence in the trial.<sup>47</sup> As Justice Sulan of the District Court of South Australia has observed, 'To prevent evidence of a defence being lead, where such a defence might exist, would be to raise doubts about the fairness of the trial process itself'.<sup>48</sup> Other possible sanctions include:

- allowing the judge or the prosecution to comment to the jury on the accused's failure to disclose the defence at an early stage, and inviting the jury to draw adverse inferences from the non-disclosure. Of this option Justice Sulan commented, 'I cannot conceive of any situation in which adverse comment would do anything other than bring the

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<sup>46</sup> Note that the 1993 UK Royal Commission on Criminal Justice recommended against requiring defence counsel to disclose the names of the witnesses to be called because (i) such decisions are often made in the course of the trial, and (ii) it could give an advantage to the Crown where the prosecution called a defence witness that the defence had decided not to call: see -BM Maude, n 36 at 719.

<sup>47</sup> G Griffith and H Figgis, *Crimes Amendment (Diminished Responsibility) Bill 1997: Commentary and Background*, NSW Parliamentary Library Research Service Briefing Paper No 19/1997, pp 24-25.

<sup>48</sup> JR Sulan, 'Defence co-operation in the trial process', n 45.

fairness of the trial process into question'.<sup>49</sup>

- the Court ordering costs against an accused who does not comply with disclosure requirements;
- the Court taking an accused's failure to notify the defence into account in sentencing;
- a right for the prosecution to have the case adjourned, or to call evidence in rebuttal or to recall witnesses. These are currently procedures requiring the leave of the Court.<sup>50</sup> Of course, these measures to some extent defeat one of the purposes of defence disclosure, to expedite trials; and
- the Court being empowered to impose restrictions upon the cross-examination of Crown witnesses.<sup>51</sup>

### **Empirical questions concerning efficiency**

A key argument on behalf of pre-trial defence disclosure is that it would increase the efficiency of the criminal justice system. As the NSWLRC said in its 1987 discussion paper on Criminal Procedure:

The necessity for the prosecution to present lengthy evidence of matters which are not at issue between the parties would be avoided. This should reduce the duration and complexity of the trial proceedings and eliminate unnecessary inconvenience to witnesses whose evidence is not disputed. In addition, the risk of proceedings being terminated or interrupted because of unexpected developments would be reduced.<sup>52</sup>

Similar arguments were submitted to the NSWLRC in the context of its inquiry into the right to silence. Among other things, it was submitted that 'Adjournments in response to unexpected developments in the course of the trial would be eliminated, also shortening trials'.<sup>53</sup> Following on from this, the NSWLRC also noted the argument that 'compulsory

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<sup>49</sup> Ibid; a contrasting argument is presented in GL Davies, 'The prohibition against adverse inferences from silence: a rule without a reason?' - Part 1 and Part 11 (2000) 74 *The Australian Law Journal* 26 and 99.

<sup>50</sup> Leave for the prosecution to re-open their case after the defence has presented its case is only granted in exceptional circumstances: *R v Chin* (1984) 157 CLR 671; JD Heydon, *Cross on Evidence*, 6<sup>th</sup> Australian Edition, Butterworths 2000, pp 515-525.

<sup>51</sup> This was recommended by the SCAG Working Group on Criminal Trial Procedure, subject to the overriding consideration of the interests of justice -SCAG report, n 44 at 10.

<sup>52</sup> NSWLRC, Discussion paper on Criminal Procedure, n 6 at para 5.10.

<sup>53</sup> NSWLRC, The Right to Silence, n 5 at para 4.58.

defence pre-trial disclosure would lead to more just trial outcomes by preventing the defence from taking the prosecution by surprise at trial, leading evidence which the prosecution could not reasonably have anticipated and did not have any opportunity to investigate'. Over recent years an important aspect of this argument has been directed against 'ambush defences' which, as the NSW DPP has reportedly claimed, puts the 'Crown at an unfair disadvantage'.<sup>54</sup> The Attorney General has also spoken of the 'need to stop attempts at ambush defences where surprise last-minute evidence is introduced into court to delay the process and to traumatise victims of crime'.<sup>55</sup> In relation to these issues, the following questions can be asked:

- Has the case against 'ambush defences' been made on an empirical basis?

It is argued in this respect that, although the case in support of defence disclosure has focused on the waste and inefficiencies associated with the introduction of surprise or ambush defences of which the prosecution has had no warning, these concerns have not been borne out by the relevant empirical research. For example, in its final report of March 1999 into the right to silence, the Parliament of Victoria's Scrutiny of Acts and Regulations Committee commented that submissions were 'generally dismissive' of the idea that 'ambush' defences cause a problem, with the Victorian Director of Public Prosecutions, for example, conceding that 'the "ambush" defence may be more theoretical than real'. The report went on to say that 'This is consistent with the English research which suggests that 'ambush' defences are relied on in somewhere between 1.5% and 10% of cases. The higher of these estimates are arguably over-inclusive, in that they may take an excessively broad interpretation of the concept of the 'ambush' defence'.<sup>56</sup> The NSWLRC has also acknowledged that 'it will only be infrequently that an experienced Crown prosecutor will be unaware of or be unable to anticipate a defence'.<sup>57</sup>

- Can the savings and benefits in costs and time to the criminal justice system be demonstrated, either by reference to NSW, or to any other relevant jurisdiction? Is there any research on this issue from any comparable jurisdiction? If so, what problems have defence disclosure regimes in other jurisdictions experienced and what has been done by way of reforming these regimes? Have these reforms worked?

A partial answer to these difficult questions is that some work has been undertaken in other jurisdictions, notably in relation to the regime established under Victoria's *Crimes (Criminal Trials) Act 1993*. The NSWLRC identified various problems experienced with the regime, including 'defence exploitation of drafting deficiencies in the case statement, defence responses which consist of a global denial with no detail whatsoever, the inability

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<sup>54</sup> D Humphries, Law chief bids to head off defence ambush in court', *The Sydney Morning Herald*, 29 February 2000.

<sup>55</sup> NSWPD, (Hansard Proof, Legislative Assembly), 8 August 2000, pp 7-8.

<sup>56</sup> Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Final Report - Inquiry into the Right to Silence*, March 1999, p 6.

<sup>57</sup> NSWLRC, *The Right to Silence*, n 5 at para 4.60.

of unrepresented defendants to comply and judicial reluctance to impose sanctions for non-compliance'.<sup>58</sup> For Chris Corns, one of the leading researchers in this field, the response was to argue for the reform of the disclosure scheme, not abandon it.<sup>59</sup> This occurred in 1999, following what the then Attorney General, Mrs Wade, described as 'substantial research and consultation about how the trial process could be improved'.<sup>60</sup> Mrs Wade commented of the 1993 regime: 'Unfortunately, it seems that the legal profession has been reluctant to take advantage of the provisions in the legislation designed to isolate the issues and assist in controlling the trial'.<sup>61</sup> At this early stage no formal research appears to have been undertaken on the 1999 scheme, but anecdotal evidence suggests that it is an improvement on its 1993 pre-decessor,<sup>62</sup> with Justice Mark Weinberg pointing to the successful use of the three specific judges to supervise the pre-trial 'directions hearings'.<sup>63</sup>

### Questions of principle

The question of efficiency itself is of course tied up with complex issues of perspective and principle. For those concerned primarily with reducing costs and delays in the criminal justice system, the main criteria for judging the success or otherwise of a pre-trial disclosure regime is in terms of its efficiency in producing pre-trial guilty pleas, thereby avoiding the need for so many lengthy criminal trials. On the other side, commentators concerned more with the civil liberties aspect to the question may look upon this as yet another form of pressure on often vulnerable individuals to co-operate with the prosecuting authorities.<sup>64</sup> The claim may also be made that guilty pleas from those charged with indictable offences are already relatively high in NSW.<sup>65</sup> These contrasting perspectives may not be mutually exclusive, but they do suggest the different weight that may be given to the range of factors involved in the pre-trial disclosure debate.

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<sup>58</sup> Ibid, at para 4.28.

<sup>59</sup> C Corns, n 43 at 111-114.

<sup>60</sup> VPD (Legislative Assembly), 6 May 1999, p 812.

<sup>61</sup> Ibid.

<sup>62</sup> Telephone advice from Dr Chris Corns of the School of law and Legal Studies, La Trobe University.

<sup>63</sup> M Weinberg, n 16.

<sup>64</sup> D Brown et al, *Criminal Laws*, 2<sup>nd</sup> Edition, The Federation Press 1996, p 194.

<sup>65</sup> Ibid, p 186. However, the empirical research conducted by Weatherburn and Baker indicates that the problem is with the lateness of many guilty pleas, with only around 6% being entered between the time a trial date is set and the day of the trial. Conversely, around 60% of guilty pleas are entered on the day of the trial itself -D Weatherburn and J Baker, *Delays in criminal case processing: an empirical analysis of delay in the NSW District Criminal Court* (2000) 10 *Journal of Judicial Administration* 5 at 13.

