Standing Committee on Law and Justice

Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001

Second report

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Terms of reference

That the Committee inquire and report on:

The provisions of the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*, together with the system of pre-trial disclosure in New South Wales, including:

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

(b) the rate of compliance with pre-trial disclosure requirements by:
(i) legally aided defendants,
(ii) privately funded defendants,
(iii) Police,
(iv) The Office of the Director of Public Prosecutions;

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

(d) the effect of pre-trial disclosure requirements on court delays and waiting times in the Supreme Court, District Court and the Court of Criminal Appeal;

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

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

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

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

That the Committee inquire and report within three years of the date of commencement of the Act, namely, by 18 November 2004.

These terms of reference were referred to the Committee by the Attorney General on 30 July 2003. Note that the reporting date was later extended by the Attorney General to 24 December 2004.

Committee membership

	The Hon Christine Robertson MLC, Australian Labor Party *Chair*
	The Hon Greg Pearce MLC, Liberal Party *Deputy Chair*
	The Hon David Clarke MLC, Liberal Party
	The Hon Amanda Fazio MLC, Australian Labor Party
	Ms Lee Rhiannon MLC, The Greens
	The Hon Eric Roozendaal MLC, Australian Labor Party*

* Replacing the Hon Tony Burke MLC from 28 June 2004

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Chair's foreword

This is the second and final report by the Standing Committee on Law and Justice as part of its inquiry into the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*. The inquiry began in May 2002 when the Attorney General referred the provisions of the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000 to the Committee for inquiry. The Committee published its first report in September 2002.

The Committee heard evidence that pre-trial disclosure orders have only been made in a very small number of cases. Reasons why so few orders have been made to date include the requirement that a trial be 'complex' before an order can be made, the relative infancy of the scheme and the success of existing non-statutory pre-trial disclosure mechanisms.

The infrequency of pre-trial disclosure orders under the scheme made it difficult for the Committee to gauge the impact of the new scheme on court delays, unrepresented defendants and the right to silence, presumption of innocence and burden of proof, as required by our terms of reference. Notwithstanding the limited impact of pre-trial disclosure orders to date, the Committee generally supports any initiative that has a positive impact on court delays and the Committee considers that there is a role for formal pre-trial disclosure orders backed up by sanctions.

I would like to thank my colleagues on the Committee for their participation in the Inquiry, and their bi-partisan approach to the report and its findings and recommendations. The Committee has also valued the input of various stakeholders including legal professional bodies and advocacy groups as the Committee is aware of the time and resources involved in preparing submissions. I would also like to thank the Committee Secretariat for their assistance in drafting this report and administering the inquiry.

Hon Christine Robertson MLC
Committee Chair

Executive summary

Introduction (Chapter 1)

During the passage of the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill in 2000, the Legislative Council referred its provisions, as passed, and the system of pre-trial disclosure in NSW to the Standing Committee on Law and Justice for inquiry. The Committee commenced its inquiry in May 2002 and it soon became clear that it was too early to assess the merits of the new legislation and adequately address the terms of reference, as very few orders for pre-trial disclosure had been made under the new provisions. The Committee recommended in its First Report, therefore, that the Attorney General refer the terms of reference back to the Committee in the next session of Parliament. The Attorney General accepted the recommendation and referred similar terms of reference to the Committee on 30 July 2003. The Committee deferred the commencement of the inquiry until February 2004 in order to ensure that the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001* (the Amendment Act) had been in operation for a sufficient period to permit effective assessment of the reforms it introduced.

Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001 (Chapter 2)

The Amendment Act was assented to on 19 April 2001 and commenced on 19 November 2001. Prior to the Amendment Act, pre-trial disclosure on the part of the defence was limited to a statutory requirement to give notice of any alibi and, in murder trials, to give notice of an intention to raise the defence that she or he is not guilty due to a substantial impairment by abnormality of the mind. In addition, the *Evidence Act 1995* requires that, if either party intends to lead evidence relating to tendency or coincidence or first-hand hearsay, the party must give notice of that intention.

The Amendment Act introduced a statutory duty of prosecution and defence pre-trial disclosure in complex criminal cases in the District and Supreme Court where the court makes a pre-trial disclosure order. Sanctions for non-compliance with pre-trial disclosure orders were also introduced. The Amendment Act further introduced reforms to the way in which police officers disclose information to the Director of Public Prosecutions. It also made changes to the procedures relating to the indictment presented by the prosecution and notice for alibi evidence. The reforms were principally designed to increase efficiency in the conduct of complex criminal trials and to reduce court delays.

Pre-trial disclosure orders (Chapter 3)

A pre-trial disclosure order *can only be made* if the court is satisfied that a trial will be a 'complex criminal trial', having regard to certain factors. The Committee was informed that pre-trial disclosure orders have been made in only a very small number of cases. Reasons why so few orders have been made to date include the requirement for a trial to be 'complex' before an order can be made, the relative infancy of the scheme and the success of existing non-statutory pre-trial disclosure mechanisms.

A pre-trial disclosure order can only be made if the court is satisfied that the trial will be a 'complex criminal trial' having regard to certain factors in section 136(2) of the *Criminal Procedure Act 1986*. Section 136(2) can be interpreted in two ways. The first interpretation is that all three subsections must be met before an order can be made. This interpretation rests on the literal interpretation of the word 'and' in the subsection.

The second interpretation is that the court must only be satisfied that *one* of the subsections is met - either (a) *or* (b) *or* (c). The interpretation of section 136(2) was considered last year by Justice O'Keefe in *R v Monroe* [2003] NSWSC55, who favoured the second interpretation, holding that 'the word *"and"* in (a) and (b) should be interpreted as *"or"*. The Committee concluded that clarifying the meaning of section 136(2) would be beneficial and broadens the definition of 'complex criminal cases', which might lead to more use of pre-trial disclosure orders. The Committee recommends that the Attorney General seek a legislative amendment to ensure that section 136(2) clearly reflects the interpretation given to it by Justice O'Keefe, by relacing the word 'and' in subsections 136(2)(a) and (b) with 'or'.

The Committee was advised that the relative infancy of the pre-trial disclosure order scheme may have contribute to its limited use so far with some practitioners still getting used to the new provisions. The Committee was also informed that the success of existing methods of encouraging pre-trial disclosure among parties may be limiting the perceived need for formal pre-trial disclosure orders and that judges may be reluctant to make pre-trial disclosure orders because there is a potential to delay proceedings.

Timing of pre-trial disclosure orders

The timing of pre-trial disclosure orders was raised as an issue before the Committee. Section 136(1) of the *Criminal Procedure Act* 1986 requires that the presentation of an indictment is a pre-requisite to the making of a pre-trial disclosure order. Difficulties with this requirement can stem from the fact that many list judges do not formally arraign the accused. To overcome these difficulties, the Office of the Director of Public Prosecutions suggested an amendment to section 136(1) to allow the court to make a pre-trial disclosure order after the presentation by the Crown of the indictment, even though a plea is not formally entered by the accused. The Committee did not receive sufficient information to enable it to reach any firm conclusion about this potential amendment. It appears, however, that it may be a matter worth pursuing and the Committee recommended that the Attorney General consider whether the legislative amendment identified would be beneficial to the pre-trial disclosure scheme.

Compliance and sanctions

The terms of reference require the Committee to examine the rate of compliance with pre-trial disclosure requirements. The Committee has been advised that there has generally been a high level of compliance by the prosecution and defence with the few orders made to date. The Amendment Act also introduced a regime of discretionary sanctions that can be applied to both the prosecution and the defence for non-compliance with pre-trial disclosure orders. As far as the Committee is aware, neither the District nor the Supreme Court has applied sanctions in any trial in which a pre-trial disclosure order has been made. This accords with the fact that the orders have largely been complied with.

Impact of pre-trial disclosure orders (Chapter 4)

The terms of reference require the Committee to consider the effect of the new pre-trial disclosure requirements on several aspects of the criminal justice system including court delays, unrepresented defendants, the right to silence, the burden of proof and the presumption of innocence. Submissions to the inquiry also raised the issue of the impact of the new requirements on disadvantaged defendants.

Impact on court delays

Submission makers and witnesses were generally in agreement that, due to the small number of pre-trial disclosure orders made to date, the overall impact of the new scheme on court waiting times has been

minimal. Nonetheless, information provided to the Committee about the specific orders that have been made indicates that they have positively impacted on those trials.

The Committee is pleased to note the improvement in court delays in the higher courts in NSW in recent years and acknowledges that the pre-trial case management mechanisms of the courts have had a significant impact on delays. The Committee generally supports initiatives that have a positive impact on court delays. The Committee is of the view that it is too early to determine the impact of pre-trial disclosure orders on court delays given the small number of orders made to date. The Committee also notes that the differing views held by inquiry participants as to their potential impact, with some speculating that they could in fact lengthen trials. The Committee is also of the view that, even if the eventual impact of pre-trial disclosure orders on court delays is minimal, there is still a role for formal pre-trial disclosure orders backed up by sanctions.

Impact on unrepresented and disadvantaged defendants

In relation to unrepresented defendants, the Committee notes that a pre-trial disclosure order cannot actually be made where a defendant is unrepresented. In addition it seems that the impact of unrepresented defendants being excluded from the pre-trial disclosure scheme is minimal since the likelihood that a defendant in a complex criminal case would be unrepresented is 'very small'.

The Committee is concerned that the new scheme for pre-trial disclosure orders may have a detrimental impact on disadvantaged defendants (once it is used more frequently). While it is difficult to establish at this early stage the nature of this impact, the Committee recommends that any future review of the scheme incorporate an analysis of the impact of the orders on disadvantaged defendants.

Impact on right to silence, presumption of innocence and burden of proof

The terms of reference require the Committee to consider the effects of the pre-trial disclosure requirements on the right to silence, the presumption of innocence and the burden of proof. The majority of inquiry participants expressed the view that the pre-trial disclosure requirements implemented by the Amendment Act had little or no impact on these three doctrines. The Committee is aware, however, that any impact that they may have is difficult to gauge at this stage due to the small number of orders made. The Committee has therefore not formed its own view on this issue.

Other reforms and issues (Chapter 5)

In addition to introducing the new regime for pre-trial disclosure in complex criminal cases, the Amendment Act made changes to the requirements for giving notice of alibi evidence, the presentation and amendment of indictments and police disclosure to the prosecuting authorities.

Alibi evidence

The Amendment Act altered the *Criminal Procedure Act 1986* to require that, if an accused person wishes to adduce evidence in support of an alibi, notice of the particulars of the alibi must be given at least 21 days before the trial is listed for hearing. If notice is not given within that time frame the accused cannot adduce evidence at trial in support of an alibi (except with the leave of the Court). This requirement applies to all trials on indictment and not just complex criminal trials.

Prior to the amendment, notice of alibi evidence was required within ten days following an accused person's committal for trial. While the Committee did not have the opportunity to explore this issue in

a great deal of detail there seems to be sufficient concern about the change to the time frame for notification of alibi evidence to warrant further investigation. The Committee therefore recommended that the Attorney General examine this issue to establish whether the new time frame of 21 days is unreasonably impacting on the Crown and the police, with a view to potentially amending the legislation if necessary.

Presentation and amendment of indictments

The Amendment Act altered the time frame for the presentation and amendment of indictments for *all* matters in the District and Supreme Courts, not just complex criminal trials. An indictment must now be presented within four weeks after the committal of the accused for trial. This time period can be extended by the Court in which the trial is to be heard or by the Regulations or the Rules of the Court. If the indictment is not presented within the four week time frame (and unless an extension is granted) the Court can either proceed with the trial as if an indictment has been presented or adjourn the trial or 'take such other action as it thinks appropriate in the circumstances of the case'. The new regime for indictments also precludes prosecutors from *amending* an indictment that has been presented at trial without the leave of the court and the consent of the accused.

The Committee notes that the amendment to the time frame for settling indictments has been identified as one of the most significant aspects of the Amendment Act. In terms of compliance, it appears that the ODPP has been able to meet the new time frame with the assistance of the new Trial Preparation Unit funded for this purpose. There also appears to be some indication that the new time frame is having a beneficial impact in terms of efficiency in the pre-trial process. The Committee is pleased to conclude that this aspect of the Amendment Act seems to be meeting its stated purpose of enhancing the efficiency and fairness of the criminal justice system.

Police disclosure to prosecuting authorities

The Amendment Act modified the *Director of Public Prosecutions Act 1986* to formalise the existing duties placed on police officers to disclose information pertaining to the investigation of offences to prosecuting authorities. It appears to the Committee that because the introduction of the statutory obligation of disclosure on police largely had the effect of codifying existing rules regarding police disclosure, rather than imposing new obligations, it has not at this stage had a significant impact on police or the prosecution.

While the Committee agrees that the system of police disclosure may not need to be changed, it is important that officers understand their duty to disclose relevant material and to protect relevant material that is the subject of bona fide clams of privilege, public interest immunity or statutory immunity. The Committee has recommended that the Minister of Police examine the level of awareness among police officers of the changes to their pre-trial disclosure requirements brought about by the Amendment Act and whether there is a need for additional educational resources.

Summary of recommendations

Recommendation 1 **18**

That the Attorney General seek a legislative amendment to ensure that section 136(2) of the *Criminal Procedure Act 1986* clearly reflects the interpretation given to it by Justice O'Keefe in *R v Munroe* [2003] NSWSC55, by relacing the word 'and' in subsections 136(2)(a) and (b) with 'or'.

Recommendation 2 **23**

That the Attorney General examine the issue identified by the Office of the Director of Public Prosecutions in its submission to the Committee's inquiry, relating to the requirement that an indictment be presented before a pre-trial disclosure order can be made, and consider whether the legislative amendment identified by the ODPP would be beneficial to the scheme of pre-trial disclosure implemented by the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*.

Recommendation 3 **40**

That any future review undertaken by the Government of the new pre-trial disclosure scheme implemented by the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001* or pre-trial disclosure in general incorporate an analysis of the impact of pre-trial disclosure orders on disadvantaged defendants.

Recommendation 4 **47**

That the Attorney General examine the impact of the amendment to section 150 of the *Criminal Procedure Act 1986* implemented by the *Criminal Procedure Amendment Pre-trial Disclosure Act 2001* to require that notice for alibi evidence in all trials on indictment be given at least 21 days before a trial is listed for hearing. The examination should establish whether the amendment unreasonably impacts on the Crown and the police and whether a legislative amendment is necessary.

Recommendation 5 **60**

That the Minister of Police examine the level of awareness among police officers of the changes to the pre-trial disclosure requirements brought about by the *Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001*, in particular, the insertion of section 15A into the *Director of Public Prosecutions Act 1986* and section 149(6) of the *Criminal Procedure Act 1986* relating to the saving of immunities, and whether there is a need for additional educational resources.

Chapter 1 Introduction

Terms of reference

1.1 During the passage of the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill in 2000, the Legislative Council referred its provisions, as passed, and the system of pre-trial disclosure in NSW to the Standing Committee on Law and Justice for inquiry.[1] The Committee commenced its inquiry in May 2002 and it soon became clear that it was too early to assess the merits of the new legislation and adequately address the terms of reference, as very few orders for pre-trial disclosure had been made under the new provisions. The Committee recommended in its First Report, therefore, that the Attorney General refer the terms of reference back to the Committee in the next session of Parliament.[2]

1.2 The Attorney General accepted the recommendation and referred similar terms of reference to the Committee on 30 July 2003.[3] The terms of reference are set out on page iv. The Committee deferred the commencement of the inquiry until February 2004 in order to ensure that the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001* (the Amendment Act) had been in operation for a sufficient period to permit effective assessment of the reforms it introduced.

Conduct of the inquiry

1.3 The Committee placed advertisements calling for submissions in newspapers and legal journals in February 2004. The Committee Chair also wrote to 40 individuals, agencies and organisations advising of the inquiry and inviting them to make submissions. The Committee received 12 submissions. A list of submission makers is set out as Appendix Two. The Committee held a public hearing on Monday 7 June 2004 at which nine witnesses from five agencies gave evidence. A list of witnesses is set out as Appendix Three.

Structure of the report

1.4 This report is divided into four chapters. Chapter One contains introductory information about the inquiry and this report.

1.5 Chapter Two provides an overview of the Amendment Act, including the background to its introduction and a brief overview of the system of pre-trial disclosure prior to the amendments. It also sets out the purpose of the reforms and describes each of the changes implemented by the Amendment Act.

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1 Legislative Council, New South Wales, *Minutes of Proceedings, No 85*, item 8 (7 December 2000). The original terms of reference are attached as Appendix One

2 Legislative Council, New South Wales, Standing Committee on Law and Justice, Report 21, *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001- First Report*, September 2001

3 The Chair informed the House of the receipt of the terms of reference on 2 September 2003: Legislative Council, New South Wales, *Minutes of Proceeding, No 18*, item 25

1.6 Chapter Three examines the frequency and type of pre-trial disclosure orders made under the provisions introduced by the Amendment Act and compliance with those orders. Other issues relating to the new scheme for pre-trial disclosure orders, including the sanctions applicable to non-compliance and issues relating to the timing of pre-trial disclosure orders, defence response to prosecution disclosure and the saving of immunities, are also examined in this chapter.

1.7 Chapter Four examines the effect of the new pre-trial disclosure requirements on several aspects of the criminal justice system including court delays, unrepresented and disadvantaged defendants, the right to silence, the burden of proof and the presumption of innocence. The need for ongoing monitoring of the new scheme for pre-trial disclosure orders is also considered.

1.8 Chapter Five examines other reforms introduced by the Amendment Act including changes to the requirements for giving notice of alibi evidence, the presentation of indictments and police disclosure to the prosecuting authorities.

Chapter 2 *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*

The *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001* (Amendment Act) was assented to on 19 April 2001 and commenced on 19 November 2001. This Chapter sets out the background to the introduction of the Amendment Act, including a brief overview of the system of pre-trial disclosure prior to the amendments. It also sets out the purpose of the reforms and describes each of the changes implemented by the Amendment Act.

Background to the introduction of the Amendment Act

Pre-trial disclosure prior to the Amendment Act

2.1 There is no general common law right to discovery by either party in criminal trials in Australia.[4] Nor is there, in most jurisdictions including NSW, a general statutory requirement for pre-trial disclosure in criminal trials. This is unchanged by the Amendment Act.

2.2 There were, however, some pre-trial disclosure obligations upon both the prosecution and the defence in NSW prior to the Amendment Act. The requirements were governed by a combination of common law, prosecution policy and guidelines of the NSW Director of Public Prosecutions and the Commonwealth Director of Public Prosecutions, rules of the Law Society of NSW and the NSW Bar Association, standard directions of the Supreme Court of NSW and some statutory provisions.[5] The Attorney General in the second reading speech to the Bill described pre-trial disclosure as '...subject to ad hoc procedure and practice that diminishes consistency and certainty in case management.'[6]

2.3 In brief, pre-trial disclosure on the part of the defence was limited to a statutory requirement to give notice of any alibi and, in murder trials, to give notice of an intention to raise the defence that she or he is not guilty due to a substantial impairment by abnormality of the mind. In addition, the *Evidence Act 1995* requires that, if either party intends to lead evidence relating to tendency or coincidence or first-hand hearsay, that party must give notice of that intention.[7] The rules of the Law Society and the Bar Association require the prosecution to disclose to the defence certain relevant material including the details of potential witnesses. The Director of Public Prosecutions (DPP) guidelines require prosectors to make full disclosure to the defence of the facts and circumstances and the identity of relevant witnesses.