The most discussed argument against defence disclosure is that it would infringe several fundamental principles of the criminal justice system. In its discussion paper, *The Right to Silence*, the NSWLRC noted arguments to the effect that:

Requiring the defendant to provide information about the defence case before trial would be inconsistent with the principle that the burden of proving the defendant's guilt is on the prosecution, which is required to establish guilt without any assistance from the defendant. Compulsory defence pre-trial disclosure might also operate in practice as a form of compulsion on the defendant, inconsistent with the defendant's privilege against self-incrimination. It is also argued that compulsory defence pre-trial disclosure would be inconsistent with the presumption of innocence.<sup>66</sup>

Clearly, such concerns raise issues of a very complex kind, involving considerations which touch upon legal theory, history and practice.<sup>67</sup> At its broadest the question is, 'does the objective of reducing the duration and complexity of criminal proceedings justify the introduction of rules which require the defence to disclose its case or any specific part of it'? Should the interests of the prosecution which are served by mandatory defence disclosure prevail over the right of an accused to reserve his or her defence? The answer may be general in nature, or it may turn on the detail of the disclosure scheme concerned. Either way, the main issues at stake in the debate can be summarised as follows:

- Is compulsory defence disclosure inconsistent with the principle against self-incrimination? In 1993 the UK Royal Commission on Criminal Justice argued that no such inconsistency was involved: 'Where defendants advance a defence at trial it does not amount to an infringement of their privilege not to incriminate themselves if advance warning of the substance of such a defence has to be given. The matter is simply one of timing'.<sup>68</sup>
- Is compulsory defence disclosure inconsistent with the doctrine of the right to silence? Among those who advocate such disclosure, this claim is answered in different ways. For some, there is no infringement;<sup>69</sup> for others, any infringement is kept within acceptable limits and/or is outweighed by societal interests in the efficiency of the

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<sup>66</sup> NSWLRC, *The Right to Silence*, n 5 at para 4.62.

<sup>67</sup> GL Davies, 'The prohibition against adverse inferences from silence: a rule without a reason?' - Part 1 and Part 11 (2000) 74 *The Australian Law Journal* 26 and 99.

<sup>68</sup> Report of the Royal Commission on Criminal Justice, Cm 2263 (1993) at pp 97-98.

<sup>69</sup> The UK Royal Commission on Criminal Justice concluded that compulsory pre-trial disclosure did not involve a breach of fundamental principles, because the only difference between pre-trial disclosure and advancing a defence at trial was timing: see NSWLRC, *The Right to Silence*, n 5 para 4.62.

criminal justice system,<sup>70</sup> as well as in ‘the search for truth’ in criminal trials.<sup>71</sup>

- Is compulsory defence disclosure inconsistent with the presumption of innocence - that ‘one golden thread (running through) the English Criminal Law’<sup>72</sup> - which places the ultimate burden of establishing guilt on the Crown? From that presumption there follows the principle that the burden of proving guilt rests solely upon the prosecution. Moreover, the presumption can be said to have implications for both the persuasive burden of proof in criminal cases, as well as the evidential burden to show that there is sufficient evidence of the matters which need to be established to secure a conviction. In respect to both, it is for the prosecution alone to establish first that there is a case to answer and afterwards that guilt has been proved beyond reasonable doubt. It is not that the introduction of compulsory pre-trial defence disclosure would reverse either the onus of proof or the evidential burden. In practice, however, it may be seen as weakening the rule that a defendant cannot be compelled to assist in a process which may result in the proof of his or her guilt. This is not so much a question of whether the issues, defences or evidence that a defendant may wish to raise are, or may be, self-incriminating. The question, rather, is whether, as a matter of principle, a defendant should be required to assist the prosecution in the formulation of its case?
- Would defence disclosure facilitate ‘the search for truth’ in criminal trials? Is the search for truth a fundamental purpose of such trials? Reciprocal disclosure as between prosecution and defence, it is argued by Tanovich and Crocker, is ‘consistent with a fundamental purpose of a criminal trial: the search for truth’.<sup>73</sup> Further, Tanovich and Crocker, writing from a Canadian perspective, recognise that the search for truth is not an absolute in a criminal trial and that it must sometimes yield to other values, such as fairness. However, their argument is that a modest and carefully structured scheme of reciprocal disclosure can ‘enhance the truth-seeking function of the trial without jeopardizing the fairness of the accused’s trial’.<sup>74</sup>
- Often the case for defence disclosure combines an argument for efficiency with the contention that ‘the search for truth’ is indeed a fundamental purpose of criminal trials. But are these goals always consistent? This may not be the case if, for example, as a sanction against the defence for non-compliance, the court may allow evidence to be

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<sup>70</sup> C Corns, n 43 at 113. Corns notes that concerns about fundamental principles have to be seen in the context of the problems created by long criminal trials’..

<sup>71</sup> DM Tanovich and L Crocker, n 35 at 342.

<sup>72</sup> *Woolmington v DPP* [1935] AC 462 at 481 (Viscount Sankey LC)

<sup>73</sup> DM Tanovich and L Crocker, n 35 at 339-341.

<sup>74</sup> DM Tanovich and L Crocker, n 35 at 340. Under their modest proposal the defence should be required to disclose to the Crown: (a) the names and statements of witnesses, other than the accused, whom it plans to call to testify; (b) notice of any defence that will be presented; and (c) the reports of experts whom the defence intends to call to substantiate the defence



adduced without formal proof.

- What of the question of the imbalance in resources between the prosecution and most defendants? Is the prohibition against defence disclosure one method by which that imbalance has been addressed? Again from a Canadian perspective, Chief Justice Lamer commented in this respect that, having regard to the protections associated with the privilege against self-incrimination, ‘it is up to the state, with its greater resources, to investigate and prove its own case, and that the individual should not be conscripted into helping the state fulfil this task’.<sup>75</sup>

#### 4. PRE-TRIAL DEFENCE DISCLOSURE - THE DEBATE IN NSW

##### Court delays generally

As the Second Reading speech for the Pre-trial Disclosure Bill 2000 makes clear, in NSW, as elsewhere, the debate about pre-trial defence disclosure is part of the wider discussion about court delays and the general efficiency of the criminal justice system. That discussion has a long history in NSW. As Weatherburn and Baker commented recently, ‘Trial court delay has been a persistent problem in the NSW District Criminal Court’. They add that ‘The delay in bringing matters to trial in the late 1980s prompted widespread public criticism of the NSW court system’, a development which in the 1990s resulted in the introduction of many administrative and legislative initiatives to reduce court delays.<sup>76</sup> These have ranged from the introduction of a statutory discount scheme for early guilty pleas in 1990, to a ‘sentence indication scheme’ in 1992 and, most recently in 1999, the assignment of a List Judge to the Sydney Registry of the NSW District Criminal Court to oversee criminal case progress.<sup>77</sup>

By way of an indication of the effectiveness of some of these initiatives, in its 1996 *Report on Customer Service in Courts Administration*, the Public Accounts Committee of the NSW Legislative Assembly found that ‘the objective of reducing court backlog and delays is as important now as it was in the late 1980s’.<sup>78</sup> Three years on, a report by the Auditor General into the *Management of Court Waiting Times* observed that, ‘when compared with available information against the other Australian Supreme/District Court, the operations in NSW compare unfavourably in terms of overall case finalisation times’.<sup>79</sup>

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<sup>75</sup> *R v P (M.B.)* [1994] 1 SCR 555; MD Tochor and KD Kilback, n 37 at 399.

<sup>76</sup> D Weatherburn and J Baker, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court*, NSW Bureau of Crime Statistics and Research 2000, p 1.

<sup>77</sup> For a fuller account of these various initiatives see D Weatherburn and J Baker, n 65.

<sup>78</sup> Public Accounts Committee, *Customer Service in Courts Administration: The Missing Dimension*, Report No 9/51, June 1996, p 22.

<sup>79</sup> NSW Auditor-General, *Performance Audit Report: Management of Court Waiting Times*, September 1999, p 3. The report acknowledged that This could in part be caused by

This more general issue of court delays and the concerns which have been expressed about the inefficiencies of the criminal justice system were considered in detail in a 1996 briefing paper by the NSW Parliamentary Library Research Service titled, *Dealing With Court Delays in NSW*. It is enough to emphasise in this context that these concerns form a constant backdrop against which the more immediate debate about defence disclosure has taken place.

### **NSWLRC's discussion paper from 1987**

As for the specific subject of pre-trial disclosure, this has been raised and considered several times in recent years. For example, it was discussed in detail by the NSW Law Reform Commission in a discussion paper from 1987. Among other things, the discussion paper took the view that special rules are required in respect of expert and technical evidence and recommended that 'Any party proposing to call evidence of an expert, scientific or technical nature should disclose that intention to the court before trial and provide an outline of the evidence and the names of the witnesses who are to give it'.<sup>80</sup> That apart, it was recommended that the defence should not be compelled to disclose the names and addresses of the witnesses intended to be called and that, if there is to be mandatory disclosure by the defence of expert and technical evidence, it 'should be limited to that evidence which the defence proposes to call at trial'.<sup>81</sup> The Commission commented in this respect, 'We think that to require disclosure of all information, whether it is intended for use at trial or not, would impose an unconscionable burden on the accused person and would be an unjustifiable invasion of individual privacy'.<sup>82</sup>

More generally, the Commission favoured a scheme characterised by mutual or reciprocal pre-trial disclosure by both prosecution and defence.<sup>83</sup> The discussion paper commented:

The Commission's view is that a system where the prosecution and the defence both make relevant disclosure is undoubtedly more reasonable, effective and professional than one where there is either no disclosure or disclosure by the prosecution alone. We believe that there are many circumstances in which disclosure by the defence before trial is in the best interests of the accused

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significant differences between States in term of the adequacy of resources in relation to caseload'.

<sup>80</sup> NSW Law Reform Commission, *Criminal Procedure Discussion Paper*, n 6 para 5.66.

<sup>81</sup> *Ibid*, para 5.36.

<sup>82</sup> *Ibid*.

<sup>83</sup> *Ibid*, paras 4.95 and 5.64. See too NSW Law Reform Commission, *Criminal Procedure: Procedure from Charge to Trial: A General Proposal for Reform*, Discussion Paper 13/1986, paras 71-74.

person. However, we recognise that disclosure by the defence is an area in which it is difficult to advocate proposals for without the benefit of public consultation and consideration of the competing principles.<sup>84</sup>

On some issues the views of Commission members were divided but there seemed to be general agreement that ‘There should be a range of measures designed to encourage rather than compel disclosure by the accused person’.<sup>85</sup>

### **The NSW Attorney General’s discussion paper from 1989**

Two years later, in May 1989, the NSW Attorney General’s Department issued a *Discussion Paper on Reforms to the Criminal Justice System* which, after considering in detail the issue of pre-trial defence disclosure, put forward the following preferred option for reform:

The accused should be required to disclose to the prosecution and the Court:

- (i) the general nature of his or her defence; and
- (ii) the areas in which the prosecution case is disputed.

Where the accused departs from the nature of his or her disclosed defence or fails to comply with a requirement of disclosure the trial Judge or the prosecution (with leave of the Judge) may refer to this and invite the jury to draw appropriate inferences.<sup>86</sup>

It was explained that the requirement under (i) would involve in many cases ‘simply a disclosure of the “title” of the defence (eg, consent, intoxication, self-defence, etc). In other cases the requirement of disclosure would be satisfied by a statement such as “the person who committed the crime of which I have been charged was not me” or “the fire which destroyed my house was not deliberately lit by me but was accidental”’.<sup>87</sup> Examples of the ‘areas in which the prosecution case is disputed’ would be where ‘it is admitted that the offence occurred but it is denied that it was the accused who committed the offence’, or where ‘it is admitted that a fire, started by me, destroyed my house which was insured, but I started the fire accidentally rather than deliberately’.<sup>88</sup>

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<sup>84</sup> NSW Law Reform Commission, *Criminal Procedure Discussion Paper*, n 6 para 5.64.

<sup>85</sup> *Ibid*, para 5.68.

<sup>86</sup> NSW Attorney General’s Department, *Discussion Paper on Reforms to the Criminal Justice System*, May 1989, p 56.

<sup>87</sup> *Ibid*, p 54.

<sup>88</sup> *Ibid*, pp54-55.

The above discussion paper was considered by Professor Mark Aronson in his 1992 Australian Institute of Judicial Administration report on *Managing Complex Criminal Trials*. Aronson noted that the proposal for reform met with ‘substantial opposition’ and that it was not pursued by the NSW Attorney General.<sup>89</sup> Aronson commented further that ‘There are obvious attractions in requiring the defence to indicate at least the broad outline of their case at the outset of the case. No compelling “civil liberties” argument can be made against requiring to indicate whether the defence denies: the requisite mental state, and, if so, which mental state is asserted; the authenticity of documents’.<sup>90</sup>

### **JA Nader QC’s submission to the NSW Attorney General**

As part of the ongoing debate about the cost and efficiency of the criminal justice system, in 1993 the question of managing complex criminal trials was taken up again in NSW by JA Nader QC in his submission to the Attorney General. Basically, the submission recommended that the powers of a trial judge at a ‘preparatory hearing’<sup>91</sup> should include ordering the prosecution to serve on the accused a ‘case statement’ to which the accused would then have to reply in the form of a ‘defence response’. Such response should either (a) admit, (b) identify as non-contentious or as not to be admitted or denied, or (c) deny any fact or matter alleged in the prosecution case statement.<sup>92</sup> Further, it was recommended that the defence response should ‘specify any positive defence that it is intended to rely on’. As well, full notice should be given of all expert evidence: ‘I can see no legitimate forensic purpose in allowing a party to a criminal trial to catch another party by surprise with expert evidence’, Mr Nader concluded.<sup>93</sup>

On the thorny issue of sanctions to induce an accused person to plead specifically to each material allegation of fact made in the prosecution’s case statement, Mr Nader suggested that where a material allegation of fact is not ‘specifically pleaded to’ in the defence response ‘that fact shall be taken to be admitted by the accused’.<sup>94</sup> Moreover, as an

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<sup>89</sup> M Aronson, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure*, The Australian Institute of Judicial Administration, 1992, p 30. Aronson went on to add his support to the case for defence disclosure, but only in relation to complex criminal trials. He also cautioned against adopting an approach which would have what he called a ripple effect back up the stream to the interrogation process: On the difficult question of devising appropriate sanctions for failure to comply with disclosure obligations, the report recommended that the jury should *not* be invited to draw an adverse inference in such circumstances. At the same time, it recognised that if the package of reforms it had proposed fails, then the case for limiting the right to silence will have been considerably

<sup>90</sup> Ibid.

<sup>91</sup> This Preparatory Hearing was to be part of the trial itself, not merely a pre-trial stage.

<sup>92</sup> JA Nader QC, *Submission to the Honourable Attorney General Concerning Complex Criminal Trials*, 1993, p 40.

<sup>93</sup> Ibid, p 42.

<sup>94</sup> Ibid, p 40.

inducement to co-operation he also favoured the use of discounted sentences to reduce the number of active issues at trial. Mr Nader recommended:

That any form of co-operation, at or before trial, short of a plea of guilty, that has the effect of reducing the duration or expense of a trial...should be considered by the judge when sentencing an accused person as a possible basis for mitigation of punishment.<sup>95</sup>

### **The right to silence - a new reference to the NSWLRC**

On 29 May 1997 the issue of defence disclosure was raised by the NSW Police Commissioner, Peter Ryan, who called for a number of reforms to the criminal justice system, including the introduction of ‘advanced disclosure of a defence case through pre-<sup>96</sup> Responding to this and other suggestions, a spokeswoman for the then NSW Attorney General, Hon JW Shaw MLC, said that preliminary work had already been completed on referring the matter to the NSWLRC.<sup>97</sup> This was confirmed on 25 June 1997 when the Hon JW Shaw QC said that he had decided to ‘refer the wider issue of disclosure of a defence relied on by the accused to the NSWLRC under the general heading of a review of the right to silence.’<sup>98</sup> The reference, which was made on 1 August 1997, included directions to consider:

- whether there should be any mandatory pre-trial or pre-hearing disclosure of the nature of the defence and of the evidence in support of that defence;
- if so, whether it should be possible to draw any inferences from the failure to disclose such defence or evidence, or the manner of such mandatory disclosure, or from any change in the nature of the defence or in the evidence in support of it.

### **Diminished responsibility and defence disclosure**

In fact the NSWLRC had touched on the issue of defence disclosure in its May 1997 report, *Partial Defences to Murder: Diminished Responsibility*. That report did not discuss the question of a general duty of defence disclosure, but it indicated that in its view there are strong arguments for considering a defence of diminished responsibility to be a special case justifying pre-trial disclosure.<sup>99</sup> In the event the law was changed by the *Crimes Amendment (Diminished Responsibility) Act 1997*. The Act introduced a new defence to murder of

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<sup>95</sup> Ibid, p 48.

<sup>96</sup> B Lagan, ‘Ryan sets blueprint to purge justice system’, *The Sydney Morning Herald*, 29 May 1997.

<sup>97</sup> ‘Ryan plan “return to Star Chamber”’, *The Sydney Morning Herald*, 30 May 1997.

<sup>98</sup> NSWPD (Hansard proof), 25 June 1997, p 4.

<sup>99</sup> NSWLRC, *Report 82 -Partial Defences to Murder: Diminished Responsibility*, May 1997, para 3.102.

substantial impairment by abnormality of mind. Procedurally, it also requires a person accused of murder to notify the prosecution before the trial that he or she intends to raise a defence of substantial impairment, as well as to provide the prosecution with particulars of the evidence to be given by witnesses in support of the defence.<sup>100</sup> These developments are discussed in a later section of this paper, as part of the analysis of the current legal position in NSW.

It can also be noted that in its October 1997 report, *Partial Defences to Murder: Provocation and Infanticide*, the NSWLRC commented that ‘there are strong arguments in favour of compulsory defence disclosure in respect of the defence of provocation’, but added that the issue was to be dealt with as part of the general inquiry into the right to silence.<sup>101</sup>

### **The right to silence and defence disclosure**

Subsequently, in May 1998 the NSWLRC released a discussion paper titled, *The Right to Silence*, which contains a detailed analysis of the question of pre-trial disclosure. There the Commission said that it ‘is presently minded to accept’ the arguments supporting compulsory defence pre-trial disclosure. The Commission distinguished in this respect between different aspects of the right to silence. According to the discussion paper, ‘The importance of the right to silence after the defendant has been committed for trial does not...rest upon the same basis as that which exists before the event’.<sup>102</sup> Three options for further consideration were outlined:

Option 1 would require the defence to *disclose the expert evidence it intends to rely on at trial*. Under option 2, the defence would be required to *disclose expert evidence and the intention to raise certain defences*. Under option 3, the defence would be required to *disclose both expert evidence and the nature of the issues which will be litigated at trial*.<sup>103</sup> (emphasis added)

Various consequential matters followed on from these options. First, there is the question of the consequences of non-compliance with disclosure obligations. In other words, would any sanctions be in place, including an invitation to the jury to draw an adverse inference from a failure to comply? The Commission thought that ‘the jury should be permitted to take into account’ the non-disclosure of defence evidence or its inconsistency, but added on the other side that a defendant should ‘not be able to be convicted solely on the basis of an adverse inference drawn under the court’s powers to sanction non-compliance with

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<sup>100</sup> These developments are discussed in –G Griffith and H Figgis, n 47, pp 20-26.