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4 NSW Law Reform Commission, Report 95, *The Right to Silence*, July 2000, para 3.2 ('NSWLRC, Report 95, *The Right to Silence*'). Note that 'discovery' is a process whereby parties to an action disclose to each other the documents in their possession relating to the matter.

5 A detailed description of the pre-trial disclosure requirements that existed prior to the Amendment Act is set out in: NSWLRC, Report 95, *The Right to Silence*, Ch 3

6 Legislative Council, New South Wales, *Hansard*, 8 August 2000, p8288

7 *Evidence Act 1995*, ss 67, 97 and 98

Development of the Amendment Act

2.4 The background to the development and introduction of the Amendment Act is examined in detail in a NSW Parliamentary Library Research Service paper titled 'Pre-Trial Defence Disclosure: Background to the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000'.[8] A brief overview is set out below.

2.5 The subject of pre-trial disclosure has been considered several times in the criminal law reform debate in NSW over the past two decades. Of particular importance in the development of the Amendment Act is the work of the NSW Law Reform Commission during its review of the right to silence, which commenced in August 1997.[9] The review included consideration of several issues relating to pre-trial disclosure, including whether mandatory pre-trial defence disclosure should be introduced. In its final report the Commission made a number of recommendations for increased levels of both prosecution and defence pre-trial disclosure in criminal trials. Many of these recommendations formed the basis of the Amendment Act, although not all of the Commission's recommendations were adopted, as noted by one commentator:

> Recommendations 2-13 of the report provide for increased levels of pre-trial disclosure in criminal trials. These recommendations formed the basis for the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act*. There are however, variations between the Law Reform Commission Report recommendations on pre-trial disclosure and the legislation. For example, the legislation does not take up the recommendation that 'the defendant disclose the general nature of the case he or she proposes to present at trial', nor does the legislation take up the recommendation of 'disclosure requirement for the Local Court'.[10]

2.6 Options for reform in the area of pre-trial disclosure were also considered by a working group established by the former Attorney General, the Hon Jeff Shaw, in 1999 under the auspices of the Criminal law Review Division of the NSW Attorney General's department. The working group included representatives from the Director of Public Prosecutions, the Legal Aid Commission, the Bar Association, the Law Society, Crown Prosecutors, Public Defenders and the police.[11] As noted by Ms Robyn Gray, Deputy Solicitor for Public Prosecutions with the Office of the Director of Public Prosecutions (ODPP), there was a difference of opinion among the working group:

> Not surprisingly there was a deal of difference of view, some fairly predictable splits along 'party lines', and many discussion drafts before the working group made its

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8 Griffith G, *Pre-Trial Defence Disclosure: Background to the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000*, NSW Parliamentary Library Research Service, Briefing Paper 12/2000 ('Griffith'). NSWLRC, Report 95, *The Right to Silence* also has a review of previous inquiries and proposals for reform relating to pre-trial disclosure in Australia: para 3.60-3.84

9 NSW Law Reform Commission, Discussion Paper 41, *The Right to Silence*, May 1998; NSW Law Reform Commission, Research Report 10, *The Right to Silence and Pre-Trial Disclosure in New South Wales*, July 2000; and NSWLRC, Report 95, *The Right to Silence*

10 Loukas C, 'Pre-Trial Disclosure', Judicial Officers Bulletin, Volume 13, Number 6, July 2001, p2

11 Legislative Council, New South Wales, *Hansard*, 8 August 2000, p8288

> recommendations to the Attorney in late 1999. On many fundamental issues no consensus was reached. The draft Bill emerged some eight months later.[12]

2.7 The passage of the Bill through Parliament was subsequently controversial, as noted by Ms Gray:

> The Bill was introduced into the Lower House by the NSW Attorney General in August 2000. Its passage took eight months and was eventful and controversial. The Lower House in December 2000 refused to accept amendments made to the Bill in Committee in the Upper House, and returned the Bill to the Upper House. The Upper House considered the Bill again in February/March 2001. As a result, it insisted that matters initially set out in the regulations to the Bill be included in the Bill itself, but agreed to reinsert two provisions which it had earlier deleted, namely an obligation on the defence, when pre-trial disclosure is orders, to disclose specific defences and to disclose to which prosecution evidence it intends to object to and the basis for that objection.[13]

Purpose of the Amendment Act

2.8 The long title of the Amendment Act identifies its purpose as 'amending the *Criminal Procedure Act 1986* with respect to pre-trial disclosure by the prosecution and the defence; to make related amendments to the *Crimes (Sentencing Procedure) Act 1999* and the *Director of Prosecutions Act 1986*; and for other purposes'. The Government stated that the reforms were principally designed to increase efficiency in the conduct of complex criminal trials and to reduce court delays. In his second reading speech to the Bill, the Attorney General described the purpose of the reforms as follows:

> The purpose of 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. Pre-trial disclosure in New South Wales is presently subject to ad hoc procedure and practice that diminishes consistency and certainty in case management. The present situation is regulated by a combination of common law rules, legislation, prosecution guidelines, Bar Association and Law Society rules and Supreme Court practice directions. This bill improves upon and formalises these requirements. …In addition to providing for case-managed pre-trial disclosure, the bill provides other amendments designed to enhance further the efficiency and fairness of the criminal justice system.
>
> … Pre-trial disclosure carries significant benefits for the parties involved in a case, the courts and the criminal justice system generally. 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.

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12 Gray R, ' The New pre-trial Disclosure Regime in New South Wales', paper presented to the International Association of Prosecutors Conference, 10 August 2001, pp4-5 ('Gray')

13 Gray, p5

> The defendant is in a better position to make an informed decision about whether to plead guilty based on the strength of the disclosed prosecution case. If the defence is pleading not guilty, they are assisted in preparing for the trial by being made aware of the prosecution case in advance. Furthermore, pre-trial disclosure ensures that prosecutors disclose all evidence available to them, not just the evidence in the prosecution's possession that is favourable to its case. I emphasise that the defence response is premised on full and timely disclosure of the prosecution case. 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, as made clear in new section 47F(4).[14]

2.9 The Amendment Act enshrined its purpose of reducing court delays by inserting the new section 134 into the *Criminal Procedure Act 1986*, which states '[t]he purpose of this Division is to enable the court, on a case by case basis, to impose pre-trial disclosure requirements on both the prosecution and the defence in order to reduce delays in complex criminal trials.' The issue of court delays is examined in Chapter 4.

Arguments in support of and against the Amendment Act

2.10 The debate on the Bill focused mainly on the advantages and disadvantages of allowing the court in certain circumstances to impose compulsory pre-trial disclosure requirements on the defence. The general nature of the debate on defence disclosure has been summed up by Dr Griffith as follows:

> 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 make about what are called 'ambush defences'.[15]

Arguments in support

2.11 The main arguments presented in support of the reforms during debate on the Bill in Parliament and in the wider community are noted below:

- the reforms would draw together, formalise and clarify the combination of laws, rules, regulations and guidelines that previously regulated pre-trial disclosure

14 Legislative Council, New South Wales, *Hansard*, 8 August 2000, pp8288-8289

15 Griffith, p9

- pre-trial disclosure allows improved preparation of the prosecution case and improved fairness in the trial process as the prosecution will have the opportunity to consider and test all the evidence
- the defendant would be in a better position to make an informed decision about whether to plead guilty based on the strength of the disclosed prosecution case
- defence pre-trial disclosure addresses the problem of defendants 'ambushing' the prosecution at trial with defences the prosecution could not anticipate
- adjournments in response to unexpected developments in the course of a trial would be minimised
- parties would be able to focus on issues that are in contention, rather than having to prepare evidence in relation to issues that are not in dispute
- a better and fairer outcome can be reached as pre-trial disclosure by both parties ensures the court would be aware of all the relevant information
- pre-trial disclosure in general increases efficiency in the criminal justice system leading to a reduction in court delays and the costs association with such trials and also reducing the impact on victims and witnesses.

Arguments against

2.12 The main criticisms and arguments against the pre-trial disclosure reforms that were raised during the debate on the Bill in Parliament and the wider community are noted below:

- the reforms would have a negative impact on defendants in complex criminal trials because they undermine the right to silence, the presumption of innocence and the burden of proof
- the prosecution would be able to tailor its case in light of the disclosed defence case
- compulsory pre-trial disclosure would place a resource burden on legal services to defendants
- there may be acceptable reasons for the defence to depart from the disclosed defence at trial and the ability to do this under a pre-trial disclosure order is limited
- orders for compulsory pre-trial disclosure may not have the effect of reducing court delays as asserted
- the use of sanctions for breaches of disclosure orders is inappropriate
- the use of sentencing discounts for compliance with pre-trial disclosure requirements is inappropriate
- the requirement that indictments must be presented within four weeks after the committal of the accused for trial and the restriction on amending indictments were criticised as being too onerous on the prosecution
- the fact that the requirement for investigating police officers to disclose all relevant information to the DPP does not apply to investigative officers of statutory bodies

such as ICAC and the National Crime Authority or to Federal police was also criticised.

Reforms implemented by the Amendment Act

2.13 The Amendment Act introduced a statutory duty of prosecution and defence pre-trial disclosure in complex criminal cases in the District and Supreme Court where the court makes a pre-trial disclosure order. Sanctions for non-compliance with pre-trial disclosure orders were also introduced, along with an incentive-based penalty reduction scheme. The Amendment Act further introduced reforms to the way in which police officers disclose information to the DPP. It also made changes to the procedures relating to the indictment presented by the prosecution and notice for alibi evidence.

Pre-trial disclosure orders in complex criminal cases

2.14 The Amendment Act inserted a new division into the *Criminal Procedure Act 1986* to enable the District and Supreme Courts to impose pre-trial disclosure requirements on the prosecution and defence in complex criminal trial, on the application of any party or on its own initiative.[16] The new pre-trial disclosure regime is based on a case management model, which involves hands-on management by the court.

2.15 An order *can only be made* if the court is satisfied that a trial will be a 'complex criminal trial', having regard to certain factors.[17] The factors that must be taken into account include the likely length of the trial, the nature of the evidence to be adduced and the legal issues likely to arise. This requirement attracted much comment from inquiry participants and is examined in Chapter Three. The court must also be satisfied that the accused will be represented by a legal practitioner.[18]

2.16 The new division sets out the information that must be disclosed by both parties pursuant to an order for pre-trial disclosure (see Appendix Four for detail) and disclosure must be made in accordance with a timetable determined by the court.[19] Generally, the required disclosure consists of disclosure of the case for the prosecution, followed by disclosure of the defence's response to the case for the prosecution, followed by disclosure of the prosecution's response to the response by the defence.[20]

2.17 Significantly, the defence is required to disclose whether the accused person proposes to adduce evidence at the trial of contentions as to: insanity, self-defence, provocation, accident, duress, claim of right, automatism, or intoxication and must also disclose details of those witnesses on whom the accused person proposes to rely.[21]

16 *Criminal Procedure Act 1986*, Chapter 3, Part 3, Division 3, Pre-trial disclosure – case management

17 *Criminal Procedure Act 1986*, s 136(2)

18 *Criminal Procedure Act 1986*, s 136(4)

19 *Criminal Procedure Act 1986*, ss 137(2), 138, 139 and 140

20 *Criminal Procedure Act 1986*, s 137(1)

21 *Criminal Procedure Act 1986*, s 139(1)

2.18 The frequency and type of pre-trial disclosure orders made to date is examined in Chapter Three. The impact of the orders on various aspects of the criminal justice system court delays, unrepresented and disadvantaged defendants, the right to silence, the burden of proof and the presumption of innocence is examined in Chapter Four.

Sanctions for non-compliance

2.19 A regime of discretionary sanctions that can be applied by the court to both the prosecution and the defence for non-compliance with pre-trial disclosure requirements was also established.[22] Sanctions include the exclusion of evidence which has not been disclosed, dispensing with formal proof, adjournment and comment to the jury. Certain sanctions can only be applied to the defence if the prosecution has complied with its pre-trial disclosure requirements. This reform is discussed in detail in Chapter Four.

Incentive for compliance

2.20 Sentencing legislation was amended to enable the courts to impose a lesser penalty than it would otherwise impose on an offender who was tried on indictment, having regard to the degree to which the defence has made pre-trial disclosures for the purposes of the trial.[23] The lesser sentence must not be unreasonably disproportionate to the nature and circumstances of the offence.

Voluntary pre-trial disclosure

2.21 The reforms reserve the possibility of voluntary pre-trial disclosure by an accused to the prosecutor of any information, document or other things that the accused person proposes to adduce in evidence in the proceedings.[24]

Duty on police officers to disclose information

2.22 The *Director of Public Prosecutions Act 1986* was amended to formalise the general duty on police officers to disclose to the DPP all relevant information, documents or other things obtained during the investigation of an alleged indictable offence that might reasonably be expected to assist the case for the prosecution or the case for the accused.[25] Previously, disclosure by police officers to the DPP was regulated primarily by the prosecution and policy guidelines of the NSW DPP and the Commonwealth DPP. This reform is discussed in detail in Chapter Five.

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22 *Criminal Procedure Act 1986*, s 148

23 *Crimes (Sentencing Procedure) Act 1999*, s 22A

24 *Criminal Procedure Act 1986*, s 149(4)

25 *Director of Public Prosecutions Act 1986*, s 15A

Notice for alibi evidence

2.23 The *Criminal Procedure Act 1986* was amended to require notice for alibi evidence in all trials on indictment (not just complex criminal trials) to be given at least 21 days before a trial commences.[26] Previously, notice of alibi evidence was required within 10 days following a committal. If notice is not given within 21 days an accused may not, without the leave of the Court, adduce evidence at trial in support of an alibi. This reform is discussed in detail in Chapter Five.

New regime for indictments

2.24 The Amendment Act established that an indictment must be presented within four weeks after the committal of the accused for trial unless this time period is extended either by the Court in which the trial is to be heard or by the Regulations or the Rules of the Court in which the trial is to be heard.[27] This reform applies to all matters in the District and Supreme Courts, not just complex criminal trials. The Amendment Act also provided that Regulations and Rules of the Court may make provisions for the manner of presenting indictments.[28] In addition, prosecutors cannot amend an indictment that has been presented at trial without the consent of the accused or the court's leave. This reform is discussed in detail in Chapter Five.

Commencement

2.25 The new pre-trial disclosure provisions do not apply if the accused person was committed for trial before the commencement of the legislation.

Saving of immunities

2.26 The reforms include the saving of any immunity that presently applies to the disclosure of information, documents or other things, including client legal privilege, public interest immunity and sexual assault communications privilege.[29] This reform is discussed in Chapter Three.

Attorney General's review

2.27 The Attorney General is required to review the pre-trial disclosure procedures established by the Amendment Act to determine whether they are utilised by the courts and whether they have been effective in reducing court delays in complex criminal trials.[30] The Attorney General is also required to examine the cost impacts of the procedures. This review is to take place as soon as possible after the Amendment Act has been in operation for 18 months (ie after May

26 *Criminal Procedure Act 1986*, s 150

27 *Criminal Procedure Act 1986*, s 129

28 *Criminal Procedure Act 1986*, s 129

29 *Criminal Procedure Act 1986*, s 149(6)

30 *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*, s 6

2003). A report on the outcome of the review is then to be tabled in each House within 12 months (ie by May 2004).[31]

2.28 The Director of the Criminal Law Review Division of the Attorney General's Department, Mr Lloyd Babb, advised the Committee that the Department had initially engaged the NSW Bureau of Crime Statistics and Research (BOCSAR) to undertake the review.[32] BOCSAR formed the view, however, that the small number of pre-trial disclosure orders made to date precluded a statistical assessment of the reforms.[33] Mr Babb subsequently advised the Committee that the Department is now undertaking the review itself and is likely to report by early July.[34] At the time of finalising this report, the Department's review had not yet been tabled.

Relevant statute law revision and amendments

2.29 Since its enactment the Amendment Act has undergone statute law revision whereby the majority of the substantive provisions (ss 1-3 and Sch 1-3) were repealed.[35] The only remaining substantive provision is the section that requires the Attorney General's Department to undertake a review (see paragraph 2.25 for more detail of the review).[36]

2.30 The *Criminal Procedure Act 1986* has also been amended since the Amendment Act was introduced, which caused the renumbering of the provisions introduced by the Amendment Act.[37] The Amendment Act, for example, inserted a new 'Division 2A Pre-Trial Disclosure – Case management' into Part 3 of the Act, containing new sections 47A-47P. That division is now numbered Division 3 and the sections were renumbered as sections 134-149.

2.31 Throughout this report the current sections of the *Criminal Procedure Act 1986* will be referred to rather than the provisions of the Amendment Act or the sections of the *Criminal Procedure Act 1986* as initially introduced by the Amendment Act.

31 *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*, s 6

32 Telephone conversation between Mr Lloyd Babb, Director, Criminal Law Review Branch, NSW Attorney General's Department and Senior Project Officer, 3 February 2004

33 Submission 11, NSW Attorney General's Department, p4

34 Mr Lloyd Babb, Director, Criminal Law Review Division, NSW Attorney General's Department, Evidence, 7 June 2004, p26

35 *Statute Law (Miscellaneous Provisions) Act 2003* No 82 (assented 27 November 2003)

36 *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*, s 6

37 See the *Criminal Procedure Amendment (Justices and Local Courts) Act 2001*, Sch 1[61]

Chapter 3 Pre-trial disclosure orders

The terms of reference require the Committee to examine the frequency and type of pre-trial disclosure orders made under the provisions introduced by the Amendment Act. The Committee is also required to examine compliance with those orders. In addition, the Committee examines several other issues relating to the new scheme for pre-trial disclosure orders identified by inquiry participants including the sanctions that apply to non-compliance with disclosure orders and issues relating to the timing of pre-trial disclosure orders, defence response to prosecution disclosure and the saving of immunities.

Frequency and type of pre-trial disclosure orders made

3.1 The Committee has been informed that pre-trial disclosure orders have been made in only a very small number of cases. In this regard, the ODPP advised in March 2004 that 'declarations that a matter was a complex matter to which the pre-trial disclosure provisions applied have been made by the Supreme Court of NSW in six matters and by the District Court in three matters to date.'[38] Orders were subsequently made in eight of those cases (six in the Supreme Court and two in the District Court).[39] Particulars of the matters where pre-trial disclosure orders were made were provided by the ODPP (see Appendix Five).

3.2 The ODPP also informed the Committee that *unsuccessful* applications for pre-trial disclosure orders had been made in two Supreme Court matters and one District Court matter (see Appendix Six).[40] In June 2004 the Attorney General's Department advised that pre-trial disclosure orders had also been made in three Commonwealth cases (see Appendix Seven).[41]

3.3 The information supplied by the ODPP included an outline of the orders made in each of the eight cases (see Appendix Five). Concomitant with the infrequent use of the legislation, the Committee did not receive a great deal of comment in relation to the type of pre-trial disclosure orders made. The Legal Aid Commission NSW expressed the view, with which the Committee concurs, that it is too early to draw any definite conclusions about the type of orders being made:

> The number of orders made to date is still too small to draw any definite conclusions about the type of orders being made. In complex trials there may be a number of issues that could be regarded as peripheral to the central factual dispute. Some of these issues can be clarified pre-trial by effective case management from the bench, by interlocutory pre-trial applications or be determined in the absence of the jury during the course of a trial. Some issues may be the subject of disclosure requirements by other legislation, eg Notice of Intention to Rely on Hearsay Evidence, etc.

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38 Submission 5, Office of the Director of Public Prosecutions, p1

39 Submission 5, Office of the Director of Public Prosecutions, p1. In the remaining matter no order was subsequently sought or made, '…as the court had made the declaration of its own motion and the Crown Prosecutor conducting the matter did not consider that orders were necessary.'

40 Submission 5, Office of the Director of Public Prosecutions, p1

41 Tabled document No 1, Mr Lloyd Babb, Director, Criminal Law Review Division, NSW Attorney General's Department, Part 1

> It is thus impossible to be any more definite than to say that the type of pre-trial disclosure orders made, may in many cases simply confirm that a defence is to be relied on which is obvious from the evidence already available, eg that a client was mentally ill. There is also a requirement to serve copies of experts' reports to be relied on by the defence in the pre-trial disclosure legislation. In many cases, this is the kind of exchange of information that is already done in the lead up to a trial by both prosecution and defence. However, the fact that the pre-trial disclosure regime requires timely service of this expert material means that complex issues can be clarified before, rather than during a trial. This should reduce trial time and reduce the need for adjournments.[42]

3.4 Shortly before this report was finalised the Committee was advised by both the Supreme Court and the District Court of NSW that no further pre-trial disclosure orders had been made in the intervening time.[43] The Committee examines the reasons for the infrequent use of pre-trial disclosure orders later in this chapter.

Reasons for the small number of orders made

3.5 A range of views were expressed during this inquiry as to why so few pre-trial orders have been made to date. The reasons included the requirement for a trial to be 'complex' before a pre-trial disclosure order can be made, the relative infancy of the scheme and the success of existing non-statutory pre-trial disclosure mechanisms.

'Complex criminal trials' and interpretation of *Criminal Procedure Act 1986*, s 136(2)

3.6 The legislation specifies that pre-trial disclosure orders can only be made if the court is satisfied that the trial in question will be a 'complex criminal trial' having regard to certain factors.[44] The factors that must be taken into account include the likely length of the trial, the nature of the evidence to be adduced at the trial and the legal issues likely to arise.

3.7 The Law Society of NSW noted that small number of orders made 'is as expected, given that the majority of criminal trials are not long and complex matters, which are the target of the pre-trial disclosure procedures.'[45] Similarly, the DPP, Mr Nicholas Cowdery AM QC, noted that the 'vast majority' of trials in the District and Supreme Court last year were not complex within the meaning of the legislation:

> The terms of the legislation restrict their availability to complex criminal trials, and the section provides three criteria, one of which at least has to be satisfied. That is the first limiting factor that restricts availability of those orders to a small part of the work that we do. I interpolate that, on the figures for last year, 2003, my office prosecuted about

42 Submission 9, Legal Aid Commission NSW, p2

43 Telephone conversation between Ms Tonya Wood, Associate to Justice Blanch, District Court of NSW and Committee Secretariat Director, 19 November 2004 and telephone conversation between Ms Megan Greenwood, CEO and Principal Registrar, Supreme Court of NSW and Committee Secretariat Director, 19 November 2004

44 *Criminal Procedure Act 1986*, s 136(2)

45 Submission 7, Law Society of NSW, p1

> 2,115 trials in the District Court and about 80 trials in the Supreme Court. The vast majority of those trials do not qualify as complex criminal trials under the criteria in the Act, so there is only a small field to which they could apply in any event. [46]

3.8 The Committee was advised that complex criminal trials are more likely to arise in the Supreme Court rather than the District Court (which accords with the fact that the majority of orders made to date have arisen in the Supreme Court).[47] Mr Brian Sandland, the Director of the Criminal Law Division of Legal Aid, expanded on this distinction in evidence before the Committee:

> In the District Court you have far more matters pumping through the system. You might have on hand in the criminal jurisdiction in the Supreme Court in a 12-month period 100 or so and you would have up to 3,000 or in that vicinity in the District Court. You would expect, given those circumstances, that the matters being handled in the Supreme Court are the ones that attract the heavier penalties and are likely to be more complex. It has technology facilities available greater than in the District Court, and the Commonwealth DPP, I understand, is instituting more prosecutions now in the Supreme Court than used to be the case, pursuant to practise note 98. You have more complex fraud matters go up to the Supreme Court, you have matters that attract either life sentences or more serious sentences and as investigations become more sophisticated and the resources of the police are being utilised in that way, you are going to have more complex evidentiary matters put to the courts of higher jurisdiction.[48]

3.9 Several inquiry participants drew the Committee's attention to the difficulties with interpreting the gateway 'complex criminal trial' test as potentially limiting the number of orders made. The issue was explained by the Attorney General's Department as follows:

> There is a gateway provision through which a case must pass before pre-trial disclosure orders are made. That provision is section 136(2) of the *Criminal Procedure Act 1986*, which provides that:
>
> > (2) The court may order pre-trial disclosure only if the court is satisfied that it will be a complex criminal trial having regard to:
> >
> > (a) the length of the trial; and
> >
> > (b) the nature of the evidence to be adduced at the trial; and
> >
> > (c) the legal issues likely to arise at the trial.
>
> It is possible that some judges have considered that all three subsections must be met prior to the making of an order. If the legislation is so interpreted then it will be applicable to a smaller number of cases than if an order can be made if one subsection is met.[49]

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46 Mr Nicholas Cowdery AM QC, Director of Public Prosecutions, Evidence, 7 June 2004, p1

47 Submission 9, Legal Aid Commission NSW, p1

48 Mr Brian Sandland, Director, Criminal Law Division, Legal Aid Commission NSW, Evidence, 7 June 2004, p45

49 Submission 11, NSW Attorney General's Department, p2

3.10 The first interpretation of section 136(2), as mentioned by the Attorney General's Department, is that all three subsections must be met before an order can be made. This interpretation rests on the literal interpretation of the word 'and' in the subsection. The second interpretation is that the court must only be satisfied that *one* of the subsections is met, ie either (a) *or* (b) *or* (c).

3.11 The Committee was advised by the ODPP that the interpretation of section 136(2) was considered last year by Justice O'Keefe of the Supreme Court, in *R v Monroe* [2003] NSWSC55, who favoured the second interpretation, holding that 'the word *"and"* in (a) and (b) should be interpreted as *"or"*.' [50] In reaching his decision Justice O'Keefe noted that sometimes the word 'and' in a statue may have the effect of 'or':

> In some statutory provisions, the word, "and" may have the effect of "or". Whether it does or not is a matter of construction that will depend on the form, context and purpose of the statutory provision. For example there may be a list of items that are joined by "and" in a statutory provision in which the list itself may be governed by or affected by words which show that the various items in the list are really alternatives.[51]

3.12 Justice O'Keefe also considered the intention of Parliament in his interpretation, noting that the second, less restrictive, interpretation of section 136(2) accords with the intent of the Amendment Act to reduce court delays:

> Just as a dispersive effect may be given to provisions linked by the word "and" as a result of the context of such provision, so too, in my opinion, may such an effect be given as a result of the object or purpose of the legislation in which that word occurs. … In the present case, the object or purpose of the Act is to reduce court delays in complex criminal trials. This is in the public interest. Furthermore, the making of an order under s 47 C is discretionary. Recognition can thus be given to the traditional common law right of an accused person by the way in which such discretion is exercised on a case by case basis. Such considerations favour a reading of the section that is not unduly restrictive. If all of the requirements of s 47C(2)(a)(b) and (c) had to be fulfilled before a criminal trial could be classified as "complex", the ambit of the application of s 47C would be significantly reduced. For example, there are many criminal trials in which the evidence likely to be adduced will be complicated, technical, difficult to understand, ie complex, but the trial may not be long, nor may it involve legal issues.[52]

3.13 The Director of the Criminal Law Review Division of the Attorney General's Department, Mr Lloyd Babb, noted that, while the determination of Justice O'Keefe provides guidance, the determination of a single judge of the Supreme Court is not binding on other Supreme Court judges.[53]

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50 Submission 5, Office of the Director of Public Prosecutions, p4

51 *R v Monroe* [2003] NSWSC55, at para 14

52 *R v Monroe* [2003] NSWSC55, at para 25, 27 and 28. Note the provision numbers cited by Justice O'Keefe have subsequently been amended, see para 2.33

53 Mr Babb, NSW Attorney General's Department, Evidence, 7 June 2004, p27

3.14 In this regard, the Committee is aware that there is some disagreement within the legal fraternity as to the correct interpretation of section 136(2). Justice O'Keefe's view was supported by several participants in this inquiry, including the DPP who stated:

> We have the problem of the interpretation of the word 'and' in subsection (2) of section 136. There is an interpretation, on which we rely, by Justice O'Keefe in the matter that we have referred to. He interpreted the 'and' as meaning 'or'.[54]

3.15 Conversely, Mr Sandland of Legal Aid disagreed with Justice O'Keefe's interpretation of the intention of Parliament in passing the Amendment Act. He expressed the view that the wording of the provision indicates Parliament's intention to be that all three requirements must be met in order for a trial to be considered complex:

> If the legislation says, firstly, that the court will make a pre-trial disclosure order in the case of a complex trial, and will consider length of trial, and evidence to be called, and legal issues involved, it means just that: that those three criteria have to be present. I can envisage a situation, probably posed by the Director of Public Prosecutions, where you could have a complex matter which was not all that long and where there may be some advantage in an exchange of experts' evidence in order to clarify issues pre-trial. But, if the Parliament had intended that result, presumably it would have drafted section 136 more clearly. I think the drafting is clear: that, in terms of identifying whether a trial is complex, one has to look at all three of those matters.
>
> My view is that, given that the intent of the Parliament seems to be clear, with all due respect to the judge who determined the case of *Munroe*, it does not see to be apparent that the Parliament intended 'or' to be placed between each of those criteria. That could be fixed up by the Parliament if that is the intention. At the moment, I do not think that is the intention. I think complex trials are ones that are long, legally complex and may involve kinds of evidence that is not normally encountered. But Parliament has not sought to prescribe what is a long trial. The average trial, in the Supreme Court, is one that runs for about 14 days, and in the District Court for a bit shorter than that. So one does not have to stray too far beyond that to be getting into the realms of a trial that may be regarded by the court as long.[55]

3.16 Some inquiry participants suggested that for the sake of clarity, a legislative amendment to section 136(2) may be necessary. For example, the Law Reform Commission warned that Justice O'Keefe's interpretation 'will not necessarily be followed' and that 'if nothing else, it needs clarification'.[56]

3.17 The ODPP supported an amendment to replace 'and' with 'or' in ss 136(a) and (b) in order to 'put the issue beyond doubt'.[57] The ODDP emphasised that requiring all three elements to be present meant that the benefits of pre-trial disclosure orders would be available to a smaller number of cases.[58] The ODDP also foreshadowed difficulties with requiring all three criteria to be met:

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54 Mr Cowdery, Director of Public Prosecutions, Evidence, 7 June 2004, p3

55 Mr Sandland, Legal Aid Commission NSW, Evidence, 7 June 2004, p48

56 Submission 12, NSW Law Reform Commission, p2

57 Submission 5, Office of the Director of Public Prosecutions, p4

58 Submission 5, Office of the Director of Public Prosecutions, p4

> If, for example, an order for pre-trial disclosure is not made in a baby shaking case in which the cause of the child victim's death will be the crucial issue in dispute, the Crown will generally not be served with the defence medical reports until such time as the defence experts give their evidence. This will create difficulties for the Crown in the cross-examination of defence experts and may result in the Crown having to lead further evidence in reply. If the defence reports are served ahead of the trial, the Crown can seek response and comments from its own experts so as to be in a position to immediately cross-examine defence experts and call evidence in its own case if necessary.[59]

3.18 Other inquiry participants argued that an amendment was not necessary. Mr Sandland, for example, expressed the view that the interpretation of the provision as requiring that all three criteria be satisfied was appropriate and advised that he did not support a legislative amendment to require only one criterion must be met:

> My position, on behalf of the Legal Aid Commission, is that the way the legislation is drafted at the moment is appropriate. I think responsible counsel, involved in say a shorter trial which nevertheless involves complex issues where experts' evidence is required, will have exchanged their experts' reports in any event. I know that is happening from the anecdotal evidence that I receive. It may not happen across the board, in every case, but my view is that responsible counsel are addressing issues, and are acting in the best interests of running only matters that are relevant to the defence case, and hence I do not see a need to extend this legislation by requiring only one of those criteria to be present.[60]

3.19 Some inquiry participants went further and argued that pre-trial disclosure orders should not be limited to complex cases. In this regard, the Law Reform Commission has argued, in both its *Right to Silence* report and its submission to the Inquiry, that the availability of pre-trial disclosure orders should not be limited to 'complex criminal cases':

> The Commission can, however, see no reason why the Division should be limited to 'complex criminal trials'. We reiterate that courts ought to be able to invoke the provisions on pre-trial disclosure in all cases in which they are appropriate: see Report 95 at paras 3.98 and 3.127. The appropriate question is not whether the trial can be described as 'complex' but whether, having regard to the issues in the trial it is useful to set in train the indicated regime of mutual disclosure. For example, many sexual assault cases are relatively simple but disclosure of the nature of the defence will enable the trial judge more readily to determine the relevance of cross-examination (which will, in many cases, be distressing for the complainant) and confine counsel to matters that are actually in dispute; moreover, the Prosecutor may well not need to question the complainant in chief about intimate details when it is clear that these are not in issue.[61]

3.20 The Committee notes the differing views expressed to it on the interpretation of section 136(2) and is mindful that other judges may choose not to follow the judgement made by Justice O'Keefe in *R v Munroe*. In this regard an element of uncertainty exists in relation to the key determinant of whether a pre-trial disclosure order is possible. The Committee also notes

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59 Submission 5, Office of the Director of Public Prosecutions, pp4-5

60 Mr Sandland, Legal Aid Commission NSW, Evidence, 7 June 2004, p49

61 Submission 12, NSW Law Reform Commission, p2

that the interpretation of section 136(2) favoured by Justice O'Keefe broadens the section and makes pre-trial disclosure orders available to a larger number of cases.

3.21 The Committee is aware that the likely impact of such an amendment on the use of pre-trial disclosure orders cannot really be predicted and notes in this regard the comments of Mr Zahra, Senior Public Defender, who stated that there is no indication that the interpretation of section 136(2) is contributing to the few orders being made:

> We do not have any problem with "and" being changed to "or" and we will see how it goes. … but I do not think on the present trends we would see any significant change in that, but we have no problem with that being amended to "or". I do not get any sense that judges have felt frustrated by the provisions or thought it is badly drafted. No-one has challenged this in superior courts. No-one has suggested until now it is too limiting. They just have not used it.[62]

3.22 Nonetheless, it is the Committee's view that clarifying the meaning of section 136(2) would be beneficial and that broadening the definition of 'complex criminal cases' might lead to more use of pre-trial disclosure orders. The Committee recommends, therefore, that the Attorney General seek a legislative amendment to ensure that section 136(2) of the *Criminal Procedure Act 1986* clearly reflects the interpretation given to it by Justice O'Keefe in *R v Munroe* [2003] NSWSC55, by relacing the word 'and' in subsections 136(2)(a) and (b) with 'or'.

Recommendation 1

That the Attorney General seek a legislative amendment to ensure that section 136(2) of the *Criminal Procedure Act 1986* clearly reflects the interpretation given to it by Justice O'Keefe in *R v Munroe* [2003] NSWSC55, by relacing the word 'and' in subsections 136(2)(a) and (b) with 'or'.

Infancy of the scheme and awareness

3.23 The Committee was advised that the relative infancy of the pre-trial disclosure order scheme may also have contributed to its limited use so far. Although the scheme has been in effect since November 2001, Mr Sandland of Legal Aid indicated that practitioners may still be getting used to the new provisions:

> It is a new concept in the context of a legislative framework and I think the practitioners on both sides of the bar table are endeavouring to get used to it, coming to grips with it and seeing the extent to which it works for them and the interests that they serve. … Once the practitioners involved and the bench get used to the limits of the legislation, and how it may assist, we may find that it is used more than perhaps it has been used since it came in.[63]

62 Mr Peter Zahra, Senior Public Defender, NSW Public Defenders Office, Evidence, 7 June 2004, p19

63 Mr Sandland, Legal Aid Commission NSW, Evidence, 7 June 2004, p45

3.24 The Committee did not receive any evidence relating to the level of awareness of the new provisions among criminal defence lawyers and prosecutors, although the evidence presented by the witnesses from Legal Aid, the Public Defenders Office and the ODPP suggests a high level of awareness within those agencies.