<sup>101</sup> NSWLRC, *Report 83 –Partial Defences to Murder: Provocation and Infanticide*, October 1997, para 2.160.

<sup>102</sup> NSWLRC, *The Right to Silence*, n 5 para 4.80.

<sup>103</sup> *Ibid*, para 4.81.

compulsory disclosure requirements'. The Commission was also of the opinion that 'Non-disclosed evidence would not be admissible except with the leave of the court'. Secondly, unrepresented defendants must be considered as a special case to which the disclosure obligations only apply by order of the court.<sup>104</sup> Thirdly, the NSWLRC discussed at some length the fact that 'A satisfactory regime of compulsory defence disclosure would require timely and adequate legal representation'. In the Commission's view, 'It is very doubtful whether, in legally aided cases, the significant additional burden of compliance with disclosure obligations could be adequately undertaken having regard to the present level of funding'.<sup>105</sup> In other words, as recognised by the Attorney General in his statement of 8 August 2000, any proposal to require compulsory defence disclosure will have resource implications for legal aid.

### **An election promise**

In the run-up to the general election of March 1999, the Labor Government promised it would introduce defence disclosure. In fact, the proposal was along the lines of option 3, as outlined by the NSWLRC, in which the defence would be 'required to outline its case, including any expert evidence before trial'.<sup>106</sup> Responding to criticisms of the proposal, the then Attorney General, Hon JW Shaw QC, said the proposed changes 'are no more than a reasonable and incremental development of the existing process', designed among other things to 'avoid the absurd situation where the prosecution is confronted with detailed scientific or medical evidence at the last minute and is expected to rebut that material without any chance to obtain alternative expert opinion'. He concluded:

The current proposal is a procedural change which does not deny the defence its fundamental right to test the Crown's case and to argue that the prosecution has not proved the charge beyond reasonable doubt.

It is intended to allow evidence presented to the jury to be properly investigated and, where appropriate, challenged.<sup>107</sup>

### **The ensuing debate**

During the course of the ensuing debate, the proposal was supported by the Director of Public Prosecutions, Mr Nicholas Cowdery QC, who is reported to have said that the

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<sup>104</sup> Ibid, para 4.97.

<sup>105</sup> Ibid, para 4.98.

<sup>106</sup> Joint Statement from the Premier of NSW, Mr Bob Carr and the Attorney General, Mr Jeff Shaw, MLC, QC, *Overhaul of Criminal Trial Process - Defence Required to Outline its case before Trial*, Media Release, 10 January 1999.

<sup>107</sup> J Shaw, 'Justice made quicker and simpler', *The Sydney Morning Herald*, 13 January 1999.

current obligations ‘put the Crown at an unfair disadvantage, leaving its case open to “ambush” by the defence’. He also thought that defendants stood to gain, ‘particularly in cases where early disclosure of their evidence revealed a major flaw in the Crown case’. Of the present arrangements, Mr Cowdery said:

This is a very inefficient system and there’s scope for a bit of commonsense in opening it up without unfairly prejudicing the accused’s defence...They say this is a weakening of the presumption of innocence. It’s no such thing. It’s about trying to help the court operate better.<sup>108</sup>

On the other side, the president of the NSW Law Society, Mr John North, was among those who criticised the proposed reform, saying: ‘It is another attempt to attack one of the great principles of justice; that is, it is up to the Crown to prove guilt beyond reasonable doubt and not the responsibility of the defence to prove innocence’. He is reported to have added that the proposal is inconsistent with the winding back of legal aid: ‘It can’t work with unrepresented defendants and, because of the nature of criminal law procedures, there is already an unnatural balance of power on the side of the prosecution’.<sup>109</sup>

Like Ian Barker QC, President of the NSW Bar Association,<sup>110</sup> the NSW Law Society’s spokesman on criminal law, Trevor Nyman, questioned the timing of the proposal, as well as its mandatory nature. Mr Nyman also argued that the problem it was intended to cure was ‘more perceived than real’. He continued: ‘More than 95 per cent of criminal cases involve pleas of guilty. Of those that do go to jury trial, more than 90 per cent are straightforward and speedy. If cases are unduly lengthy, it is almost always because the prosecution witnesses are numerous and detailed’.<sup>111</sup>

Of the few complex criminal trials which do occur, Nyman commented that these are ‘mostly shortened by agreement between prosecution and defence’. His suggestion was that voluntary disclosure protocols should be formulated:

Experienced defence lawyers properly prepared and briefed, routinely make such disclosures. There is room for wider use of protocols, notably where expert evidence, such as psychiatric materials, will be the main issue for the jury.<sup>112</sup>

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<sup>108</sup> D Humphries, Law chief bids to head off defence ambush in court, *The Sydney Morning Herald*, 29 February 2000.

<sup>109</sup> Ibid.

<sup>110</sup> Lawyers slam defence move, *The Daily Telegraph*, 13 January 2000.

<sup>111</sup> T Nyman, Changes in trials will be hardest on the vulnerable, *The Sydney Morning Herald*, 12 January 1999.

<sup>112</sup> Ibid.



Shaw responded: ‘The Government’s proposal would ensure, as far as practicable, that this process of exchange occurs in *all* cases, not merely those where there are co-operative legal practitioners involved’. Further, it was in this context that he argued that the proposed changes ‘are no more than a reasonable and incremental development of the existing process’.<sup>113</sup>

### **Ministerial statement**

On 8 August 2000 the NSW Attorney General, the Hon RJ Debus MP, foreshadowed in the Legislative Assembly the introduction of legislation in the present parliamentary session to ‘implement a pre-trial disclosure regime’ which, it was explained, will ‘allow judges to speed up criminal trials by requiring the defence to outline its case before a trial begins’. The Minister continued:

The judge will be able to require both the Crown and the defence to reveal specific evidence and material at a reasonable time before the trial. Pre-trial disclosure will forever change the conduct of complex criminal trials in New South Wales. For the first time, with the consent of the court, the defence must disclose before the actual trial whether it intends to rely on specific defences – such as insanity, self-defence, provocation, accident, duress, claim of right, automatism or intoxication – as well as the already required disclosure when a defendant seeks to rely on an alibi or impairment of mind. If those requirements are not met, the judge can refuse to allow the evidence to be admitted later.<sup>114</sup>

The new disclosure regime would be subject to review, it was said, and additional resources would be provided to both the DPP and the Legal Aid Commission. Further, it was explained that the Government planned to have the proposed legislation in place in time for the commencement of the *Crimes (Forensic Procedures) Act 2000* on 1 January 2001. That Act implements the Government’s DNA testing regime, in respect of which the Minister said ‘we need to make sure that complexities surrounding scientific proceedings do not cause more complex or lengthier trials’. This is one rationale, therefore, behind the proposed introduction of defence disclosure. Another was the ‘need to stop attempts at ambush defences where surprise last-minute evidence is introduced into court to delay the process and to traumatise victims of crime’. Summing up, the Minister commented:

The application of the new regime will decrease trial length, the average cost of complex criminal trials and the time in courtrooms, occupying available judges. The Attorney General’s Department estimates that pre-trial disclosure could reduce some complex

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<sup>113</sup> J Shaw, n 107.

<sup>114</sup> NSWPD (Hansard Proof, Legislative Assembly), 8 August 2000, pp 7-8.

matters by a number of days and provide an extraordinary saving of up to 40 per cent of time spent at trial.<sup>115</sup>

### **The continuing debate about court delays**

Days later, on the release of new figures on court delays in NSW,<sup>116</sup> the imperative of improving the efficiency of the justice system seemed more pressing than ever. NSW Bureau of Crime Statistics and Research figures showed that, among other things, in cases before the District Court where a person is on bail, it takes more than a year before an outcome is reached. This prompted the Premier to acknowledge that his Government needed to 'work harder' to cut delays.<sup>117</sup> He added that the proposed pre-trial disclosure scheme is one aspect of the Government's response to the problem.<sup>118</sup> For the Opposition, the Hon Chris Hartcher MP, said the pre-disclosure legislation would be 'welcomed', but he doubted if it would solve court delays.<sup>119</sup> Likewise, Dr Don Weatherburn, Director of the NSW Bureau of Crime Statistics and Research is reported to have said that pre-trial disclosure would 'help reduce delays' but that 'more needed to be done'.<sup>120</sup> It was against this background that the Pre-trial Disclosure Bill 2000 received its Second Reading speech on 16 August 2000.<sup>121</sup>

## **5. THE NSW DEBATE IN A WIDER CONTEXT**

As one might expect, this ongoing debate in NSW is by no means an isolated phenomenon. Indeed, discussions about the related issues of court delays, the right to silence and defence disclosure have taken place in almost every comparable jurisdiction in recent times. Three Australian examples of this trend can be noted.