3.25 In relation to judges, Mr Babb advised that, as part of its continuing judicial education program, the Judicial Commission of NSW has undertaken the following educational activities regarding pre-trial disclosure:

> *Judicial Officers Bulletin*, July 2001 – this publication, which was sent to all judicial officers, contained a lead article by Ms Chrissa Loukas (the Director of the Criminal Law Review Division of the Attorney General's Department) which considered the main aspects of the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*. …
>
> 2002 Supreme Court Annual Conference – a paper was given by the Honourable Justice Barr at this conference for Supreme Court judges on the topic *Recent Developments in Criminal Law*. It covered the legislation and its application in proceedings in criminal trials where the accused was committed for trial on or after 19 November, 2001.
>
> Judicial Information Research System – this electronic database which is available to all judicial officers in New South Wales contains information on pre-trial disclosure in its *Principles and Practices of Sentencing* component. The information in this component of the database is linked to relevant legislation and case law.
>
> *The Sentencing Manual* – this textbook on the law, principles and practice of sentencing in New South Wales has been provided by the Commission to all judicial officers. It contains information on the legislation and its application in criminal trials.
>
> Bench Books – the *Local Courts Bench Book* and the *Criminal Trial Courts Bench Book* are provided to judicial officers sitting in criminal matters. Both bench books contain information about the legislation and procedure to assist judicial officers.[64]

Effectiveness of existing pre-trial disclosure mechanisms

3.26 The Committee was also informed that the success of existing methods of encouraging pre-trial disclosure among parties may be limiting the perceived need for formal pre-trial disclosure orders. In this regard, the DPP pointed to the practices of Justice Barr in the Supreme Court:

> … in the Supreme Court arraignments are conducted normally by Justice Barr, who has developed very effective techniques and approaches for having the parties identify issues, in having the evidence limited, to the extent that it can be, and in gaining efficiencies in that way, without having to invoke the regime of the Act. So he, as the arraignments judge, is very effective in achieving many of the objectives of the Act in any event. ...[65]

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64 Mr Lloyd Babb, Director, Criminal Law Review Division, NSW Attorney General's Department, Answers to questions taken on notice, Evidence, 7 June 2004

65 Mr Cowdery, Director of Public Prosecutions, Evidence, 7 June 2004, p1

3.27 The Public Defenders Office also noted the work of Justice Barr and expressed the view that other pre-trial disclosure practices are applied by the courts without the need for formal disclosure orders:

> …only a very small number of Supreme Court trials have seen formal implementation of the processes contained within the statutory pre-trial disclosure regime, as distinct from other processes adopted by the Court to achieve efficiency and clarification of issues without recourse to orders or sanctions. Although the Supreme Court has made such orders, in the main that Court and the District Court employ a range of other pre-trial practices that complement the statutory disclosure and its principle objects. Pre-trial listing before an assigned trial judge is now a common practice. This has been adopted in order to refine trial issues and minimise the prospects of avoidable trial attenuation, particularly that which might hitherto have entailed hours or days of a jury being sent out of court whilst legal issues were resolved.
>
> Justice Barr is the senior Criminal trial list judge with responsibility for pre-trial arraignments and listing of what are, in the main, the Court's homicide matters. It is his Honour's practice to ensure that matters are listed for trial in a timely fashion, having required of the parties a full disclosure of trial issues, including pre-trial matters to be determined. In the ordinary course his Honour will not list matters for trial before the broad outline of a trial, its duration, likely complications and matters amenable to pre-trial determination have been identified. Once listed, with a trial judge assigned, it is common practice for there to be, sometimes several, pre-trial directions hearings before the trial judge in order to resolve matters. It is the view of the Public Defenders that these processes are highly desirable and prove productive in the overwhelming majority of matters. The processes are effectively applied in many trials, without recourse to formal disclosure orders or the necessity of considering the definition of 'complex' in the Act.[66]

3.28 The impact of existing, less formal, pre-trial disclosure mechanisms on court delays is examined in Chapter Four.

Other reasons

3.29 The DPP also suggested that judges may be reluctant to make pre-trial disclosure orders because there is a potential to delay proceedings:

> … there is a reluctance on the part of judges, particularly in the District Court, to invoke the regime that applies to complex criminal trials. The reason for that is that there is the potential for delay, and for the creation of a great deal more work for everybody concerned, and perhaps not for major benefits in the conduct of the trial in the vast majority of cases. [67]

3.30 Other inquiry participants raised the potential for delay in the context of discussing the impact of the pre-trial disclosure orders on court waiting times, as examined in Chapter Four.

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66 Submission 8, NSW Public Defenders Office, pp2-3

67 Mr Cowdery, Director of Public Prosecutions, Evidence, 7 June 2004, p1

3.31 In 2001 Ms Gray of the ODPP predicted that 'applications from the defence are expected to be rare'.[68] During the hearing Mr Sandland of confirmed that Legal Aid does not 'as a matter of course invite the making of pre-trial disclosure orders'.[69] He indicated that the defence was less likely that the prosecution to make an application for pre-trial disclosure laws due to the adversarial nature of the criminal justice system:

> …We usually think that the prosecution is holding the aces and that because we, from the defence perspective, do not have to prove anything we simply have to test whether the evidence has been proven to the requisite standard beyond reasonable doubt. So it is not likely in that context that you would necessarily be volunteering your defence. … in general terms, given that it is an adversarial system and given that the prosecution has the onus of proof, the defence is more likely to be responding to an application by the prosecution to have pre-trial disclosure orders made.[70]

3.32 The Committee was also advised that the availability of formal pre-trial disclosure orders may in itself encourage cooperation between parties and thereby render the making of orders less necessary. For example, Mr Babb noted:

> One can only really evaluate the system knowing that there is a regime for pre-trial disclosure in place and that parties know that, if they fail to voluntarily engage in case management, then that can be ordered. It is hard to determine how much impact the fact that a court can make the specific orders would have on the willingness of parties to engage in conduct voluntarily. That is something that I think would be very hard to test for.[71]

Conclusion

3.33 As the proceeding discussion reveals, a range of factors appear to have contributed to the small number of pre-trial disclosures orders made under the new legislation. It has been difficult, however, for the Committee to ascertain which, if any, of the factors cited by inquiry participants have been more influential. While it is unclear how significant the disagreement regarding the 'complex criminal trial' gateway test is in this context, the Committee has recommended a legislative amendment to clarify the matter and encourage further use of pre-trial disclosure orders. The potential future use of the orders is examined at the end of this chapter.

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68 *Gray*, p15

69 Mr Sandland, Legal Aid Commission NSW, Evidence, 7 June 2004, p45. As for applications from prosecution, the DPP stated '[t]hat is a matter in the discretion of the Crown prosecutor who is briefed in the matter or in the arraignment Crown prosecutor who is dealing with the arraignments. So it is a matter for that prosecutor to assess the nature of the case, the issues and the evidence involved': Mr Cowdery, Director of Public Prosecutions, Evidence, 7 June 2004, p2

70 Mr Sandland, Legal Aid Commission NSW, Evidence, 7 June 2004, p46

71 Mr Babb, Attorney General's Department, Evidence, 7 June 2004, pp28-29

Timing of pre-trial disclosure orders

3.34 Section 136(1) of the *Criminal Procedure Act 1986* requires that the presentation of an indictment is a pre-requisite to the making of a pre-trial disclosure order.[72] The ODPP identified difficulties with this requirement due to the fact that many list judges do not formally arraign the accused:

> The legislation provides for the presentation of an indictment as a pre-requisite to the making of pre-trial disclosures orders. Many list judges, however, do not formally arraign the accused; the judge simply receives the indictment from the prosecutor and places it on the court file. The reason for this approach is the time involved in having the indictment (which may be lengthy) read out to the accused, when the list may contain 40 or more matters for arraignment. Accused persons are not normally brought to court for directions hearings after the arraignments day, so if a pre-trial disclosure application is to be pursued after the arraignments day, special arrangements need to be made to bring the accused to court on a later occasion and then to arraign them.[73]

3.35 The ODPP suggested a legislative amendment may resolve this problem:

> One Crown Prosecutor suggested that the Chief Justice and the Chief Judge could issue a direction that accused persons are to be formally arraigned (rather than the indictment filed) on the arraignments day, which will enable the pre-trial disclosure legislation to be applied. For the reason referred to above (the time involved) this is unlikely to be favoured by the Court. An alternative approach would be the amendment of the legislation to provide that the pre-trial disclosure orders may be made after the *presentation* by the Crown of the indictment, even though a plea is not formally entered by the accused.[74]

3.36 Mr Babb agreed that such a legislative amendment may be 'worthwhile':

> I think that that could be a worthwhile change. The DPP did not cite any examples where they thought that it had had any material effect, but they are probably correct in their interpretation of presenting the indictment at the arraignment. Again, it may be something that could have some effect and enable more orders to be made so in that regard I would probably support their recommendation.[75]

3.37 In addition, Mr Sandland indicated that he had 'no problem' with the ODPPs proposal:

> As I understand it, the DPP is concerned about the informal arrangements to have indictments presented to the court (ie handed up) without the indictment being read and a formal plea being entered. As long as a plea of not guilty has been indicated to the court I can see no problem with the DPP's proposal that pre-trial disclosure

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72 *Criminal Procedure Act 1986, s 136(1)*: 'After the indictment is presented in any criminal proceedings, the court may order both the prosecutor and the accused person to undertake pre-trial disclosure in accordance with this Division.'

73 Submission 5, Office of the Director of Public Prosecutions, p5

74 Submission 5, Office of the Director of Public Prosecutions, pp5-6

75 Mr Babb, NSW Attorney General's Department, Evidence, 7 June 2004, p32

> orders may be made after the presentation by the Crown of the indictment, even though a plea is not formally entered by the accused.[76]

3.38 The Committee did not receive sufficient information to enable it to reach any firm conclusion about the potential amendment identified by the ODPP. It appears, however, that it may be a matter worth pursuing and, in this regard, the Committee is of the view that the Attorney General should consider the issue identified by the ODPP, including whether the legislative amendment identified would be beneficial to the scheme of pre-trial disclosure implemented by the Amendment Act.

Recommendation 2

That the Attorney General examine the issue identified by the Office of the Director of Public Prosecutions in its submission to the Committee's inquiry, relating to the requirement that an indictment be presented before a pre-trial disclosure order can be made, and consider whether the legislative amendment identified by the ODPP would be beneficial to the scheme of pre-trial disclosure implemented by the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*.

Defence response to prosecution disclosure

3.39 One of the requirements relating to defence disclosure that was introduced by the Amendment Act has attracted criticism from the Public Defenders Office. The Public Defenders Office has argued that section 139(2)(f) of *Criminal Procedure Act 1986* is unduly onerous because 'to disclose all objections that will be taken to evidence prior to the trial is unrealistic in the extreme'.[77] Section 139(2)(f) states:

> The accused person's response to the particulars raised in the notice of the case for the prosecution is to contain the following: (f) notice as to whether the accused person proposes to dispute the admissibility of *any other proposed evidence* disclosed by the prosecuting authority and the basis for the objection [emphasis added].[78]

3.40 This position, however, did not find much support among other inquiry participants. For example, the DPP disagreed that the requirement was too onerous in the context of the other obligations placed on the defence:

> I do not agree with that submission. It does not require the defence to identify all possible objections that might be taken to evidence. It is a regime that requires, in the first place, the prosecution to disclose evidence in various categories to which the legislation applies that the Crown will be relying upon and for the defence then to indicate its approach to that evidence which has been identified. There will always be things that come up in the course of a trial that cannot be predicted in advance and

76 Mr Brian Sandland, Director, Criminal Law Division, Legal Aid Commission NSW, answers to questions taken on notice, Evidence, 7 June 2004

77 This issue was identified by the NSW Public Defenders Office in its submission to the first stage of this inquiry, 14 August 2002, p2

78 *Criminal Procedure Act 1989*, s 139(2)(f)

> there may be objections taken by the defence to particular questions or the admission of particular evidence in the course of the running of the trial. It does not preclude that, but that can still happen. So I do not agree with the submission. I think it might be overstating the problems somewhat.[79]

3.41 Mr Babb also advised the Committee that he did not share the Public Defenders concerns:

> I do not really. I think I can understand where the Public Defenders are coming from. There will no doubt be objections that you do not notify in advance that come up as a result of how the trial runs, or a change of heart. When you are really finetuning your view of how you are going to run the trial you realise, "I do want to either keep this evidence in or try to keep it out." But the Act provides that in section 140(2) of the *Criminal Procedure Act 1986*, which is part of the pre-trial disclosure legislation, a court may waive requirements. I would think that that would certainly be a requirement whether it was waived in advance or action would not be taken because you had decided to approach legal questions in a different way. I do not see any sanctions being sought to be invoked or any real problem arising from it being in.
>
> It is very practical and it usually happens in most trials that before the trial begins counsel do discuss whatever is going to be objected to and you try to have those arguments prior to the empanelling of the jury. What it does stop is trials aborting because if you do not have the arguments before the evidence is led and it gets in only for an objection to then be taken, it is before the jury and the jury is prejudiced if it should not have gone in. Really, that is formalising what is currently happening. Defence notify the Crown Prosecutor that they object to these portions of the evidence. Many times the Crown Prosecutor says, "I agree. I wasn't going to lead it in any event", or "No, I do want to proceed. We better have that argument. Let's let the judge know that that will take the first two days of trial." I do not really share Mr Zahra's concern about the inclusion of that particular subsection.[80]

3.42 The Committee acknowledges the conflicting opinions expressed in relation to section 139(2)(f) and notes that it did not receive sufficient evidence to draw any firm conclusions about the Public Defenders concerns.

Compliance with pre-trial disclosure orders

3.43 The terms of reference require the Committee to examine the rate of compliance with pre-trial disclosure requirements by legally aided and privately funded defendants, police and the ODPP. Compliance by the prosecution and defence is examined in this section while compliance by Police is examined in Chapter Five where the new obligations of disclosure placed on police by the Amendment Act are explored.

3.44 The Committee has been advised that there has generally been a high level of compliance by the prosecution and defence with the few orders made to date. For example, Legal Aid stated that 'the Legal Aid Commission is not aware of any cases in which it has acted in-house where

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79 Mr Cowdery, Director of Public Prosecutions, Evidence, 7 June 2004, p11

80 Mr Babb, NSW Attorney General's Department, Evidence, 7 June 2004, p32

there has been a failure to comply with pre-trial disclosure orders.[81] The Public Defenders Office similarly noted that:

> … there has been a generally high level of compliance by both parties wherein orders have been made. We are assured that in every case where a Public Defender has been involved there has been compliance.[82]

3.45 In addition, the ODPP advised the Committee that all but one of the pre-trial disclosure orders made have been complied with by the prosecution and the defence:

> In all matters in which pre-trial disclosure orders have been made both the Office of the Director of Public Prosecutions and the legal representatives of the accused persons have complied with the orders made. However, in the *Styman, Taber and Ravell* matter some of the defence counsel did not comply with the orders by the date specified.[83]

Sanctions

3.46 The Amendment Act introduced a regime of discretionary sanctions that can be applied to both the prosecution and the defence for non-compliance with pre-trial disclosure orders.[84] The available sanctions are as follows:

- *Exclusion of evidence*: the court may refuse to admit evidence in any criminal proceedings that is sought to be adduced by a party who failed to disclose the evidence to the other party in accordance with pre-trial disclosure requirements.
- *Dispensing with formal proof*: the court may allow evidence to be adduced by a party to criminal proceedings without formal proof of a mater if the evidence was disclosed to the other party and the other party did not disclose a intention to dispute or require proof of the matter as required by the pre-trial disclosure requirements.
- *Adjournment*: The court may grant an adjournment to a party if the other party seeks to adduce evidence in criminal proceedings that the other party failed to disclose in accordance with pre-trial disclosure requirements and that would prejudice the case of the party.
- *Comment to the jury*: The judge or, with leave of the court, any party may comment on a failure by a party to comply with pre-trial disclosure requirements in any criminal proceedings. However, 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.

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81 Submission 9, Legal Aid Commission NSW, p2

82 Submission 8, NSW Public Defenders Office, p2

83 Submission 5, Office of the Director of Public Prosecutions, p1. Note that while the Committee is aware that a public defender appeared in the *Styman* matter, the issue of non-compliance identified by the ODPP was not explored by the Committee

84 *Criminal Procedure Act 1986*, s 148

3.47 The legislation provides that the sanctions relating to the exclusion of evidence and making comments to the jury cannot be applied to the accused *unless* the prosecution has complied with its pre-trial disclosure requirements.[85]

3.48 As far as the Committee is aware, neither the District nor the Supreme Court has utilised the sanctions provision in any trial in which a pre-trial disclosure order has been made. This accords with the fact that the orders have largely been complied with, as noted in the proceeding section on compliance.

3.49 As the sanctions are yet to be applied it is difficult to comment on their effectiveness. Nonetheless the sanctions provisions attracted much comment from inquiry participants as examined below.

Deterrent power of the availability of sanctions

3.50 Some participants acknowledged the deterrent power of the availability of sanctions. For example, the Public Defenders Office stated that:

> We readily concede that there may be a valid argument that, although seldom employed, the availability of a formal disclosure mechanism with sanctions fosters wider adoption of a generally cooperative approach, albeit without need to rely upon the provisions directly.[86]

3.51 Similarly, the DPP stated:

> … I think it is important to have sanctions prescribed to show that the legislation is intended to be complied with, that it is intended that there will be penalties for not doing so, even if, when push comes to shove, the sanctions are not enforced in any meaningful or in any punitive way.[87]

Impact of sanctions on defendants

3.52 The potential for sanctions to impact on the outcome of a case for a defendant attracted strong comment. For example, Justice Action argued that it is unfair and inappropriate for penalties to relate to the outcome of a case:

> Justice Action believes that it is unfair and inappropriate that the penalties for breaching the new rules may affect the outcome of the case. Any sanctions for inadequate compliance with the rules should be separate to the outcome of the principal case. We do not agree that substantial consequences (like the exclusion or admission of evidence or adverse comment to the jury) should flow from the non-observance of procedural requirements in ordinary cases.[88]

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85 *Criminal Procedure Act 1986*, s 148(5)

86 Submission 8, NSW Public Defenders Office, p3

87 Mr Cowdery, Director of Public Prosecutions, Evidence, 7 June 2004, p12

88 Submission 10, Justice Action, p2

3.53 The potential impact of sanctions on a defendant was viewed by several inquiry participants in the context of the defendant's right to a fair trial. In this regard, Mr Craigie, Deputy Senior Public Defender, noted that sanctions would only be applied 'through the filter' of conducting a fair trial:

> Obviously a judge will have to consider on a case-by-case basis whether, in balance of smoothing the trial, he or she is going to bring about a situation that ends up with either the Court of Criminal Appeal or, heaven forbid, the High Court saying, 'Fundamentally, this trial failed'. That has to be the ultimate filter through which the sanction must pass.[89]

3.54 The ODPP indicated that it is difficult to envisage appropriate sanctions applying to defaulting accused persons in murder trials because such sanctions may affect the right of the accused to a fair trial:

> In the *Styman* matter, despite the making of pre-trial disclosure orders, the defence DNA experts' and telephone experts' reports, although provided to the Crown pursuant to the orders, were not provided before the commencement of the trial. One very experienced Crown Prosecutor commented that although the legislation provides in section 148 for various sanctions for parties who fail to disclose evidence in accordance with pre-trial requirements, it is difficult to envisage appropriate sanctions applying to defaulting accused persons in murder trials. Such sanctions may significantly affect the right of the accused to receive a fair trial.[90]

3.55 The DPP also noted that the enforcement of sanctions may have implications for the duty of the court to ensure a fair trial:

> …The difficulty about the question of sanctions is that the court has an overriding duty in the interests of justice to ensure that any trial is fair. For example, take a murder case where there was a failure to notify under the regime a particular piece of evidence: One of the sanctions available is that that evidence not be allowed to be led at the trial, but that may be very pertinent evidence going to a significant issue in the conduct of the trial, and the trial judge, faced with that option, may be very reluctant to say, 'No, you cannot lead that evidence', and that may lead to what might be a tainted conviction which would then probably be overturned on appeal. I think it is important to have the sanctions in place to show that this is a serious attempt to try to ensure compliance with the legislation, but the enforcement of the sanctions may be another matter.[91]

3.56 Legal Aid noted that courts may be reluctant to impose more severe sanctions for fear of jeopardising the right to a fair trial and stated that 'this may be particularly so in a multi-accused trial where one party does not comply, but all other accused do.'[92] Mr Sandland speculated that the courts may be more prepared to impose the less sever sanctions such adjourning a matter so that the other side can properly prepare evidence in reply to what is being presented.

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89 Mr Chris Craige SC, Deputy Senior Public Defender, NSW Public Defenders Office, Evidence 7 June 2004, p23

90 Submission 5, Office of the Director of Public Prosecutions, p5

91 Mr Cowdery, Director of Public Prosecutions, Evidence, 7 June 2004, p12

92 Submission 9, Legal Aid Commission NSW, p2

3.57 Mr Babb also queried whether a court would refuse to allow an accused person to adduce evidence that was important for their defence as a sanction:

> I have yet to see any court that would refuse to allow an accused person to adduce evidence that was important for their defence, and I do not think that will happen in New South Wales. If it did then that would be an appealable ground. It would be a miscarriage of justice. That sanction could really only be invoked when the evidence was not going to be important in an accused person's defence. Of course, the adjournment is something that is invoked quite often with or without pre-trial disclosure orders. It is an important sanction, if you like, but an important avenue to correct the imbalance that may occur when some sort of expert evidence is given, for example.[93]

Impact on disadvantaged defendants

3.58 Justice Action expressed concern that defendants who do not have a good understanding of all the legal complexities of their case might be penalised for non-compliance:

> Additionally, it is unfair that the accused person suffer the consequences of a matter that is out of their hands. Many accused people do not have a good understanding of all the legal complexities of their case. This is particularly true for people who have limited education, have intellectual disabilities, do not speak English as their first language etc. Typically these same people are represented by Legal Aid or community legal centre lawyers who do not have the resources to take the time to properly explain it to them either. Further they often have only limited input into the preparation of their case. Why should they suffer when their lawyers do not meet all the requirements of the Act?[94]

3.59 Mr Sandland commented, however, that due to the availability of interpreters an accused person with language difficulties should not be disadvantaged:

> An accused person who is represented and has language difficulties will have available to him or her the services of an interpreter. Those interpreters go through a form of accreditation, and that means that the message conveyed by their counsel or solicitor should be done so in an accurate way, in their language. So there should be no disadvantage to an accused person who has a language difficulty by virtue of the fact that sanctions are imposed, because of the availability of interpreters.[95]

3.60 Legal Aid did, however, express general concern about the application of sanctions to legally aided defendants:

> It does seem to be the case that the courts would be reluctant to impose the more severe sanctions for fear of jeopardising the right to a fair trial. This may be particularly so in a multi-accused trial where one party does not comply, but all other accused do. In general terms, the Legal Aid Commission remains concerned about the impact of these sanctions on both unrepresented defendants and those represented by

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93 Mr Babb, NSW Attorney General's Department, Evidence, 7 June 2004, p31

94 Submission 10, Justice Action, p2

95 Mr Sandland, Legal Aid Commission NSW, Evidence, 7 June 2004, p50

> the Legal Aid Commission or whose defence is funded by the Legal Aid Commission.[96]

Sanctions against legal representatives

3.61 Mr Babb noted that in Victoria the sanctions applicable to pre-trial disclosure orders are broader than the sanctions that can be applied in NSW and include sanctions against lawyers:

> … other jurisdictions have aimed at sanctions more broadly, and not aimed them at the impact they might have on an accused person's case but at the question of costs, for example, and the question of professional misconduct complaints.
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> …Victoria includes cost orders, including against a party's legal practitioner. The Act provides the court can institute professional complaints against legal practitioners for non-disclosure.
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> …That is one of the areas I am quite interested in, the Victorian avenue of, 'Okay, if that's happened let's look at why it's happened' and if it can be sheeted home to the lawyers then perhaps costs may need to be awarded against the accused himself if the accused has led to the delay or the lawyers. Costs are an important sanction that is used in civil trials. They are generally not used in criminal trials. If they are used, they are generally only awarded against prosecuting authorities.[97]

3.62 Expanding the sanctions to include penalties against lawyers was supported by Justice Action which stated:

> We consider there is a better chance of avoiding delay and achieving the desired outcomes by making lawyers responsible for their own work, including any unreasonable failures to comply with the Act. We suggest that exposing lawyers to findings of unsatisfactory professional conduct would be a more appropriate and effective way of ensuring the Act's requirements are satisfied.[98]

3.63 The Committee notes that it appears that, as part of the Attorney General's review (see paragraph 2.25), the Department has been canvassing views on the possibility of including sanctions against legal representatives. As stated in the Law Society Journal, the proposal has not found favour with the Law Society:

> In the context of its review of the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*, the Attorney General's Department has asked stakeholders to consider expanding existing pre-trial disclosure sanctions to include costs orders against parties or their representatives, or a special facility for the court to make a complaint about a practitioner to the Legal Services Commission. The Law Society's Criminal Law Committee has rejected the proposal to impose punative costs sanctions in the context of criminal proceedings. The Committee also contended that there is no need

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96 Submission 9, Legal Aid Commission NSW, p2

97 Mr Babb, NSW Attorney General's Department, Evidence, 7 June 2004, p31

98 Submission 10, Justice Action, p3

> to create a specific complaint provision, given that means already exists for the court or any member of the public to make a complaint against a legal practitioner.[99]

Conclusion

3.64 The Committee notes that considerable concern was expressed about the potential impact of some of the sanctions on the right to a fair trial and there appears to be general agreement that this may lead to caution on the part of judges when considering the application of sanctions. The actual impact of these concerns, and the sanctions generally, will only be revealed once the new regime for pre-trial disclosure orders s used with more frequency and the occasion to apply sanctions arises.

3.65 The Committee notes the comments made in relation to the deterrent power of sanctions and finds it instructive that inquiry participants did not express overall dissatisfaction with the availability of sanctions.

3.66 One potential reform the Committee considers worth considering is the application of sanctions to legal practitioners. As the Attorney General's review has not yet been tabled in Parliament, the Committee is not aware of the extent or outcome of the Department's examination of this issue. The Committee is of the view that the Attorney General should consider the issue of sanctions available under section 148 of the *Criminal Procedure Act 1986* in the context of his review.

Future use of pre-trial disclosure orders

3.67 The Committee canvassed the views of inquiry participants as to the likely future use of pre-trial disclosure orders and there seemed to be general agreement that their use would increase. Legal Aid, for example, identified a general trend toward increased length and complexity of criminal cases, which may give rise to more orders:

> The figures available from District Court and Supreme Court Annual Reviews indicate that the average length of trials in both jurisdictions is increasing. In the District Court in Sydney, the average duration of a trial had increased to 14.11 days by December 2002. The Statewide average length of criminal trials finalised in 2002 was significantly less namely 6 days. In Sydney the average duration was 8.3 days for the full year. Figures are not yet available for 2003 but the annual report for the District Court is due to be released shortly. In the Supreme Court, the average length of trials heard in Sydney during 2002 was 14.8 sitting days. This figure has been relatively stable for the previous 2 years. However, anecdotal evidence suggests that there is greater complexity in Supreme Court trials and that the kinds of matters now being heard in the jurisdiction will impact significantly on the average length of trials. Statistics for 2003 are also not yet available. The general trend is towards increased length and complexity in both jurisdictions. This suggests that more pre-trial disclosure orders are likely to be made in the future and that it can be anticipated that more of these orders will be made in the Supreme Court than the District Court.[100]

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99 'Pre-trial disclosure review: Law Society rejects punitive costs sanctions', *Law Society Journal*, August 2004, p7

100 Submission 9, Legal Aid Commission NSW, pp1-2

3.68 Mr Sandland of Legal Aid also noted:

> I anticipate that it has been slow to get a foothold, and that is not uncommon given the experience in other jurisdictions which have a pre-trial disclosure regime. However, I think there is scope for it getting a foothold and being used to a greater extent in the future.[101]

3.69 Mr Babb of the Attorney General's Department also expressed the view that more orders would be made in the future and pointed to several prosecutors who have sought orders:

> I actually think that it will be a situation where orders will increase with time. One of the interesting things when you look at what cases orders have been made in, the names of the same Crown Prosecutors come up. For example, Mark Tedeschi has now had Gonzales and Folbigg trials where he has sought orders. Richard Herps got an order in Munroe and sought an order in a complicated drug case that he has been running in the Supreme Court. I am a Crown Prosecutor on secondment as Director of the Criminal Law Review Division and I know that the discussions that Crown Prosecutors have about the benefits of getting the orders tends to filter through the organisation. I think that in time we will see more orders being sought by Crown Prosecutors and probably more orders being made by courts.[102]

101 Mr Sandland, Legal Aid Commission NSW, Evidence, 7 June 2004, p45

102 Mr Babb, NSW Attorney General's Department, Evidence, 7 June 2004, pp26-27

Chapter 4 Impact of pre-trial disclosure orders

The terms of reference require the Committee to consider the effect of the new pre-trial disclosure requirements on several aspects of the criminal justice system including court delays, unrepresented defendants, the right to silence, the burden of proof and the presumption of innocence. Submissions to the inquiry also raised the issue of the impact of the new requirements on disadvantaged defendants. The Committee also examines the need for ongoing monitoring of the new scheme for pre-trial disclosure orders.

Court delays

Court delays in the District and Supreme Court

4.1 As discussed in Chapter Two, the Government identified the underlying purpose of the Amendment Act as increasing efficiency in the criminal justice system and reducing court delays. The issue of court delays has longstanding in NSW, reaching prominence in the 1980s when substantial delays in bringing matters to trial in the District and Supreme Courts attracted widespread criticism.[103]

4.2 Subsequently, the 1990s saw the introduction of many administrative amendments and legislative initiatives to reduce court delays. These have included '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.'[104] Despite these initiatives, the problem of court delays persisted throughout the 1990s:

> 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'. 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.'[105]

4.3 In August 2000, at the time the Attorney General announced the Government's intention to introduce the Amendment Act, the latest BOCSAR figures showed a 'significant increase in trial court delay in the Higher Criminal Courts.'[106]

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103 Griffith, p17

104 Griffith, p17

105 Griffith, p17

106 Bureau of Crime Statistics and Research, 'NSW Criminal Court Statistics 1999', *Media Release,* 10 August 2000

4.4 Since then, however, BOCSAR has identified a steady improvement in delays in the higher courts in NSW. The latest NSW criminal court statistics released by BOCSAR on 18 September 2003 show continued improvement:

> Trial court delay in the Higher Criminal Courts has continued to decline, with the median delay between committal and case finalisation for trial cases where the accused was on bail falling by 15 per cent, from 240 days in 2001 to 203 days in 2002. In the Local Courts, however, delays for defended cases rose from 109 days in 2001 to 119 days in 2002 (an increase of nine per cent).[107]

4.5 In addition, research released by BOCSAR in September 2004, based on an examination of trends in trial court delay between 1988 and 2003, shows significant improvements in the time serious criminal cases are taking to be disposed of in the District Court:

> Serious criminal cases are taking less time to dispose of in the NSW District Criminal court and more time to dispose of in the NSW Local Court. The Bureau examined trends in trial court delay between 1988 and 2003. Where the accused is on bail, it now takes less than a third of the time (about 214 days) it took in 1988 (about 596 days) to dispose of a trial in the NSW District Court. Where the accused is in custody it now takes about half the time (about 169 days) it took in 1988.[108]

4.6 Several inquiry participants commented on the progress made in reducing court delays in recent years. For example, the Hon RO Blanch AM, Chief Judge of the District Court of NSW, stated that:

> As you would be aware, those delays have now been eliminated and in the District Court, where almost all of the trials in New South Wales occur and there is no longer a problem. The Productivity Commission has established a national standard that no more than 10% of criminal lodgements pending completion should be more than 12 months old. In the recent report of that Commission, it was said: "In the Supreme Court, Queensland was the only jurisdiction that met this standard. In the District Court, New South Wales was the only jurisdiction that met this national standard." [109]

4.7 Legal Aid also noted that delays in the higher courts have significantly reduced in the past few years:

> The available evidence indicates that waiting times have significantly reduced in both the District Court and the Supreme Court in the last 5 years. The median delay between committal and outcome for finalised trials in the District Court was 188 days in 2002 compared with 329 days in 1998. In the Supreme Court, the median delay was 234 days in 2002 compared with 593 days in 1998.[110]

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107 Bureau of Crime Statistics and Research, 'NSW Criminal Court Statistics 2002', *Media Release*, 18 Sept 2003

108 Bureau of Crime Statistics and Research, 'Long-term trends in trial court delay in NSW', *Media Release*, 30 September 2004. See also Kuan YY, 'Long-term trends in trial case processing in New South Wales, *Crime and Justice Bulletin*, Bureau of Crime Statistics and Research, No 82, August 2004

109 Submission 1, Hon Justice RO Blanch AM, Chief Judge District Court of NSW, p1

110 Submission 9, Legal Aid Commission NSW, p3

Impact of pre-trial disclosure orders on court delays

4.8 Submission makers and witnesses were generally in agreement that, due to the small number of pre-trial disclosure orders made to date, the overall impact of the new scheme on court waiting times has been minimal. For example, Legal Aid stated that 'given the number of orders made to date, it is impossible to say that these orders have had any impact on court waiting times.'[111] Certainly a statistical analysis of the impact is not possible at this stage, as BOCSAR has advised the Attorney General's Department:

> …because of the small number of orders that have been made it would be pointless to make a formal statistical assessment of the impact of the pre-trial disclosure reforms on trial court delay.[112]

4.9 It follows that, according to the DPP, the new pre-trial disclosure scheme cannot be credited for the reduction in court delays in the higher courts in NSW over the past few years:

> The situation is pretty good at present. It has been improving steadily over the past year or two and now trials are coming on in the District Court within about three or four months of arraignment and in the Supreme Court about six months. Historically that is pretty good, but I do not think that this legislation can claim the credit for that; there are a lot of initiatives that are in place to improve the waiting times and reduce backlogs.[113]

4.10 While the number of pre-trial orders made to date is too small to have an overall impact on court delays, information provided to the Committee about the specific orders that have been made indicates that they have positively impacted on those trials. In this regard, the ODPP advised that in three of the matters in which pre-trial disclosure orders had been made, benefits, including time savings, had been made:

> In the remaining three matters (*Folbigg, Monroe* and *Styman and others*), the Crown Prosecutors who conducted the trials have reported that the application of the pre-trial disclosure orders had a positive effect in that they enabled:
>
> - the Crown to be aware of the expert medical evidence and other experts' evidence to be relied upon by the defence, prior to the commencement of the trial;
>
> - the narrowing of the issues prior to commencement of the trial, via the preparation of statements from Crown experts in response to the statements of defence experts and the service of these statements on the defence;
>
> - the preparation prior to the trial by the Crown Prosecutor of cross-examination of defence experts, based on the reports served by the defence and the statements of the Crown experts in response. This enabled the Crown's cross-examination to proceed immediately after the completion of the defence experts' examination in chief. Without the prior service of the reports, the Crown would have sought an adjournment in order to prepare the cross examination and to enable the Crown's

111 Submission 9, Legal Aid Commission NSW, p3

112 Submission 11, NSW Attorney General's Department, p4

113 Mr Cowdery, Director of Public Prosecutions, Evidence, 7 June 2004, p4

experts to prepare their statements in reply – this would have caused delay and interrupted the smooth flow of the trial;

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

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

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

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

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

- the trial to progress smoothly without any applications for adjournment by the Crown after having been taken by surprise by new defences raised by the defence for the first time in evidence; and no applications for adjournment by the defence on the basis of failure by the prosecution to disclose.[114]

4.11 The Public Defenders Office also advised that in a Commonwealth trial where a pre-trial disclosure order was made the management of that trial 'may well have been enhanced':

> Two Public Defenders who appeared for different accused amongst nine charged in a Commonwealth trial for large-scale narcotics importation were engaged in a very lengthy process of pre-trial preparation and responses disclosure by the Crown being a large part of that process. Although the trial was of 22 weeks duration, it is our observation that its management may well have been enhanced from the point of view of the judge, jury and parties by a process that assisted in isolating the issues.[115]

4.12 Mr Mark Tedeschi, Senior Crown Prosecutor with the ODPP, noted that the time saving advantage of pre-trial disclosure orders lies in the early exchange of expert reports:

> The main advantage of an order declaring a trial a complex trial is that it places a compulsion on the defence to serve its expert reports on the Crown. The cases that have been declared complex trials, and where there has been a very substantial benefit, have been cases where the benefits have been in reduced trial length and reduced complexity of a trial because of the exchange of expert reports. …

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114 Submission 5, Office of the Director of Public Prosecutions, pp2-3. The ODPP also submitted a summary of the information provided by the relevant Crown Prosecutors concerning the impact of the pre-trial disclosure orders on the conduct of the three relevant matters. This summary is attached as Appendix Seven

115 Submission 8, NSW Public Defenders Office, p2

> The real time-saving advantage of pre-trial disclosure has been in the early exchange of expert reports. The classic example is the trial that I did of Kathleen Folbigg last year. That was declared a complex trial by Justice Barr, and there was an exchange of expert reports from the defence to the Crown. The Crown had to present the reports of all its experts to the defence well prior to the trial. But, after the defence served its reports on us, we were able to respond to those reports using our experts. A vast amount of scientific evidence was disposed of before we even got before the jury. I think there are a lot of other trials, perhaps not as complex as that one, where there would be a considerable saving of time if the defence was prepared or required to provide its expert reports to the prosecution prior to the commencement of the trial.[116]

4.13 The Committee, however, heard significantly contrasting views as to the potential impact of pre-trial disclosure orders on court delays, with some inquiry participants arguing that disclosure orders could in fact increase delays. For example, the Hon RO Blanch AM, Chief Judge of the District Court, speculated that 'although the stated purpose of the legislation was to speed up the criminal trial process, the making of orders under this legislation would, in fact, have the opposite effect of slowing down the criminal trial process.'[117]

4.14 Legal Aid argued that pre-trial disclosure orders may lead to more contested pre-trial applications, which might outweigh savings in trial time:

> The impact of the pre-trial legislation in New South Wales on waiting times is yet to be felt as a result of the small number of orders made. There is however evidence available in other jurisdictions in Australia and overseas where pre-trial disclosure orders are firmly entrenched, and where the effect on Court waiting times might be able to be gauged. The Commission is aware of at least one study being done by Associate Professor Dale Ives from the University of London, Ontario, which looks at the impact of pre-trial orders in comparable jurisdictions. ... The Commission understands Professor Ives' research in some jurisdictions has revealed that pre-trial disclosure legislation has led to a tendency towards more contested pre-trial applications. This may ultimately reduce the length of the trial if these pre-trial applications narrow issues. The risk to a body such as the Legal Aid Commission which is responsible for funding a large amount of trial work is that this may still result in increased costs if the pre-trial activity outweighs the savings in trial time. From the Court's point of view, there is also the risk that it may lead to increased waiting times between committal for trial and finalisation.[118]

4.15 Justice Action similarly speculated that pre-trial disclosure orders may prolong the trial process by lengthening the pre-trial stage:

> An immediate concern of Justice Action is that the Act does not in fact reduce delay. Rather, it prolongs the criminal process by extending the length of the pre-trial stages. When the defence now has to make pre-trial disclosures (the prosecution always had to), supposedly to confine the issues at trial, police and prosecutors take the opportunity to identify weaknesses in their case and then investigate further to reinforce the case. … Delays can also result from argument in court about whether

116 Mr Mark Tedeschi, Senior Crown Prosecutor, Office of the Director of Public Prosecutions, Evidence, 7 June 2004, pp1-2