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<sup>115</sup> Ibid. According to the Minister, in 1999 250 criminal trials took 10 days or more to complete.

<sup>116</sup> NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics 1999*.

<sup>117</sup> B Lagan and L Doherty, 'Delays for justice are getting longer', *The Sydney Morning Herald*, 11 August 2000. Mr Ryan also called for examination of the right of silence for the accused, as well as examination of majority jury verdicts in criminal trials.

<sup>118</sup> ABC 2BL Radio News Interview, 10 August 2000.

<sup>119</sup> L Doherty, 'Ambushes out, to speed up trials', *The Sydney Morning Herald*, 9 August 2000.

<sup>120</sup> B Langer and L Doherty, n 117. DR Weatherburn added that, to cut delays, there should be fewer adjournments and greater certainty that trials would proceed on allocated dates'. For a more detailed discussion see -D Weatherburn and J Baker, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court*.

<sup>121</sup> *NSWPD* (Hansard proof), 16 August 2000, p 72. In the light of the foregoing debate, it is worth noting that the Attorney General, the Hon RJ Debus MP, commented that the reforms he intended to introduce had been drafted at one stage with the assistance of a working party consisting of, among others, the NSW Law Society and the NSW Bar Association.

### **The SCAG Working Group on Criminal Trial Procedure<sup>122</sup>**

In the September 1999 report of the Working Group of the Australian Standing Committee of Attorneys-General (SCAG) on Criminal Trial Procedure the issue of pre-trial procedures was dealt with at length. It was viewed from the twin perspectives of the need to reduce court delays, on one side, and an underlying commitment to the adversarial system of criminal justice, on the other. With these guideposts in place, the Working Group identified requirements:

The critical features of the disclosures that we propose be made by the defence are the requirements that the defence disclose what is not in dispute and respond with regard to specific defences. Such requirements relieve the Crown of the need to prove matters not in dispute, but do not detract from the essential character of the accusatorial system. Other than alibi and expert evidence we do not suggest that the defence should be required to disclose the evidence which it proposes to call. It must be recognised that a defendant should not be expected to identify the defence case to the same depth and breadth as the Crown.<sup>123</sup>

Of this recommendation, one member of the Working Group, Michael Rozenes QC, has said that, while the recommendation may serve the goals of ‘efficiency and certainty’, it still constitutes ‘a significant departure from the traditional position’.<sup>124</sup> In recognition of this fact, Rozenes explained, ‘the Working Group by recommendations 26 (requirement for a prosecution case statement) and 27 (prohibition on the prosecution changing its case) sought to ensure that the prosecution could not profit forensically from early defence disclosure’.<sup>125</sup>

The Working Group report commented that the most difficult issue is that of ‘sanctions against a defendant for non-compliance with the pre-trial regime’. On this question the Group favoured an approach based on incentives to comply, rather than sanctions for non-compliance. It recommended therefore that those who ‘cooperate fully with the pre-trial regime should be entitled to a sentence discount if convicted’.<sup>126</sup> As Rozenes recognised,

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<sup>122</sup> The relevant recommendations are set out at Appendix B.

<sup>123</sup> SCAG Working Group Report, n 44 p 48.

<sup>124</sup> But note that the SCAG Working Group report itself maintained that its recommendations did not infringe any fundamental principle of the criminal law (at p 44).

<sup>125</sup> M Rozenes, ‘The right to silence in the pre-trial and trial stages’, *Criminal Trial Reform Conference*, Paper presented at the AJA/SCAG Conference on Criminal Trial Reform, Melbourne, 24-25 March 2000

<sup>126</sup> SCAG Working Group report, n 44, p 49. It was further recommended that the extent of the discount should be left to the sentencing judge. This was said to be modelled on section 442B of the Crimes Act 1900 (NSW) under which a sentence discount for assistance to

this would translate practically into a penalty scheme for the non-compliant accused. He also observed: ‘It is clear that the right to silence has by these provisions suffered a significant erosion. However, in the context of other statutory and common law incursions it is not an erosion that significantly interferes with the integrity of the accusatorial system’.<sup>127</sup>

### **The SCAG Deliberative Forum on Criminal Trial Reform**<sup>128</sup>

Pre-trial disclosure procedures were also discussed in the June 2000 report of the SCAG Deliberative Forum on Criminal Trial Reform. It, too, argued against the use of sanctions to encourage early disclosure, stating:

Formal sanctions for breaches of disclosure obligations are not supported – encouragement and incentives are considered more appropriate.<sup>129</sup>

A major difference between the recommendations of this report and that of the Working Group is that the Deliberative Forum did not advocate that the defendant should be required to identify such specific defences as self-defence and automatism.<sup>130</sup>

### **The Law Reform Commission of Western Australia**<sup>131</sup>

In its final report of September 1999 titled, *Review of the Criminal and Civil Justice System*, the Law Reform Commission of Western Australia recommended a legislative regime of reciprocal disclosure by prosecution and defence as part of a formal system of pre-trial negotiations between the parties. Where a prison sentence is available on conviction and the defendant pleads not guilty, it was recommended that defence disclosure should be required seven days after full prosecution disclosure. In particular, the defence should be required to disclose statements by expert witnesses (but not other witnesses), plus reveal the defence attitude to the facts or law set out in the prosecution statement and to any records which the prosecution proposes to tender in evidence. The defence would also identify any particular ground on which it may be contended that guilt will not be proved. The report suggested, by way of example, that the statement ‘would indicate if the defence

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authorities is recognised but the extent of the discount need not be specified. Relevant case law was also cited (Ibid, p 75). Note that the powers of the court to reduce penalties are now found under Part 3, Division 1 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

<sup>127</sup> M Rozenes, n 125, p 5.

<sup>128</sup> The relevant recommendations are set out at Appendix C.

<sup>129</sup> SCAG, *Deliberative Forum on Criminal Trial Reform, Report*, June 2000, p 66. The report was released on 18 September 2000.

<sup>130</sup> Ibid, p 68.

<sup>131</sup> The relevant recommendations are set out at Appendix D.

case is that the prosecution will not be able to prove intention, or that it plans to rely on self-defence or provocation'.<sup>132</sup>

In its formulation of this regime, the Commission emphasised the need to balance the claims of 'truth' and 'fairness' in the criminal justice system. It stated in this respect:

Reform of the existing law on pre-trial disclosure by the defence could be directed towards providing all relevant information so the prosecution can investigate matters to be raised by the defence. If the overriding objective of the justice system is truth...then such a reform may be warranted. While there can be no quarrel with such an objective, the inequality of power and resources between the prosecution and most of those accused of criminal offences makes the implementation of this objective difficult. Compulsory pre-trial disclosure by the defence has significant resource implications. If fairness is to remain an overriding principle of the justice system, this inequality cannot be ignored.<sup>133</sup>

However, these considerations did not prevent the Commission from recommending that sanctions should apply to a defendant (as much as to a prosecutor) 'who wilfully withholds information subject to disclosure requirements'. Such sanctions should include the making of an adverse comment by the judge and, with leave of the court, the making of such a comment by the prosecution. If necessary, there should also be a right for the prosecution to re-open its case. On the other hand, it was recommended that special consideration should be given to a self-represented defendant so that, 'where the defendant is genuinely unable to obtain or afford legal representation, sanctions for the failure to disclose are imposed with caution'.<sup>134</sup>

## **6. OVERVIEW OF THE CRIMINAL PROCEDURE AMENDMENT (PRE-TRIAL DISCLOSURE) BILL 2000**

### **Principle and efficiency**

It was said in the Second Reading speech for the Pre-trial Disclosure Bill 2000 that it 'improves upon and formalises' the present 'ad hoc' disclosure requirements which are regulated 'by a combination of common law rules, legislation, prosecution guidelines, Bar Association and Law Society rules and Supreme Court practice directions. In outline, what the Bill provides for is a reciprocal pre-trial disclosure scheme which will apply to

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<sup>132</sup> The Law Reform Commission of Western Australia, *Final Report - Review of the Criminal and Civil Justice System*, September 1999, para 24.18 and Recommendation 253.

<sup>133</sup> *Ibid*, para 24.16.

<sup>134</sup> *Ibid*, para 24.20.

proceedings before the District Court and the Supreme Court on a case-by-case basis. On the question of principle, the Minister emphasised that under the proposed scheme ‘defence response’ is made contingent upon ‘full and timely disclosure of the prosecution case’. With this in mind, he argued that:

These provisions do not alter or qualify the fundamental principle that it is the Crown’s responsibility to prove the accused’s guilt beyond a reasonable doubt. Nor do they affect any privilege or immunity that applies under the law to the disclosure of information, such as client legal privilege or sexual assault communication privilege...<sup>135</sup>

On the question of efficiency, it was further argued in the Second Reading speech that pre-trial disclosure ‘carries significant’ benefits for the parties to a case, the courts and the system of criminal justice generally. The Minister explained:

It enables the parties to focus on issues that are in contention, rather than having to prepare evidence in relation to issues that are not in dispute. This will result in the more efficient use of court time and the time of counsel and less inconvenience to witnesses whose evidence would not be challenged in any event. Adjournments in response to unexpected developments in the course of a trial would be minimised.<sup>136</sup>

For this purpose the Pre-trial Disclosure Bill 2000 would insert a Part 3, Division 2A into the *Criminal Procedure Act 1986*, headed ‘Pre-trial disclosure – case management’. Further amendments would also be made to this and other relevant statutes. However, as the Minister indicated in the Second Reading speech these statutory amendments must be read alongside the proposed regulations, in this case the draft Criminal Procedure Amendment (Pre-trial Disclosure) Regulation 2000.