117 Submission 1, Hon Justice RO Blanch AM, p1

118 Submission 9, Legal Aid Commission NSW p3

> pre-trial disclosure obligations have been fulfilled and what to do if they are not. This was the likely result of the increased complexity.[119]

Other reasons for improvement in court delays

4.16 Several inquiry participants expressed the view that other pre-trial case management mechanisms used in the District and Supreme Courts were the main reason behind the improved trial times, rather than the introduction of the new pre-trial disclosure orders. For example, the Hon RO Blanch AM, Chief Judge of the District Court, stated that 'the solution to delays which used to exist in the criminal trial process in New South Wales was a management solution in the hands of the Courts themselves.'[120]

4.17 The Public Defenders Office expressed the view that the improvement in court delays may be due to the use of case management and a general willingness of parties to refine trial issues:

> The low frequency of formal pre-trial disclosure ordered does not fully reflect what is, in reality, a general and manifest willingness by parties to refine trial issues pre-trial. The general tendency in recent years, particularly in the District Court, has been for trial delays to reduce dramatically. This is in large part related to the Court's wider adoption of case management by list judges, tending to ensure pre-trial readiness of longer and complex matters. Whilst the existence of a formal structure with sanctions may be propounded as some encouragement to this process, it is the experience of the Public Defenders that greater recourse to such a formal structure has not usually been required, as is reflected by continuing improvement and reductions in delay.[121]

4.18 Legal Aid similarly highlighted the important role of case management processes in reducing delays in the higher courts in NSW:

> Case management is important as it places pressure on the parties to attend to matters which may otherwise be done just before or even during the trial. This can have the effect of prolonging a trial and hence the cost to the parties and the system as a whole. There are various means being utilised to manage case flows and pre-trial preparation. Some of them amount to de facto pre-trial disclosure.
>
> The important point is that earlier preparation is encouraged. Some judges will impose strict time standards on preparation as a means of clarifying issues; some will ask the parties whether there are pre-trial issues that could be resolved before the day fixed for trial such as a voir dire hearing on the admissibility of a record of interview; some will simply ask the parties to identify trial issues in order to clarify the time required for hearing the trial; and some will seek clarification of what witnesses are required as a means of shortening the trial.
>
> As there is no legislative backing to this kind of case management, there are many variations on the theme. Some systems have worked and others have been abandoned.
>
> As the profession becomes more used to this kind of management of the flow of work through the courts, they may see some benefits in terms of certainty of listing

119 Submission 10, Justice Action, pp1-2

120 Submission 1, Hon Justice RO Blanch AM, p1

121 Submission 8, NSW Public Defenders Office, p4

> and be more inclined to participate. The co-operation of the profession is vital to making a Case Management System work.[122]

Conclusion

4.19 The Committee is pleased to note the improvement in court delays in the higher courts in NSW in recent years and acknowledges that the pre-trial case management mechanisms of the courts have had a significant impact on delays. The Committee supports all initiatives that have a positive impact on court delays.

4.20 The Committee is of the view that it is too early to determine the impact of pre-trial disclosure orders on court delays given the small number of orders made to date. The Committee also notes that the differing views held by inquiry participants as to their potential impact. The Committee is also of the view that, even if the eventual impact of pre-trial disclosure orders on court delays is minimal, there is still a role for formal pre-trial disclosure orders backed up by sanctions. In this regard the Committee notes the comments of the Public Defenders Office:

> The Public Defenders are of the opinion that the mix of existing pre-trial procedures is for the most part effective and accords with the objects and legislative intention of the statutory disclosure regime contained in the Act, albeit that there has not been occasion to invoke its provisions in the District Court. As in the Supreme Court, there is a strong case for benefit in the availability of a statutory fallback, with sanctions if needed. [123]

Unrepresented and disadvantaged defendants

4.21 The terms of reference require the Committee to examine the impact of pre-trial disclosure orders on unrepresented defendants. Submissions to the inquiry also raised the issue of the impact of the new requirements on disadvantaged defendants.

Unrepresented defendants

4.22 In relation to unrepresented defendants, the Committee notes that a pre-trial disclosure order cannot actually be made where a defendant is unrepresented. This is due to the legislative stipulation that 'the court may order pre-trial disclosure only if the court is satisfied that the accused person will be represented by a legal practitioner'.[124]

4.23 One impact on unrepresented defendants therefore is that they are excluded from the benefits that pre-trial disclosure orders may bring. It seems, however, that this impact is minimal since, as noted by the DPP, the likelihood of a defendant in a complex criminal case being

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122 Mr Sandland, Legal Aid Commission NSW, answers to questions taken on notice, Evidence, 7 June 2004

123 Submission 8, NSW Public Defenders Office, pp3-4

124 *Criminal Procedure Act 1986*, s 136(4)

unrepresented is 'very small'.[125] The Committee is of the view, therefore, that the impact of pre-trial disclosure orders on unrepresented defendants is not a significant issue.

Disadvantaged defendants

4.24 Legal Aid and Justice Action expressed concern about the potential impact of pre-trial disclosure requirements on disadvantaged defendants who cannot afford legal representation. For example, Mr Sandland of Legal Aid argued that increased efficiency and productivity in the justice system without a commensurate increase in legal aid resources is problematic:

> …I note that the introduction of the pre-trial disclosure legislation was accompanied by extra funding being made available for the DPP and the Legal Aid Commission. This funding is now absorbed into the general revenue of the Commission but as noted in the Commission's submission dated 5 August 2002, was used to fund extra positions devoted to undertaking criminal work within the Commission and one extra Public Defender position currently employed on a temporary contract.
>
> The Legal Aid Commission continues to work with other justice sector agencies to secure efficiencies within the system. However, as a downstream agency, efficiencies achieved in terms of the quicker listing of matters in both the Supreme Court and the District Court have created extra assignment costs for the Commission in order to ensure timely legal representation for eligible accused persons appearing in Courts of higher jurisdiction. The pre-trial disclosure legislation is just one of the complex array of initiatives that when put into effect, can achieve efficiencies for the criminal justice system but at a cost to the Legal Aid Commission.
>
> The pre-trial disclosure legislation occurs in the context of greater case management being exercised in complex cases in the Supreme and District Courts. The aim of such case management is not only to ascertain the duration of a trial. Courts are seeking to clarify issues and hence reduce potential delays. Such a regime requires early preparation by both sides conducting a matter. The Commission has been required to direct extra resources to the conduct of strictly indictable matters in both the Local Court (at committal) and in higher courts in preparation for trial and/or sentence. As court delays reduce, the pressure to do this preparation in a timely way increases. This has occurred as a result of both the pre-trial disclosure legislation and the emphasis placed on pre-trial preparation by the District and Supreme Courts.[126]

4.25 Justice Action was critical that the major advantages of the pre-trial disclosure changes do not accrue to poorer defendants and the community as a whole:

> … the major advantages of the changes to the law accrue to the State, the police and the prosecution, not the community and individuals. The main effect of the legislation seems to be to allow prosecutors to fix up deficient cases. Another problem with the requirements of the Act is that they favour the rich. The legislation creates various additional obligations for the defence, including additional deadlines. These

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125 Mr Cowdery, Director of Public Prosecutions, Evidence, 7 June 2004, p11. The Committee notes that one example of an unrepresented accused in what appeared to be a complex case was cited by Mr Babb in evidence: Mr Babb, NSW Attorney General's Department, Evidence, 7 June 2004, p34

126 Submission 9, Legal Aid Commission NSW, pp5-6. See also: Mr Sandland, Legal Aid Commission NSW, answers to questions taken on notice, Evidence, 7 June 2004

> requirements impact disproportionately on people who cannot afford premium representation and who are represented by under-resourced lawyers. The additional complexity and pre-trial steps also increase pre-trial legal costs. The result is higher costs and more prejudice for poorer defendants.
>
> The Act also makes it more difficult for defendants to participate in the preparation of their defence, potentially prejudicing them. First, the increased complexity makes it more difficult for defendants to understand and keep up with the already alien criminal process. Second, there are more stages that require their input, requiring more conferences between lawyers and their clients. Where this is not possible or does not happen (for instance due to limited resources), the defendant's case may suffer.[127]

4.26 The Committee is concerned that the new scheme for pre-trial disclosure orders may have a detrimental impact on disadvantaged defendants. While it is difficult to establish at this early stage the nature of this impact, the Committee is of the view that any future review of the scheme should incorporate an analysis of the impact of the orders on disadvantaged defendants.

Recommendation 3

That any future review undertaken by the Government of the new pre-trial disclosure scheme implemented by the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001* or pre-trial disclosure in general incorporate an analysis of the impact of pre-trial disclosure orders on disadvantaged defendants.

Right to silence, burden of proof and presumption of innocence

4.27 The terms of reference require the Committee to consider the effects of the pre-trial disclosure requirements on the right to silence, the presumption of innocence and the burden of proof. The NSW Law Reform Commission has defined the 'right to silence' as a group of rights that arise at different points in the criminal justice system. This group of rights includes:

> (1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.
>
> (2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.
>
> (3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.
>
> (4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.

[127] Submission 10, Justice Action, p2

> (5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.
>
> (6) A specific immunity (at least in certain circumstances ...), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.[128]

4.28 The 'presumption of innocence' is the principle that a criminal defendant cannot be convicted of a crime unless the prosecution proves that she or he is guilty beyond a reasonable doubt. There is no burden on the accused to prove innocence. The 'burden of proof' refers to the obligation on one party or another in a case to produce enough evidence to prove their case to the required standard. In criminal cases the burden of proof rests with the prosecution to prove that the defendant is guilty beyond a reasonable doubt.

4.29 The majority of inquiry participants expressed the view that the pre-trial disclosure requirements implemented by the Amendment Act had little or no impact on these three doctrines. For example, the ODPP noted in relation to the right to silence that:

> In some of the matters in which pre-trial disclosure orders were made, the order compelled the defence to respond to the prosecution notice of its case and to serve on the prosecution copies of the experts' reports (principally the evidence of medical experts) upon which the defence intended to rely… The orders had no impact on the "right to silence" ...[129]

4.30 The ODPP also stated that the pre-trial disclosure requirements 'did not alter the presumption of innocence' and that they 'did not alter the doctrine of the burden of proof resting with the prosecution. The onus of proof remained on the prosecution to prove its case beyond reasonable doubt.'[130]

4.31 The Attorney General's Department also expressed the view that pre-trial disclosure requirements do not infringe on the right to silence:

> As was noted by the Honourable Justice O'Keefe at paragraph 11 of his judgment in *R v Monroe*, "under the common law, the rule against self-incrimination extended so as to prevent pre-trial disclosure in criminal cases. The Court did not have the power to require an accused person to reveal his or her defence or matters of evidence involved in such defence." Pre-trial disclosure by the accused person brings forward the time at which the prosecution becomes aware of the issues at trial and the contents of any expert reports that will be relied upon by an accused person. In my view the pre-trial disclosure requirements do not infringe on the doctrine of the right to silence.[131]

4.32 The Department's submission also stated that the pre-trial disclosure requirements do not effect the presumption of innocence or the burden of proof:

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128 NSWLRC, Report 95, *The Right to Silence*, p3

129 Submission 5, Office of the Director of Public Prosecutions, p3

130 Submission 5, Office of the Director of Public Prosecutions, p4

131 Submission 11, NSW Attorney General's Department, p5

> There is nothing about the pre-trial disclosure requirements which effects the doctrine of the presumption of innocence. The recommended direction in the Judicial Bench Book in relation to the presumption of innocence remains the same regardless of whether or not pre-trial disclosure is ordered: "It is, and always has been, a critical part of our system of justice that persons tried in this court are presumed to be innocent, unless and until they are proved guilty beyond reasonable doubt. This is known as the "presumption of innocence."[132]
>
> There is nothing about the pre-trial disclosure requirements which effects the doctrine of the burden of proof resting with the prosecution. The recommended direction in the Judicial Bench Book in relation to the burden of proof remains the same regardless of whether pre-trial disclosure is ordered: "This is a criminal trial of a most serious nature and the burden of proof of guilt of the accused is placed on the Crown. That onus rests upon the Crown in respect of every element of the charge. There is no onus of proof on the accused at all. It is not for the accused to prove his innocence but for the Crown to prove his guilt and to prove it beyond reasonable doubt."[133]

4.33 Legal Aid advised the Committee that it is not aware of any pre-trial disclosure orders made at the time of its submission that have been perceived to erode the right to silence or the presumption on innocence.[134] Legal Aid noted that the concept of defence disclosure can co-exist with the rights of the accused protected by the right to silence and the presumption of innocence:

> The legislative framework is aimed at revealing broad defence categories such as self defence or provocation and providing for the service of expert evidence on the prosecution that may support such broad defence categories. It is thus aimed at clarifying issues that are likely to be contested at trial. As noted above, some of these issues such as a defence of mental illness or provocation may already be quite apparent from the available evidence. The fact that the pre-trial disclosure regime sits within an adversarial system will thus always ensure that a legislative scheme such as this will be approached with some degree of caution by the defence. Similar comments to those made above apply to the presumption of innocence. The concepts of presumption of innocence and defence disclosure can co-exist, even in the context of an adversarial system.[135]

4.34 In relation to the burden of proof, Legal Aid stated:

> Although the burden of proof at all times rests with the prosecution, there are some statutory and common law defences which lead to the prosecution having to rebut or negative the defence raised, eg self defence. The burden of proof remains on the Crown. However, once a defence such as self defence is raised, there is an evidentiary burden on the defendant to establish that defence. Disclosure of that defence pre-trial is more a matter of timing, than a changing of the burden of proof.[136]

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132 Submission 11, NSW Attorney General's Department, p5

133 Submission 11, NSW Attorney General's Department, p5

134 Submission 9, Legal Aid Commission NSW, p3

135 Submission 9, Legal Aid Commission NSW, pp3-4

136 Submission 9, Legal Aid Commission NSW, p4

4.35 Alternate views were expressed by the Public Defenders Office and Justice Action. Public Defenders stated that 'clearly as a matter of fundamental principle defence disclosure runs contrary to these basic tenets of the criminal law. Again, in view of the short time in operation it is difficult to gauge whether in practice this has occurred.'[137] Justice Action argued that:

> When the defence now has to make pre-trial disclosures (the prosecution always had to), supposedly to confine the issues at trial, police and prosecutors take the opportunity to identify weaknesses in their case and then investigate further to reinforce the case. Not only does this cause delay (contrary to the stated aims of the Act) but it also seriously erodes the fundamental right to silence which protects accused people by requiring police to make out their case entirely without the assistance of the accused person.[138]

4.36 It appears to the Committee that there are still strong divisions as to the impact of pre-trial disclosure orders on the three doctrines examined in this section, as encountered by the Law Reform Commission in its review of the right to silence.[139] The Committee notes, however, that the majority of inquiry participants expressed the view that the new pre-trial disclosure orders do not impact negatively on the right to silence, the burden of proof and the presumption of innocence. The Committee is aware that any impact that they may have is difficult to gauge at this stage due to the small number of orders made. The Committee has therefore not formed its own view on this issue.

Need for ongoing monitoring

4.37 As discussed in Chapter Two, the Attorney General's Department is required to review the pre-trial disclosure procedures established by the Amendment Act to determine whether they are utilised by the courts and whether they have been effective in reducing court delays. This is a one-off statutory review. As the pre-trial disclosure orders have not been utilised to a great extent to date, the Committee canvassed the views of witnesses as to whether ongoing monitoring of the new regime for pre-trial disclosure orders, beyond this Committee's review and the Attorney General's review, was desirable.

4.38 The DPP advised that he did not see the need for ongoing monitoring because of the likelihood that the use of the orders would not increase substantially:

> My very short answer to that question is no, I do not think so. That is based on the number of matters that have so far been subjected to this regime and the likelihood of that number remaining small in the foreseeable future, unless there is legislative change, in which case then, yes, there may be a greater need for review. So far as other aspects of legislation are concerned, like settling an indictment within 28 days and so on, we are addressing that. So far we seem to be running without any great difficulty and we are not disrupting the business of the courts. I think there is a very limited need, if at all, for future monitoring.[140]

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137 This issue was identified by the NSW Public Defenders Office in its submission to the first stage of this inquiry, 14 August 2002, p2

138 Submission 10, Justice Action, p1

139 See for example, NSWLRC, Report 95, *The Right to Silence*, para 3.109-3.112

140 Mr Cowdery, Director of Public Prosecutions, Evidence, 7 June 2004, p13

4.39 Others, however, did see a role for ongoing monitoring of some sort. For example, Mr Babb of the Attorney General's Department stated:

> I do, and whether it is this Committee, the Attorney General's Department or the registries of the various courts, there will be ongoing monitoring. It is very important, you really cannot evaluate any system that aims to improve the functioning of the court system without continuing to evaluate it. …Continue to look at the number of orders made, the exact nature of the orders made and the type of cases to which the legislation is applied and compare it to those cases where it is not applied that may fit into the example of complex criminal trials and encourage people to use it to fine-tune the system in all complex trials.[141]

4.40 The Public Defenders Office also suggested that some monitoring of the number of orders and their impact on court delays may be useful:

> There may be utility in monitoring the frequency of both applications made and orders granted. We would regard it as more important to consider whether there is any significant delay problem, more specifically in long or otherwise complex trials and whether the pre-trial disclosure regime impacts for good or ill upon the factor of delays.[142]

4.41 Given the rate at which pre-trial disclosure orders have been made to date the Committee is of the view that there does not seem to be, at this stage, a pressing need to establish a time frame for on going monitoring of the scheme implemented by the Amendment Act.

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141 Mr Babb, NSW Attorney General's Department, Evidence, 7 June 2004, p35

142 Mr Peter Zahra, Senior Public Defender and Mr Chris Craige, Deputy Senior Public Defender, NSW Public Defenders Office, answers to questions taken on notice, Evidence, 7 June 2004

Chapter 5 Other reforms and issues

In addition to introducing the new regime for pre-trial disclosure in complex criminal cases, the Amendment Act made changes to the requirements for giving notice of alibi evidence, the presentation and amendment of indictments and police disclosure to the prosecuting authorities.

Alibi evidence

Notice to Crown of alibi evidence

5.1 The Amendment Act altered the *Criminal Procedure Act 1986* to require that, if an accused person wishes to adduce evidence in support of an alibi, notice of the particulars of the alibi must be given at least 21 days before the trial is listed for hearing.[143] If notice is not given within that time frame the accused cannot adduce evidence at trial in support of an alibi (except with the leave of the Court). This requirement applies to all trials on indictment and not just complex criminal trials.

5.2 Prior to the amendment, notice of alibi evidence was required within ten days following an accused person's committal for trial.[144] As the amendment requires notice to be given sometime between the committal and 21 days before the trial is listed, it therefore extends the period within which the accused must give notice of alibi.

5.3 In its submission to the Inquiry the ODPP was critical of this reform, stating that the amendment 'in effect, this allows the Crown only three weeks to investigate the alibi and this period, it is submitted, is inadequate.'[145] The ODPP provided the Committee with an example of a case where this amendment lead to an adjournment of a trial:

> One prosecutor drew to attention a matter in which the alleged offence occurred in March 2002 and the matter was listed for trial on 17 November 2003. An alibi notice was given exactly two weeks prior to trial. The Crown Prosecutor successfully sought an adjournment of the trial on the basis that the investigation of the alibi notice had not been completed. This investigation involved, in that case, police locating five witnesses; arranging to interview each of them and reducing their statements to writing and having them sign their statements; and investigating issues arising from the material provided by these five alibi witnesses. Two weeks was simply not sufficient time for all of these steps to be taken.[146]

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143 *Criminal Procedure Act 1986*, s 150(1) and (8)

144 Submission 5, Office of the Director of Public Prosecutions, p6. Note that the statutory requirement to give notice of alibi evidence within ten days of committal was one of the few statutory disclosure requirements placed on the defence prior to the Amendment Act. According to the ODPP the original 10 day period 'was chosen on the basis that this was the earliest opportunity for most accused to obtain legal representation ie most accused were not legally represented at the time of committal for trial.'

145 Submission 5, Office of the Director of Public Prosecutions, p6

146 Submission 5, Office of the Director of Public Prosecutions, p6

5.4 The ODPP raised the possibility of a return to the old time frame, or an extension of the 21 day period to a six week period:

> This prosecutor suggested that the accused should be required to provide an alibi notice at an earlier time than is currently required; possible suggestions are as per the old regime (ie. within ten days of committal for trial) or at the latest six weeks before the trial date.[147]

5.5 The Committee sought the views of witnesses on this issue and there was general agreement the new time frame placed some strain on the prosecution. For example, Mr Babb of the Attorney General's Department, expressed the view that the three week period leaves insufficient time for investigation and that a six week period is more appropriate:

> I agree that service of the notice of alibi evidence three weeks prior to trial leaves inadequate time for investigation. In my opinion a requirement that notice of alibi be served six weeks before the trial date is the least amount of time that the prosecution should be given in order to investigate the alibi.[148]

5.6 The Public Defenders Office stated that the new time frame 'places some strain on the investigative resources of the police and upon the Crown'.[149] Mr Hannon, Executive Member of the Police Association of NSW, noted the effect of the time frame on investigating officers:

> I think three weeks at the moment definitely needs to be increased if it is going to be kept in. To give our investigators time, actually, number one, to peruse the brief that they may have had sitting on the desk for the past 12 months without it coming to trial or, at least give them time to go and chase up the alibis no matter where they may be. For all we know they may be interstate. If you only want to give three weeks then they will have to drop everything to get the alibi statements or whatever else they are going to produce.[150]

5.7 The Committee notes that this reform picks up the Law Reform Commission's recommendation in its *Right to Silence* report that notice of alibi evidence should be tied to the trial date rather than the date of the committal.[151] However, as the Commission pointed out to the Committee in its submission, its recommendation included a longer time period:

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147 Submission 5, Office of the Director of Public Prosecutions, p6

148 Answers to questions on notice taken during hearing 7 June 2004, Mr Babb, NSW Attorney General's Department

149 Answers to questions on notice taken during hearing 7 June 2004, Mr Zahra and Mr Craigie, NSW Public Defenders Office

150 Mr Luke Hannon, Executive Member, Police Association NSW, Evidence, 7 June 2004, p44

151 NSWLRC, Report 95, *Right to Silence*, para 3.126. With regard to the rationale for this recommendation, the Commission stated that 'the Commission's research suggests that while alibi notices are generally given, the time frame for this requirement is not always met … The most common reason for non-compliance with the time frame for the alibi notice requirement given by defence lawyers who participated in the Commission's survey was that they had not been instructed by their client by the time notice was given. This recommendation ties the notice requirement to the trial date, rather than the committal, when it is more likely that the defendant will be legally represented': para 3.2 and 3.126

> The Commission's recommendation was that notice of alibi evidence should be given at least 35 days before trial: Report 95, Recommendation 4. The Commission is of the view that a period of no less than 21 days before the listing of the trial is simply too short to allow the prosecution sufficient opportunity to investigate alibi evidence.[152]

5.8 Legal Aid opposed any changes to the current time frame arguing that moving the time frame back would create a greater workload for police and that the resources available to the police and the DPP should be sufficient to meet the three week time frame:

> The experience of the Legal Aid Commission is that alibi evidence is rarely called. When subjected to appropriate scrutiny, it is usually found to be wanting. The defence is particularly careful in this regard. They do not want to undermine their case with one of their own witnesses. The defence usually needs time to establish the veracity of alibi evidence. This occurs in the lead up to the trial. Moving the time back for the DPP would lead to a greater workload for the police who would then be doing the investigative work, which is done by the defence in relation to alibi evidence. Although three weeks seems like a relatively short period of time in the overall history of a criminal indictable matter, the police and DPP have significant resources in comparison to that available to the defence side and should be able to complete any investigation within the current time frame. The Legal Aid Commission opposes any change to the current time frame.[153]

5.9 While the Committee did not have the opportunity to explore this issue in a great deal of detail there seems to be sufficient concern about the change to the time frame for notification of alibi evidence to warrant further investigation. The Committee is therefore of the view that the Attorney General should examine this issue to establish whether the new time frame of 21 days is unreasonably impacting on the Crown and the police, with a view to potentially amending the legislation if necessary.

Recommendation 4

That the Attorney General examine the impact of the amendment to section 150 of the *Criminal Procedure Act 1986* implemented by the *Criminal Procedure Amendment Pre-trial Disclosure Act 2001* to require that notice for alibi evidence in all trials on indictment be given at least 21 days before a trial is listed for hearing. The examination should establish whether the amendment unreasonably impacts on the Crown and the police and whether a legislative amendment is necessary.

Relevance of alibi evidence to credibility of alibi defence

5.10 The ODPP raised a further issue in relation to the presentation of alibi evidence in its submission; whether advancing evidence of alibi at the trial for the first time should be the subject of a jury direction about how the evidence can be used:

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152 Submission 12, Law Reform Commission of NSW, p5

153 Answers to questions on notice taken during evidence 7 June 2004, Mr Sandland, Legal Aid Commission NSW

> A very experienced prosecutor suggested that where an accused is legally represented, is offered the opportunity to provide answers to questions and provides information but makes no reference to an alibi and then subsequently advances an alibi for the first time at trial, the earlier failure to raise alibi be admissible as evidence relevant to the credibility of the alibi defence. It is not suggested that the evidence be relevant to the guilt or innocence of the accused.[154]

5.11 The ODPP explained that it is likely that juries are taking into account the fact that the alibi evidence was presented to the first time at trial without any guidance, and that this could lead juries to take the timing of the alibi notice into account to infer guilt, rather than just taking it into account when considering the credibility of the alibi evidence. The ODDP is of the view that a jury direction may prevent this type of reasoning from occurring:

> It would be far preferable for the position to be codified and clarified so that impermissible reasoning of this type does not occur. A special case can be made for evidence of alibi. This has previously been recognised, in that alibi was initially the only defence of which the accused was required to give prior notice to the Crown.[155]

5.12 While the Amendment Act did not include this issue, the Committee took the opportunity to canvass the views of witnesses during its hearings. In relation to the ODPP's proposition, the Public Defenders Office argued that:

> The present state of the law would make the time at which an alibi is raised an appropriate consideration for a jury in determining whether the weight to be accorded the alibi is adversely affected. The circumstances in which the alibi evidence arose are appropriate avenues for the prosecution to cross-examine both the alibi witness and the accused, where he or she gives evidence. These observations aside, the Public Defenders do not believe that the circumstances under which the accused may earlier have exercised a right to silence in not raising an earlier alibi should be admissible as evidence going to the credibility nor subject to adverse comment. The timing of the alibi notice is a subject for legitimate comment but this does not warrant any excuse to qualify the right to silence.[156]

5.13 Legal Aid also disagreed with the ODDP's proposal, on the basis that it is an erosion of the client's right to silence and that any attempt to manufacture an alibi could be the subject of cross-examination in any case:

> The Legal Aid Commission opposes the view put forward by the DPP that failure to raise alibi evidence should be admissible as evidence relevant to the credibility of the defence. Firstly, it is an erosion of the client's right to silence. If an accused person chooses not to divulge certain information, this should not be used to draw an adverse inference. Secondly, if there has been some attempt to manufacture an alibi, this should become apparent in the course of cross-examination. Many accused persons may have been affected by drugs, alcohol or have mental health problems. In these

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154 Submission 5, Office of the Director of Public Prosecutions, p6. This position equates to that outlined by Hunt CJ at CL (as he then was) in his judgment in the matter of *Maiden and Petty* in the Supreme Court (1988 35 A. Crim R 346). The decision was reversed on appeal to the High Court: (1991) 173 CLR 95

155 Submission 5, Office of the Director of Public Prosecutions, p7

156 Answers to questions on notice taken during hearing 7 June 2004, Mr Zahra and Mr Craigie, NSW Public Defenders Office, p3

> circumstances, they simply may not have recognised the significance of an available alibi witness. They should not in such circumstances be placed in the position that their failure to raise an alibi adversely affects the credibility of their defence.[157]

5.14 Mr Babb of the Attorney General's Department took a cautious approach to the proposal:

> I consider that where an accused notifies of an alibi within the prescribed time limit and maintains that alibi at trial that there should be no permissible criticism of the accused for not notifying police or the Crown of the alibi at an earlier point in time. To do so would offend the right to remain silent.
>
> The example given … refers to the raising of alibi for the first time at trial. This is only able to be done with leave, per s 150 of the *Criminal Procedure Act 1986*. The raising of alibi for the first time at trial whether or not the accused has on a prior occasion provided information to the police would in my view leave an accused open to cross-examination and comment as to the impact upon the credibility of that version in light of the late raising of the version. The reason for that is because of the legislative duty to disclose that defence. A failure to disclose within the prescribed period should be available to assist in consideration of the credibility of the defence.
>
> I am not convinced on my reading of the relevant legislation and cases that legislative amendment is required before there is scope for a judge to be allowed to give directions to a jury as to how they can use alibi raised for the first time at trial.[158]

5.15 Mr Chilvers, the Director of the Research and Resource Centre at the NSW Police Association, expressed support for the proposal, stating that 'this is really the effect of the British adjustment to the right to silence, it is really taking one element of that. We believe that that is very fair.'[159]

5.16 The Committee notes the differing views on this issue expressed by inquiry participants. Unfortunately, insufficient evidence was presented to enable the Committee to draw any firm conclusions. The Committee also notes that the views expressed indicate that this matter is closely connected to the issue of the accused's right to silence, a matter thoroughly examined by the NSW Law Reform Commission in its review of the right to silence.

New regime for presentation and amendment of indictments

The reform

5.17 The Amendment Act altered the time frame for the presentation and amendment of indictments for *all* matters in the District and Supreme Courts, not just complex criminal trials. The old section 54 of the *Criminal Procedure Act 1986*, which was amended by the Amendment Act, provided that a court *may* order an indictment to be presented on the date

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157 Answers to questions on notice taken during evidence, 7 June 2004, Mr Sandland, Legal Aid Commission NSW

158 Answers to questions on notice taken during evidence, 7 June 2004, Mr Babb, NSW Attorney General's Department

159 Mr Chilvers, NSW Police Association, Evidence, 7 June 2004, p43

fixed for the trial of a person in the court for an indictable offence, or on or before some other later date. An indictment must now be presented within four weeks after the committal of the accused for trial.[160] This time period can be extended by the Court in which the trial is to be heard or by the Regulations or the Rules of the Court.[161] If the indictment is not presented within the four week time frame (and unless an extension is granted) the Court can either proceed with the trial as if an indictment has been presented or adjourn the trial or 'take such other action as it thinks appropriate in the circumstances of the case'.[162]

5.18 The new regime for indictments also precludes prosecutors from *amending* an indictment that has been presented at trial without the leave of the court and the consent of the accused.[163] In the Second Reading speech to the Bill the Attorney General placed this amendment in the context of enhancing the efficiency and fairness of the criminal justice system:

> In addition to providing for case-managed pre-trial disclosure, the bill provides other amendments designed to enhance further the efficiency and fairness of the criminal justice system. … New section 63A prevents a prosecutor from amending an indictment that has been presented at trial without the accused's consent or the court's leave.[164]

5.19 The change to the regime for indictments has been described as one of the most significant aspects of the Amendment Act. For example, Ms Gray of the ODPP, stated in 2001:

> From the prosecution perspective, in my view the new indictment regime is of much greater and more immediate significance than the pre-trial disclosure regime. The latter applies only to those complex criminal trials in which the court makes pre-trial disclosure orders. It may ultimately be that the number of matters in which the Court exercises its discretion to make order for disclosure is quite small.
>
> By contrast, the new 'fixed indictment' regime and the four week timeframe applies across the board (subject to the regulations and the Rules of Court extending the time frame). The new indictment regime essentially requires the prosecution to settle and present the indictment within four weeks of committal for trial, and to stick to the form of indictment then presented (unless the Court grants leave to amend or the accused consents to an amendment of the indictment, presumable pursuant to a charge bargain.[165]

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160 *Criminal Procedure Act 1986*, s 129(2). The Regulations and Rules of the Court may also make provisions for the manner of presenting indictments: s 127.

161 *Criminal Procedure Act 1986*, s 129(3). The Court must, in exercising any power under this section, have regard to the fact that the crown does not have a right of appeal if the accused person is acquitted: s 129(6). The ODPP advised that the time period has been extended for District Court trials outside major regional centres to permit the filing of an indictment within eight weeks of committal for trial in proclaimed places which are located outside the main regional centres: Submission 5, Office of the Director of Public Prosecutions, p7. See Clause 10C of Part 53 of the District Court Rules

162 *Criminal Procedure Act 1986*, s 129(4)

163 *Criminal Procedure Act 1986*, s 20

164 Legislative Council, New South Wales, Hansard, 16 August 2000, p8288

165 Gray, p20

5.20 Mr Babb stated that the filing of indictments 28 days after committal 'is one of the cornerstones of the legislation'.[166] In addition, the Hon Justice RO Blanch AM, Chief Judge of the District Court, noted in his submission that the new regime for indictments is an 'important and significant change' because 'clearly the defence cannot be expected to prepare cases until they know what the charges are and the earlier there is certainty to the charges, the more speedy the process can become.'[167]

Compliance

5.21 The ODPP advised the Committee that '…the prosecution has complied with the 28 day time limit in all matters to which it is applicable.'[168] Justice Blanch also noted that the ODPP has not had any great problem complying with this requirement:

> To my observation the Offices of the Director of Public Prosecutions do not have any great problem complying with this requirement. They do on occasions request an extension of time but the Court can now control that process and this has been a significant contributing factor to the achievements made by this Court. The trials coming into the District Court are all cases where the DPP prosecuted the matter in the Local Court and there is no reason why the settling of the charge within one month of committal should be a problem.[169]

5.22 In regard to compliance with the new time frame by the prosecution, the Public Defenders Office stated:

> We are not aware of any particular impact on the level of compliance by prosecution authorities as to the timely presentation or amendment of indictments. This is not to say that the Public Defenders do not face and report occasional problems in this area, as exampled in our previous submission. We regard the prospect of minimising such instances as being primarily related to matters of adequate provision and allocation of prosecution resources, the detail of which is in the hands of the executive, prosecuting authorities and police services.[170]

Impact of the new time frame for presentation of indictments

Impact on the prosecution

5.23 As noted above, the prosecution has been able to comply with the new timeframe in all matters to which it is applicable. The Committee was advised by the ODPP that it received supplementary funding to establish a Trial Preparation Unit (TPU) to enable it to meet the requirement to present indictments within four weeks of committal:

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166 Mr Babb, NSW Attorney General's Department, Evidence, 7 June 2004, p26

167 Submission 1, Hon Justice RO Blanch AM, Chief Judge District Court of NSW, p2

168 Submission 5, Office of the Director of Public Prosecutions, p7

169 Submission 1, Hon Justice RO Blanch AM, Chief Judge District Court of NSW, p2

170 Submission 8, NSW Public Defenders Office, p4

> My Office received supplementary funding to enable the establishment of a Trial Preparation Unit (TPU) to enable the finding of final bills of indictment within the 28 days prescribed by the pre-trial disclosure legislation. The TPU is staffed mainly by Crown Prosecutors who are located in Head Office and in the regional offices. A solicitor and three administrative officers have been included in the TPU to assist the Head Office Crown Prosecutors (who are also responsible for appearing in the regular arraignments lists in the Supreme and District Courts). The TPU also performs other chambers' work and assists ODPP lawyers with advice generally and in the further screening of some complex matters.[171]

5.24 The ODPP outlined the impact that the introduction of the TPU has had, including securing earlier pleas in some matters, narrowing issues for trial, assisting lawyers with pre-committal cases and enabling earlier attention to the appropriateness of charges and early discontinuance of matters:

> (a) securing earlier pleas of guilty in some matters, ie. pleas at the arraignment date or pre-trial. The TPU Crown Prosecutors sometimes negotiate pleas after finding a bill, whereas when bills were being found by *ad hoc* Crown Prosecutors (who were not subsequently responsible for the conduct of the trial) there was not such an incentive or opportunity to negotiate a plea - the introduction of a new negotiating party bringing a fresh mind to a case can open up avenues for pleas which were not previously explored by the Local Court advocate;
>
> (b) narrowing the issues for trial, which reduces the amount of time required for the hearing of the matter;
>
> (c) assisting lawyers with pre-committal cases in the form of:
>
> > (i) identification of appropriate alternate charges, which enable the matter to be dealt with to finality at the Local Court, (and sometimes by way of a plea of guilty) or committal for sentence rather than for trial;
> >
> > (ii) identification of deficiencies in the evidence at an earlier stage, so that steps to address this can be taken while the matter is still in the Local Court. Where such deficiencies can be addressed, the likelihood of a plea is increased, and the likelihood of a successful no further proceedings submission shortly before the trial date, is reduced.
>
> (d) enabling earlier attention to the appropriateness of charges and early discontinuance of matters. For example, a significant number of recommendations for *ex officio* counts in indictments and for fine-tuning of indictments (including partial no bills) have come to the Director's Chambers for attention. These issues are being dealt with earlier in the proceedings than they might otherwise have been and one can assume that this has assisted in narrowing issues and facilitating pleas of guilty. The *ex officio* matters have frequently involved child sexual assault and complex fraud matters, where the examination of the committal transcript by the TPU Crown Prosecutor has identified additional or alternate charges;
>
> (e) enabling timely responses to applications by the defence that there be no further proceedings;

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171 Submission 5, Office of the Director of Public Prosecutions, p7

> (f) promoting discussion between solicitors and Crown Prosecutors in relation to legal issues and promoting the professional development of the solicitors (through some Crown Prosecutors adopting a mentoring role) and a team environment within the Office.[172]

Impact on backlog of trials

5.25 The DPP informed the Committee that the work of the TPU has had some impact on the backlog of trials:

> We were successful in obtaining some additional resources to establish trial preparation units in the office: Crown Prosecutors devoted to assessing matters that have been committed for trial, identifying the appropriate charges and settling the indictments within the time limit allowed. That has helped in focusing the defence mind on the charges that are going to be brought and on the possibility of pleas of guilty to one or some or all of the charges that are on the indictment. So, again, we have increased the number of pleas of guilty that way, which in turn reduces the number of trials and reduces the backlog.[173]