### **Overview of the proposed reforms**

What is proposed under the Pre-trial Disclosure Bill 2000 and its associated Regulations can be summarised as follows:

- the introduction of a case-management model of reciprocal pre-trial disclosure on a compulsory basis, much of the detail of which is set out in the draft Regulations;
- the saving of any immunity that presently applies to the disclosure of information, document or other thing including, for example, client legal privilege, public interest

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<sup>135</sup> NSWPD, (Hansard Proof, Legislative Assembly) 16 August 2000, p 73.

<sup>136</sup> Ibid.

immunity and sexual assault communications privilege.<sup>137</sup>

- the establishment of a regime of sanctions for non-compliance with pre-trial disclosure requirements;<sup>138</sup>
- the establishment of an incentive-based penalty reduction scheme for pre-trial disclosure, with the *Crimes (Sentencing Procedure) Act 1999* being amended for this purpose;
- the introduction of statutory provisions to facilitate voluntary pre-trial disclosure;<sup>139</sup>
- the amendment of the *Director of Public Prosecutions Act 1986* to impose a general duty of disclosure upon police officers involved in the investigation of an offence;
- a prohibition on the prosecutor amending an indictment that has been presented at a trial without the leave of the court or the consent of the accused person;<sup>140</sup>
- the amendment of the *Criminal Procedure Act 1986* to ensure that the court can order the indictment to be presented by the prosecution before trial, thereby permitting the pre-trial disclosure procedures to begin;<sup>141</sup>
- the amendment of the rules relating to defence disclosure of alibi evidence. Under the Bill this would be changed from a period of 10 days after committal for trial to a period ‘commencing at the time of the accused person’s committal for trial and ending 21 days before the trial is listed (either for mention or hearing)’;<sup>142</sup> and
- a review of the pre-trial disclosure regime would be undertaken by the Attorney-General to determine whether it is used by the courts and whether it has reduced costs and delays, especially for complex criminal trials. The fact that the regime only applies to cases heard in the higher courts will tend, in any event, to limit the Act’s operation to more complex cases.<sup>143</sup>

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<sup>137</sup> Proposed section 47F, *Criminal Procedure Act 1986*.

<sup>138</sup> Proposed section 47E, *Criminal Procedure Act 1986*.

<sup>139</sup> Proposed section 49A, *Criminal Procedure Act 1986*.

<sup>140</sup> Proposed section 63A, *Criminal Procedure Act 1986*.

<sup>141</sup> Proposed draft amendment of section 54 of the *Criminal Procedure Act 1986* released for consultation by the NSW Attorney General in September 2000.

<sup>142</sup> Proposed amendment of section 48, *Criminal Procedure Act 1986*.

<sup>143</sup> Clause 6, Pre-trial Disclosure Bill 2000.

### **The compulsory case management model of pre-trial disclosure**

This would operate under proposed Part 3, Division 2A of the *Criminal Procedure Act 1986*. It would permit the Supreme Court or District Court to order, on its own initiative or on the application of one of the parties to the proceedings, both the prosecution and the defence to undertake pre-trial disclosure. No guidelines or criteria for deciding which cases are to be the subject of disclosure are found in either the Bill or the related Regulation, which may raise due process concerns about how consistency is to be achieved between one case and another. When is the court's discretion to be exercised in favour of disclosure and when will it decide against it? It may be that directions are to be issued for this purpose by the Chief Justice which may, in addition, replicate the Victorian practice of employing only a small number of specialist judges to oversee the pre-trial disclosure process. None of these, or any other, possible arrangements figure in the proposed legislation which leaves the matter solely to the discretion of the court. Underlining further the discretion afforded to the courts, under the Bill pre-trial disclosure could also be limited to 'any specific aspect

<sup>144</sup>

The Bill then stipulates that the requirements for pre-trial disclosure are to be set out in the Criminal Procedure Amendment (Pre-trial Disclosure) Regulation 2000. The definitions clause of that Regulation defines the term 'accused person' to include 'the legal practitioner

<sup>145</sup> It then sets out the pre-trial disclosure scheme in order of the following five steps:

- *General requirements*: these explain the order in which prosecution and defence disclosure is to be made, starting with the prosecution statement, then the defence response, which is followed by the prosecution's own response to that defence statement. Unlike the Victorian regime, no specific timetable for disclosure is established. Instead, consistent with the case management approach adopted by the Bill, the timing of disclosure is left to the court to decide on a case-by-case basis.
- *Prosecution disclosure*: a detailed list then follows of what the prosecution notice of its case is to contain, including: a copy of the indictment; an outline of the prosecution case; copies of reports by expert witnesses to be called at the trial; copies of statements of witnesses the prosecution proposes to call at the trial; and copies of any relevant information provided by the police to the prosecution.
- *Defence response*: the requirements of the defence response are then set out, which is to include notice of any of the following defences: insanity; self-defence; provocation; accident; duress; claim of right; automatism; and intoxication. Notice must also be given of any expert witnesses for the defence and their reports, plus a response to the

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<sup>144</sup> Proposed section 47C, *Criminal Procedure Act 1986*.

<sup>145</sup> Clause 11C, Draft Criminal Procedure Amendment (Pre-trial Disclosure) Regulation 2000. The term 'legal practitioner' is preferred to the more usual 'legal representative', but it is not explained why.



- *Comment to jury*: either the judge or, with the leave of the court, any party may

comment on a failure to comply with disclosure requirements. However, the Bill states that ‘the comment must not suggest that an accused person failed to comply because the accused person was, or believed that he or she was, guilty of the offence concerned’.

### **Incentives for compliance**

A proposed section 22A would be inserted into the *Crimes (Sentencing Procedure) Act 1999* for the purpose of enabling the court to reduce penalties for pre-trial disclosure. At present the Act requires guilty pleas to be taken into account when sentencing an offender and section 23 permits the reduction of penalties where an offender has assisted the law enforcement authorities. Proposed section 22A provides that a court ‘may’ impose a lesser penalty after taking into account the ‘degree’ of pre-trial disclosure. However, the penalty reduction cannot be ‘unreasonably disproportionate to the nature and circumstances of the offence’. This incentive for disclosure can be assumed to apply to both compulsory and voluntary pre-trial disclosures.

### **Voluntary pre-trial disclosure – incentives and sanctions**

A new section 49A would be inserted into the *Criminal Procedure Act 1986* to establish a statutory basis for voluntary pre-trial disclosure. As with its compulsory counterpart, this may occur after the indictment is presented, but in the case of voluntary disclosure it can only take place up to the point when the hearing for the trial is to begin. This can be contrasted with the requirements for compulsory disclosure which continue till the proceedings are at an end. Voluntary disclosure may be made by either the prosecution or the defence and can be made in relation to ‘any information, document or other thing that the prosecuting authority or accused person proposes to adduce in evidence in the proceedings’.

Proposed section 49A (2) of the Bill and clause 11Q of the Regulation would empower the court to allow evidence to be adduced without formal proof, but only if the evidence was disclosed at least 42 days before the trial and if the other party did not disclose, at least 21 days before the trial, an intention to dispute or require proof of the matter concerned. However, on the application of a party, the court may vary these time requirements.

On the other hand, proposed section 49A (3) of the Bill and clause 11R of the Regulation would permit the court to exclude evidence in circumstances where it had ordered a party to disclose whether or not it intended to adduce evidence to dispute what the other party had revealed by voluntary disclosure. Clause 11R (2) provides:

If the party fails to disclose such an intention, as required by the order, the court is authorised to refuse to admit evidence that is sought to be adduced by the party for the purpose of disputing the evidence that has been disclosed to the party.

## 7. CONCLUDING COMMENTS

One question to ask is how will this voluntary aspect to the scheme operate alongside the compulsory component? Another is whether this last provision is the sting in the tail of the voluntary disclosure part of the scheme? Does it suggest that, by disclosing information to the defence, in reply to which the court then orders an accused person to respond or else face the sanction of exclusion of evidence, the prosecution may have a means of effectively forcing the issue as far as disclosure is concerned. In other words, what is supposed to be a voluntary component to the scheme appears, at this sanctions stage, to have a decidedly compulsory character. The question is whether a sanction of this sort should be available where voluntary disclosure is concerned? The perennial issue at stake here is how to make a voluntary scheme effective without empowering the court to apply sanctions of some sort for non-compliance? Incentives are one answer to that question and these are available under the proposed reforms. Should these, as a matter of principle, be sufficient in the circumstances? If not, do we run the risk of introducing a back-door system of compulsory disclosure?

Of course, much will depend in this respect on the discretion of the court and, as with the compulsory disclosure scheme, there are no guidelines or criteria in the proposed legislation to indicate the basis upon which that discretion may or may not be exercised in relation to the various stages of voluntary disclosure. Whilst this may be said, on one side, to facilitate the flexible nature of the case management model adopted by the Bill, it may also, on the other, raise due process concerns about the consistency of the criminal trial system. In Victoria a specialist panel of three judges deals with pre-trial 'directions hearings', but at this stage it is unclear whether a system of this sort would be adopted in NSW. In any event, the above observations suggest that the present Bill may be subject to as many questions and comments, both particular and general in nature, as any other proposal which has been introduced over recent years into this crowded area of legal reform.

Most commentators agree that the issue of sanctions is the most difficult where defence disclosure is concerned. It has been noted in this regard that both the SCAG Working Group report of September 1999 and the SCAG Deliberative Forum report of June 2000 opposed the introduction of formal sanctions for breaches of disclosure obligations, preferring to rely instead on a sentencing discount scheme as an incentive for co-operation. This option is also available under the Pre-trial Disclosure Bill 2000. However, the Bill provides the court, in addition, with an extensive range of sanctions where a party has failed to comply with the requirements of compulsory disclosure. For example, exclusion of evidence is permitted, a power which may prove to be controversial. As noted, it has been argued that evidence which tends to exculpate an accused person should never be excluded from the evidence in the trial and, as Justice Sulan of the District Court of South Australia has observed, to exclude evidence of this kind 'would be to raise doubts about the fairness

<sup>146</sup> Such an observation raises the question whether a sanction of this sort would be applied by the courts as a matter of practice, or is it an empty threat? In

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JR Sulan, n 45.

its September 1999 report the SCAG Working Group on Criminal Trial Procedure commented that exclusion of evidence exists in the case of a failure to give notice of alibi, but that 'It is rarely enforced against a defendant'. On the question of exclusion of evidence the report continued:

We suggest that it should exist, however, in respect of failure to identify the specific defence, but in terms similar to that applicable to the prosecution, namely, that the evidence can only be led if a reasonable explanation for failure to identify the defence is provided or the interests of justice otherwise require that the defendant be permitted to lead the evidence.<sup>147</sup>

Another sanction the Bill would make available to the court is the power to grant an adjournment against a party which has failed to comply with its disclosure requirements. A potential difficulty here is that such a power, if used extensively, could tend to lengthen, not shorten, complex criminal trials, thereby defeating a major purpose of the proposed reform. It is worth noting in this respect that the research of Weatherburn and Baker into delays in the NSW District Criminal Court indicates that adjournments are, after late guilty pleas, 'the most frequent cause of matters failing to proceed to trial on the day listed.'<sup>148</sup> On one view, the Pre-trial Disclosure Bill 2000 may introduce a further reason for adjournments to occur, albeit at a later stage in the criminal trial process.

A third sanction proposed in the Pre-trial Disclosure Bill 2000 is that the court may allow evidence to be adduced without formal proof, but only if that evidence was disclosed by one party and the other side did not disclose an intention to dispute or require proof of the matter. It was said earlier in the paper that the case for defence disclosure often combines an argument for efficiency with the contention that 'the search for truth' is a fundamental purpose of criminal trials. It was also suggested that these goals may not always be consistent where, for example, as a sanction against the defence for non-compliance, the court may allow evidence to be adduced without formal proof.

A further sanction under the Bill is that comment could be made to the jury, either by the judge or, with the leave of the court, by any party to the case regarding the failure to comply with pre-trial disclosure requirements. The one limitation is that 'the comment must not suggest that an accused person failed to comply because the accused person was, or believed that he or she was, guilty of the offence concerned'. In other words, an inference of guilt must not be made in any comment by either the judge or the prosecution. Unlike the Victorian *Crimes (Criminal Trials) Act 1999*, the Bill does not stipulate that leave to comment may only be granted to a party where the trial judge is satisfied that the 'proposed comment is relevant' and 'is not likely to produce a miscarriage of justice'. Presumably these are considerations to which the NSW Supreme Court and the District Court would have regard as a matter of course. Nor, unlike its Victorian counterpart, does the Bill

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<sup>147</sup> SCAG Working Group report, n 44 at 51.

<sup>148</sup> D Weatherburn and J Baker, n 65 at 16.

expressly prohibit any suggestion by a party that failure to comply may be taken into account in considering the probative value of the prosecution evidence (except as this might have applied prior to the Act). In other words, the prosecution in Victoria could not suggest that the defence's failure to comply with disclosure requirements gives added credence to its own evidence. Is this a matter the Pre-trial Disclosure Bill 2000 should address? In any event, it begs the question of what can be said to the jury, beyond perhaps a bare declaration that a party had not complied with its disclosure requirements. On the issue of comment by the trial judge and the Crown, the SCAG Working Group on Criminal Trial Procedure observed:

It is clear that this proposed sanction is fraught with difficulties. From a practical point of view, it would create enormous difficulties for a judge in determining both when a comment was appropriate and the content of the comment. Voluminous case law would follow on both issues. If a jury is to be permitted to draw an inference adverse to a defendant, issues such as the burden of proof and the "right to silence" need to be addressed. There is no form of adverse comment that can sensibly be made unless the jury is entitled to draw an inference adverse to the defendant by reason of the failure to cooperate. We do not recommend the introduction of this form of sanction.<sup>149</sup>

Of the corresponding Victorian provisions, Justice Weinberg of the Federal Court of Australia has said:

The provisions of the 1999 Act which permit the trial judge or, with the leave of the Court, a party to comment to the jury regarding a failure on the part of any party to comply with a requirement of the Act, or an order made under the Act, seem to me to provide fertile ground for appeals. The Act of course places limits upon such comments. However, if history is any guide there will soon be a substantial body of jurisprudence relating to the operation of these provisions.<sup>150</sup>

Worth noting, too, is the observation of the High Court in *Petty v R* on the distinction that is sometimes made between 'inferring a consciousness of guilt from silence and denying credibility to a late defence or explanation by reason of earlier silence'. Of this distinction, Mason CJ, Deane, Toohey and McHugh JJ said:

...the denial of the credibility of that late defence or explanation by reason of the accused's earlier silence is just another way of drawing an adverse inference (albeit less strong than an inference

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<sup>149</sup> SCAG Working Group report, n 44 at 52.

<sup>150</sup> M Weinberg, n 16.

of guilt) against the accused by reason of his or her exercise of the right to silence. Such an erosion of the fundamental right should not be permitted.<sup>151</sup>

Consistent with the SCAG Working Group report, the Pre-trial Disclosure Bill 2000 does not recommend the sanction of an award of costs against a defendant where there is a failure to comply with disclosure requirements. Nor does it propose a sanction of an award of costs against legal practitioners for either the defence or prosecution. This is basically in keeping with the SCAG Working Group report, although there it was recommended that, 'If such a rule is to exist, it should only be applicable in cases of gross mismanagement'.<sup>152</sup> This contrasts with the Victorian Act where an order to pay costs can be made against either the defendant or the defendant's lawyer where there has been an 'unreasonable failure' to comply with disclosure requirements.

A comparison of a different kind with the Victorian scheme is that the requirements associated with the directions hearings are set out in the 1999 Act, whereas in NSW much of the detail of the proposed pre-trial disclosure regime is found in the Regulations. The obvious question to ask is whether the regulations are in fact the appropriate vehicle for such important amendments which, as the lengthy debate on the issue shows, touch upon the most fundamental principles of the criminal justice system? On one view, it is the details of the scheme which are all important and these should, as a matter of transparency, scrutiny and accessibility, be available in the legislation itself. On another view, the regulations are the subject of parliamentary scrutiny by the Regulation Review Committee, which is a joint committee of both Houses of the NSW Parliament, the functions of which include the review of regulations to consider if they 'trespass unduly on personal rights and

<sup>153</sup> Is this a better forum for the kind of detailed consideration required by the complex matters at stake, or should these be the subject of primary legislation?

The Pre-trial Disclosure Bill 2000 and its associated regulations are sure to invoke many comments, both in respect to the details of the pre-trial disclosure models it proposes, as well as in relation to the broader questions of principle and efficiency which are at issue. As to the question of the details of the disclosure scheme, a significant issue in this regard is whether the accused should be required to identify such specific defences as self-defence

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<sup>151</sup> (1991) 173 CLR 95 at 101. The case is authority for the proposition that comments made by the judge or the Crown Prosecutor should not suggest that previous silence about a defence raised at a trial provides a basis for inferring that the defence is a new invention or is rendered suspect or unacceptable. This whole question of the drawing of adverse inferences from silence has been the subject of extensive analysis by the Hon Justice GL Davies, a member of the Queensland Court of Appeal. He argues that there is no justification, either historically or in common sense or logic, for a right not to answer questions or give evidence. All that is relevantly justified is an immunity from compulsion to answer questions or give evidence. Justice Davies does not discuss what, if any, implications this may have for defence disclosure, specifically -GL Davies, n 67 at 101.

<sup>152</sup> SCAG Working Group report, n 44 at 51.

<sup>153</sup> *Regulation Review Act 1987*, section 9 (1)(b).

and automatism, as recommended by the SCAG Working Group and proposed under the Pre-trial Disclosure Bill 2000? On the other hand, the SCAG Deliberative Forum report commented that other pre-trial procedures would adequately indicate if these kinds of specific defences were going to be raised by the defence. 'Thus', the report concluded, 'the requirements on the defence may not realise any benefits of real significance and may only serve to upset the balance between prosecutor and defence'.<sup>154</sup>

In the ensuing debate much will undoubtedly be made of the empirical evidence relating to court delays in NSW and pre-trial disclosure will be seen as an important step towards making the criminal trial process more efficient. As noted, the Attorney General has already said in this respect that his department 'estimates that pre-trial disclosure could reduce some complex matters by a number of days and provide an extraordinary saving of up to 40 per cent of time spent at trial'.<sup>155</sup> Some may question this estimate, at least on the basis that the pre-trial disclosure proposal is the latest in a very long line of schemes – including the 'sentence indication scheme' introduced in 1992 to encourage earlier and more frequent guilty pleas and in 1996 the broadening of the range of criminal matters triable summarily in the hope of reducing the workload of the District Court – promising to tackle the seemingly intractable problem of court delays. It is the contention of Weatherburn and Baker that most of these past efforts 'have been based on false assumptions' about the causes of court delay, especially where these have been seen to flow from problems associated with 'inadequate capacity'. They point to the better use of computerised case-management systems if court administration policy is to be based on objective data about the true causes of delay. However, their research also suggests the benefits which may flow from pre-trial disclosure, for example, in their adoption of the SCAG Working Party's recommendation that the Crown should be involved as early as possible in the trial process, including by means of the early disclosure of the facts on which the prosecution is relying in support of its case.<sup>156</sup> As the SCAG Working Group report recognised, much may depend ultimately on the operation of the adversarial system itself. Will these proposals help to create a legal culture more attuned to the advantages that can flow from cooperation and compliance? Or are they more likely to be treated as still further opportunities to dispute, argue and appeal?

A number of approaches can be taken to the issue of whether compulsory pre-trial disclosure is apt to compromise the presumption of innocence, or else infringes either the principle of the right to silence or the privilege against self-incrimination. One approach is to contend that a balance needs to be struck between, say, the right to silence and the public interest in increasing the efficiency of the criminal justice system. Such an approach would accept that the right to silence is infringed but would also maintain that this can be justified both in terms of the limited nature of that infringement and/or by the competing public good the infringement serves. The obvious response is that either the right to silence

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<sup>154</sup> SCAG Deliberative Forum report, n 129 at 68.

<sup>155</sup> NSWPD (Hansard proof, Legislative Assembly), 8 August 2000, pp 7-8.

<sup>156</sup> D Weatherburn and J Baker, n 65 at 19-23.

(assuming defence disclosure to be an incidence of this) is a fundamental principle or it is not. If it is, it should not be traded or balanced off against anything, no matter what the presumed gains may be in the efficiency of the courts. A second approach is to argue that the right to silence is itself divisible into what might be called ‘fundamental’ and ‘non-fundamental’ elements. This is suggested in the NSWLRC’s discussion paper which states that ‘The importance of the right to silence after the defendant has been committed for trial does not...rest upon the same basis as that which exists before the event’.<sup>157</sup> This argument is based in part on the contention that the protection against pre-trial disclosure is more recent in origin than other of the immunities associated with the right to silence. However, this argument can be debated. After all, if the protection is an incidence of the immunity against self-incrimination, as it is often argued, then it can claim an ancestry reaching at least as far back as the reaction against the activities of the Star Chamber in the seventeenth century. On the other hand, the right to silence at the investigatory stage can be traced more definitely to the establishment of the modern police force in the nineteenth century.<sup>158</sup> A third approach is to explain that no fundamental principle of the criminal law is infringed by a particular proposal for pre-trial disclosure. This was the approach taken by the SCAG Working Group which said of its own proposal for reform:

We believe...that our recommendations which involve identification of issues and some defences do not infringe the fundamental integrity of the accusatorial system nor do they require that a defendant assist the prosecution to prove its case. The burden of proof remains unaltered. The reforms we recommend do not infringe the fundamental right of a defendant whether viewed as a “right to silence” or otherwise.<sup>159</sup>

This last approach can be said to confront head-on the big issues at stake in the long, at times tortuous, debate about pre-trial disclosure. It neither seeks to trade-off or balance-out the goals of efficiency and the principles which underlie our system of criminal justice; nor, yet, does it read-down certain aspects or elements of those principles. Instead, it takes the approach that legislative change in this area should not, as a matter of policy, infringe any principles by which the criminal law has traditionally sought to even up the contest between the prosecution, with all the resources of the state at its back, and the accused person who, typically, does not have retained counsel and energetic investigators available to assist in the conduct of his/her defence. Indeed, for those who oppose defence disclosure in any form a key consideration is that resources are invariably unevenly matched as between the

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<sup>157</sup> NSWLRC, *The Right to Silence*, n 5 at para 4.80.

<sup>158</sup> For an overview see -G Griffith, *The Right to Silence*, NSW Parliamentary Library Briefing Paper No 11/1997, pp 6-9; Parliament of Victoria Scrutiny of Acts and Regulations Committee, *Final Report -Inquiry into the Right to Silence*, March 1999, pp 37-40. For a very different account of the historical origins and rationale of the right to silence see -GL Davies, n 67 at 31-37.

<sup>159</sup> SCAG Working Group report, n 44 at 44. But note the subsequent comments of Michael Rozenes QC, a member of the SCAG Working Group -M Rozenes, n 125.



prosecution and defence in a criminal proceeding. Viewed in this light, it is argued that the right of the accused to remain silent and not disclose any aspect of his/her defence strategy or evidence to be called at trial is one small way of 'levelling the playing field'.<sup>160</sup> As noted, Chief Justice Lamer of the Canadian Supreme Court has said in this respect that all the protections, 'which emanate from the broad principle against self-incrimination, recognise that it is up to the state, with its greater resources, to investigate and prove its own case, and that the individual should not be conscripted into helping the state fulfil this task'.<sup>161</sup> Another Canadian observer has said that an added concern in this area:

...is the fact that in the mid-1990s, the resources available to most accused persons – that is, through publicly-funded Legal Aid programs – are being reduced and restricted more and more. Instead of providing additional funding to ensure the better and more properly prepared representation of accused persons, governments across the land are slashing Legal Aid budgets and gutting programs which have as their aim the equal access by all to our system of justice. Rather than continuing efforts to 'balance the playing field', the result, if not the intent, of government financing restrictions is – and can only be – a weighing of the scales even more heavily against the position of the accused person, even as public sentiment favours policing and 'law and order' priorities when it comes to expenditures of scarce government resources.<sup>162</sup>

Whatever view is taken of this argument, and there are sure to be differing perspectives ranging from those associated with victims' rights groups to those canvassed by advocates of prisoners' rights, it is the case that many accused persons rely on the resources made available through legal aid. From this it would seem to follow that if any disclosure regime is to prove either fair and/or effective, the implications for legal aid funding must be confronted at some stage. The Attorney General has already said that, further to the proposed pre-trial disclosure scheme, additional resources will be provided to the Legal Aid Commission.<sup>163</sup> It may be that the details of that resource commitment will be needed before a fair and reasonable assessment can be made of the Pre-trial Disclosure Bill 2000.

This observation, in turn, highlights the point that the disclosure scheme which has been proposed under the present Bill can only be really understood and assessed in the context of a broader appreciation of the practical operation of the criminal justice in NSW. Those directly involved in that system, in whatever capacity, will analyse its potential impact on the highly complex questions associated with the efficient administration of criminal justice

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<sup>160</sup> CB Davison, n 35 at 119.

<sup>161</sup> Quoted in MD Tochor and KD Kilback, n 37 at 399.

<sup>162</sup> CB Davison, n 35 at 118.

<sup>163</sup> NSWPD (Hansard Proof, Legislative Assembly), 8 August 2000, pp 7-8.

in the light of their contrasting experience and expertise. However, that analysis must itself be informed by such contrasting issues of principle as the right to silence, on one side, and the idea that the ultimate purpose of a criminal trial is ‘the search for truth’, on the other. On this last theme, in the landmark judgment from the US, *Williams v Florida*,<sup>164</sup> which concerned the disclosure of the names and addresses of the witnesses the defence planned to call in support of its alibi defence, Justice White said on behalf of the Supreme Court:

The adversary system of trial is hardly an end in itself; it is not a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as “due process” is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence.<sup>165</sup>

Behind the Pre-trial Disclosure Bill 2000 lies the proposition that a carefully structured and adequately resourced scheme of reciprocal disclosure can, in the words of Tanovich and Crocker, ‘enhance the truth-seeking function of the trial without jeopardizing the fairness’<sup>166</sup> Comments of this sort suggest that, after the efficiency issues have been addressed, it is the question of the fairness of the criminal justice system which must ultimately be answered in the debate about compulsory pre-trial defence disclosure. To put it another way, a scheme which can be shown to satisfy some kind of utilitarian criterion of rational efficiency must also, it seems, meet the normative requirement of fairness. That, it could be argued, is the appropriate test for the Pre-trial Disclosure Bill 2000.

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<sup>164</sup> 399 US 78 (1970).

<sup>165</sup> *Ibid* at 82.

<sup>166</sup> DM Tanovich and L Crocker, n 35 at 340.