5.26 Mr Babb expressed similar views as to the effectiveness of the new time frame for indictments in reducing back logs:

> I would strongly suggest that the provision that requires the filing of an indictment 28 days after committal is having an enormous impact on the ability of courts to case manage the list in an orderly way, because the charges are known at an early stage and that front-end focusing of resources feeds in the additional resources of the Director of Public Prosecutions, and actually settling the indictment early has an impact.[174]

5.27 Mr Tedeschi, Senior Crown Prosecutor, noted however that the reduction in backlog can also have a negative effect:

> Ironically one of the problems that has arisen there is that a trial preparation unit Crown Prosecutor will appear at all of the District Court arraignments. The trials are being set down so soon after that that often an accused person does not have the opportunity of getting proper advice whether or not to plead guilty until the trial. So in a sense the lack of a backlog is resulting in more trials being pleas on the day of trial because they are so soon after the arraignment.[175]

Impact on police

5.28 Commenting in the *Policing Issues and Practice Journal*, Trichter and Taunton described the impact of the new requirements on police:

> The new indictment regime will have a significant flow-on effect upon police, by virtue of the requirement it places upon the DPP to settle and present the indictment within four weeks of committal for trial, and to stick to the form of indictment

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172 Submission 5, Office of the Director of Public Prosecutions, pp7-8

173 Mr Cowdery, Office of the Director of Public Prosecutions, Evidence, 7 June 2004, pp4-5

174 Mr Babb, NSW Attorney General's Department, Evidence, 7 June 2004, p29

175 Mr Tedeschi, Office of the Director of Public Prosecutions, Evidence, 7 June 2004, p5

> initially presented (unless the Court grants leave to amend or the accused consents to an amendment of the indictment). The prosecution's ability to present a certain indictment in this timeframe will require that the police brief of evidence is complete and available at the time of committee for trial.
>
> It is clear that without a complete set of relevant material at the time of committal (or very shortly thereafter), the prosecution will not be in a position to present the fixed indictment within the timeframe. Where the prosecution presents an indictment which later is discovered to be inappropriate, the prosecution will need to seek the consent of the accused to the amendment or the leave of the court. The immediate practical effect of the new regime is likely to be an increase in the length of time that matters are before the Local Court, so that when committal for trial occurs, the degree of readiness of all parties is much greater than is commonly the case. However, this will not be welcomed by some magistrates, who are under pressure to reduce delays in the Local Court.
>
> Prosecutors already face a hostile reception in the Local Court from some magistrates when seeking to further adjourn matters on the basis that the complete brief is not available.[176]

5.29 Trichter and Taunton described the increased onus on police as follows:

> Hence, the onus is on police to:
>
> - ensure the thoroughness of their investigation and, in the absence of any risk posed by the accused person remaining at large in the community, complete all investigations and obtain all evidence (e.g. transcripts, certificates of analysis, etc.) prior to charging the accused person; and
>
> - prioritise and respond in a timely fashion to requisitions by the DPP for further investigations/inquiries to be conducted and additional evidence/information to be obtained.[177]

Conclusion

5.30 The Committee notes that the amendment to the time frame for settling indictments has been identified as one of the most significant aspects of the Amendment Act. In terms of compliance, it appears that the ODPP has been able to meet the new time frame with the assistance of the new Trial Preparation Unit funded for this purpose. There also appears to be some indication that the new time frame is having a beneficial impact in terms of efficiency in the pre-trial process. The Committee is pleased to conclude that this aspect of the Amendment Act seems to be meeting its stated purpose of enhancing the efficiency and fairness of the criminal justice system.

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176 Trichter T and Taunton D, 'The new pre-trial disclosure regime in New South Wales', *Policing Issues and Practice Journal*, January 2002, p16 ('Trichter and Taunton')

177 Trichter and Taunton, p16

New regime for police disclosure to the Director of Public Prosecutions

5.31 Prior to the Amendment Act, disclosure by police officers to the prosecuting authority was regulated primarily by a combination of the following:

- Guidelines furnished by the DPP to the Police Commissioner pursuant to the *Director of Public Prosecutions Act 1986*, section 14
- common law
- Prosecution Policy Guidelines of the NSW DPP and the Commonwealth DPP
- some statutory provisions eg the provisions in the *Justice Act* requiring service of brief
- Notices under the *Evidence Act 1995* in relation to tendency, coincidence and first hand hearsay evidence.[178]

5.32 The Amendment Act modified the *Director of Public Prosecutions Act 1986* to formalise the existing duties placed on police officers (by the sources set out above) to disclose information pertaining to the investigation of offences to prosecuting authorities. The new section 15A inserted into the *Director of Public Prosecutions Act 1986,* imposing a statutory duty of disclosure, reads as follows:

> **Section 15A**
>
> (1) Police officers investigating alleged indictable offences have a duty to disclose to the Director all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person.
>
> (2) The duty of disclosure continues until one of the following happens:
> (a) the Director decides that the accused person will not be prosecuted for the alleged offence,
> (b) the prosecution is terminated,
> (c) the accused person is convicted or acquitted.
>
> (3) Police officers investigating alleged indictable offences also have a duty to retain any such documents or other things for so long as the duty to disclose them continues under this section. This subsection does not affect any other legal obligations with respect to the possession of the documents or other things.

5.33 Under the provision, officers must complete a Disclosure Certificate for all indictable matters and forward the certificate and a copy of all relevant non-sensitive information (ie information not withheld on the basis of an immunity) to the DPP.[179]

5.34 In relation to this reform the NSW Public Defenders Office noted that 'complete police disclosure to the prosecution is clearly critical to the success of a pre-trial disclosure regime.'[180]

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178 Trichter and Taunton, p7

179 *Director of Public Prosecution Regulation*, s 3A

180 Submission 8, NSW Public Defenders Office, p 2

A similar sentiment has been expressed by Ms Gray, who described section 15A as the key provision upon which the pre-trial disclosure regime rests:

> The new section 15A is a key provision. It is the foundation upon which the pre-trial disclosure regime rests. Without complete and timely police disclosure to the prosecution, the regime for prosecution pre-trial disclosure in respect of complex criminal trials created in the Act, will be ineffective. … Without proper police disclosure, the prosecution will be unable to fully comply with its own disclosure obligations.[181]

5.35 Trichter and Taunton describe the rationale and importance of police disclosure as follows:

> If the Crown is to make adequate disclosure to the defence, the police must in turn make proper disclosure to the DPP. Relevant and appropriate disclosure to the DPP by police is an important safeguard against the occurrence of a miscarriage of justice, because it ensures the accused is in a position to properly test the prosecution's case and to present material relevant to its own case. This then ensures the jury is in a position to determine where the truth lies regarding the issues relevant to the proceedings.[182]

5.36 Trichter and Taunton also note that two of the sanctions that can be imposed by a court for non-compliance with a pre-trial disclosure order are conditional upon the prosecution first having complied with its pre-trial disclosure requirements.[183]

Impact on police

5.37 Representatives of the Police Association NSW advised the Committee that since section 15A incorporates existing guidelines and policies, police disclosure to the DPP has not changed substantially since the introduction of the provision.[184] The Police Association did, however, general express concern about the level of disclosure required of police:

> A prevalent view amongst the responses we received from investigating police officers, is that the requirements of pre-trial disclosure makes the prosecution role even more onerous with all the material which is required to be supplied to the defence, including the crown's notes of witness conferencing etc. One needs only to refer to section 47E [now s 138] of the Act which sets out the information the notice of the case for the prosecution must contain, to gain an insight into the magnitude of information police must supply to the prosecution.[185]

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181 Gray, p8

182 Trichter and Taunton, p8

183 Trichter and Taunton, p9

184 Mr Luke Hannon, Sergeant of Police, Executive Member, Police Association NSW, Evidence, 7 June 2004, p36

185 Submission 6, NSW Police Association, pp2-3

5.38 The Police Association also noted the view of its members that 'in the lead up to any major criminal case which is declared 'complex', hence requiring pre-trial disclosure, the pressure being placed on scant police resources to reply to the disclosure will be further increased.'[186]

5.39 Justice Action expressed support for the new statutory disclosure provision and argued that prosecutors should be obliged to assist police to identify all relevant material to be disclosed:

> Justice Action supports the obligation on police to disclose all relevant information and documents. We believe the Act should go further and create corresponding obligations for the prosecutors to assist police to identify all relevant material including by making all reasonable inquiries and assisting police to discover additional relevant information.[187]

Compliance

5.40 The terms of reference require the committee to examine the rate of compliance with pre-trial disclosure requirements by police. In this regard the NSW Attorney General's Department advised the Committee that it is "… not aware of any matters where the police have failed to comply with this provision."[188]

5.41 The DPP, however, advised that there are still a 'large number' of cases where disclosure requirements are not satisfied by police investigators:

> The new provisions have been very beneficial, flowing from section 15A of the *Director of Public Prosecutions Act*, the amendment that was made and directions that have been given internally in the New South Wales Police. There are still a large number of cases where the requirements are not fully satisfied, where the disclosure certificate does not accompany the brief of evidence or where the disclosure certificate is incomplete. I can only speculate about the reasons for that. One might be a training issue in the police, another might be a resource issue in the police. They simply have not been able to conduct the necessary investigations to enable them to comply and sign off on the certificate. But we certainly get a large number of matters where the disclosure certificate is either not there or not complete. When that happens we follow it up, of course, and we keep hounding them until those requirements are complied with. It is an ongoing issue. Hopefully, it will become less of a problem over time.[189]

5.42 The NSW Public Defenders Office cited one example of a lack of compliance by the police:

> In a recent murder trial of *R v Belinda Van Krevel* it came to light that the police had not made appropriate disclosure to the prosecution. As a result the trial was aborted.[190]

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186 Submission 6, NSW Police Association, p3

187 Submission 10, Justice Action, p 3

188 Submission 11, NSW Attorney General's Department, p6

189 Mr Cowdery, Office of the Director of Public Prosecutions, Evidence, 7 June 2004, p7

190 This issue was identified by the NSW Public Defenders Office in its submission to the first stage of this inquiry, 14 August 2002, p2

5.43 The Legal Aid Commission expressed the view that despite the reforms and the existing framework relating to police disclosure, statements prepared by investigating officers are becoming too succinct:

> There is by virtue of section 15A of the *Director of Public Prosecutions Act* an ongoing duty of disclosure on the Police. This requirement must also be seen in the context of DPP Guidelines, the common law and the statutory framework which provides for service of briefs of evidence. Despite this framework, some experienced criminal practitioners have noticed that statements prepared by Investigating Police are becoming more succinct and that there has been an increased need to subpoena material both from the Police and other sources in order to adequately prepare a client's defence. This is a trend which seems to go against the intent of the guidelines and legislation referred to above and may need to be monitored in the future.[191]

5.44 It appears to the Committee that because the introduction of the statutory obligation of disclosure on police largely had the effect of codifying existing rules regarding police disclosure, rather than imposing new obligations, it has not had a significant impact on police or the prosecution. Although the Committee was not able to get a clear picture of the rate of compliance by police officers with the requirement, the information provided to the inquiry has not revealed any significant failures on the part of police to comply.

Saving of immunities

5.45 The Amendment Act included the saving of any immunity that presently applies to the disclosure of information, documents or other things including client legal privilege, public interest immunity and sexual assault communications privilege.[192] One issue in relation to this provision was raised by the Police Association in the context of the new statutory obligation of disclosure on police. In this regard, the Association advised the Committee that its members have suggested that the saving of immunities needs to be clarified:

> Our members have voiced the opinion that the legislation in the form of the Act needs to be clear on when statements and evidence can be withheld. This should include where witnesses, victims or police officers are in danger and matters of public interest immunity. … A recent problem experienced by some police investigators with the current legislation is highlighted in the following example. It involved a registered informant who would be providing a statement regarding an upcoming trial. He did not want to disclose that he was acting for the police as the statement would clearly have indicated, yet it was unclear as to whether or not they could withhold the statement on this basis. They decided to withhold the statement on the basis of public interest immunity and will supply it at a later date. The legislation needs to be clear in order for investigating police to know what their rights and obligations are.[193]

5.46 The Police Association has therefore recommended that 'legislation in the form of the Act needs to be made clearer for investigating police in relation to their obligations concerning when statements and evidence can be withheld.'[194]

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191 Submission 9, Legal Aid Commission NSW, p5

192 *Criminal Procedure Act 1986*, s 149(6)

193 Submission 6, NSW Police Association, p5

194 Submission 6, NSW Police Association, p5

5.47 The Committee notes the following advice in the *Policing Issues and Practice Journal* in relation to the Certificate of Disclosure required to be produced by police and the saving of immunities:

> You must indicate whether there exists any relevant sensitive information, document or other things not contained in the brief to the DPP that might be expected to assist the case for the prosecution or the case for the accused. Sensitive material includes matters where you consider a claim of privilege, pubic interest immunity or statutory immunity applies. If in doubt, seek urgent guidance as outlined earlier, or advice from the Co-ordinator, Subpoena Section, Court and Legal Services. (E/N 55186). If still in doubt, complete the question 'There is' in the certificate and seek formal advice through your commander from the General manage, Court and Legal Services, before attending any conference with the ODPP lawyer to discuss the relevance of the material.[195]

5.48 Mr Babb noted the 'greyness' of the law in relation to some immunities, such as the public interest immunity, but stressed that it is ultimately up to a judge to determine which evidence falls within an immunity:

> It is a grey area and it is necessarily a grey area in that it is a balancing of the public interest in allowing some information to be withheld because it is important for the safety of undercover operatives, for example, and the interest of the accused in having all relevant material made available. In excerpt No. 4 of the documents that I have brought, I have photocopied the principles in relation to public interest immunity. It details the balancing test. I can well understand that many police officers do not know where the balance lies and that is because many lawyers do not know exactly where the balance lies. That is a decision for the judge to make in an individual case. But what we do is at present what I think is a pretty good system where the police have to disclose all relevant material.
>
> They have to provide a notice outlining any material that they have held back because of, for example, public interest immunity. The defence then notifies them that they want to see that material. It is produced to a judge who alone looks at the material and hears arguments from the Crown Solicitor representing the police and raising the public interest immunity, and counsel for the defence, and a decision is made as to whether that material will go in. I think that is a system that works well at present. There is no clear delineation of what material must be produced and what material is privileged, but you will not get a clear delineation. It is a fine balancing act that a judge should make in each case and if he is wrong on where he determines the balance to lie, an appeal court can look at the sealed envelope and see what that material included. So I disagree with the Police Association there. I think it is a system that works well.[196]

5.49 In relation to the Police Association's recommendation, the DPP commented that legislative reform was not required but that education of police officers may be necessary:

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

195 Trichter and Taunton, p11

196 Mr Babb, NSW Attorney General's Department, Evidence, 7 June 2004, p34

> equip the police to address issues of that kind or evidence that falls into that category so that they can identify it and know how to deal with it.[197]

5.50 During evidence to the Committee Mr Chilvers, the Director of the Research and Resource Centre with the Police Association, indicated that education of police officers may well be the answer:

> The bench will clearly understand in most circumstances what legal profession client-legal privilege is. But often public interest immunity must be raised with the judge and the difficulty is that the people who must raise it are the police. There are often not very clear guidelines about what constitutes public interest immunity particularly. … Yes. I am not quite sure how you address this—on reflection, I am not sure whether it should be through legislation. But there certainly needs to be some recommendations about perhaps expanding internal guidelines for the police service about what might constitute raising the flag and ringing alarm bells where someone needs to check it out.[198]

5.51 The Committee acknowledges the comments of Mr Babb that it is a judge who undertakes the 'fine balancing act' of determining which evidence falls within a ground of immunity. The Committee is concerned, however, that if police officers do not have sufficient understanding of the immunities then information pertaining to them could be mishandled.

5.52 While the Committee agrees with the DPP and Mr Babb that the system itself may not need to be changed, it appears that the matter of education of police officers does need to be pursued. The Committee believes that it is important that officers understand their duty to disclose relevant material and to protect relevant material that is the subject of bona fide clams of privilege, public interest immunity or statutory immunity.

Recommendation 5

That the Minister of Police examine the level of awareness among police officers of the changes to the pre-trial disclosure requirements brought about by the *Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001*, in particular, the insertion of section 15A into the *Director of Public Prosecutions Act 1986* and section 149(6) of the *Criminal Procedure Act 1986* relating to the saving of immunities, and whether there is a need for additional educational resources.

197 Mr Cowdery, Office of the Director of Public Prosecutions, Evidence, 7 June 2004, p12

198 Mr Chilvers, Police Association of NSW, Evidence, 7 June 2004, p43

Appendix 1 Original terms of reference

That the Standing Committee on Law and Justice inquire and report on:

1. The provisions of the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2001, as passed by the House, together with the system of pre-trial disclosure in New South Wales including:

    (a) the provision of funding to various legal bodies required to undertake pre-trial disclosure, including but not limited to:
        (i) the Legal Aid Commission,
        (ii) the Office of the Director of Public Prosecutions,
        (iii) the Public Defenders,
        (iv) the Sydney Regional Aboriginal Corporation Legal Service and other Aboriginal legal services, and
        (v) any other legal service,

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

    (c) the rate of compliance with pre-trial disclosure requirements by:
        (i) legally aided defendants,
        (ii) privately funded defendants,
        (iii) Police,
        (iv) the Office of the Director of Public Prosecutions,

    (d) the impact of pre-trial disclosure requirements on unrepresented defendants,

    (e) the effect of pre-trial disclosure requirements on court delays and waiting times in the Supreme Court, District Court and the Court of Criminal Appeal,

    (f) the effect of pre-trial disclosure requirements on the doctrine of the right to silence,

    (g) the effect of pre-trial disclosure requirements on the doctrine of the presumption of innocence,

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

    (i) any other matter arising out of or incidental to these terms of reference.

2. That the Committee report within 18 months from the date of commencement of the Act, as assented to (ie 19 May 2003).

Legislative Council, New South Wales, Minutes of Proceedings, No 85, item 8 (7 December 2000)

Appendix 2 Submissions

No	Author
1	The Hon Justice R O **BLANCH** AM (Chief Judge, District Court of NSW)
2	Judge Derik **PRICE** (Chief Magistrate, Local Court of NSW)
3	Mr Ashok **KUMAR**
4	Mrs Patricia **WAGSTAFF**
5	Mr Nicholas **COWDERY** AM QC (Director of Public Prosecutions)
6	Mr Gregory **CHILVERS** (Police Association of NSW)
7	Mr Gordon **SALIER** (Law Society of NSW)
8	Mr Christopher **CRAIGIE** SC (NSW Public Defenders Office)
9	Mr Steven **O'CONNOR** (Legal Aid Commission of NSW)
10	Ms Stacy **SCHEFF** (Justice Action)
11	Mr Laurie **GLANFIELD** (Attorney General's Department)
12	Justice Michael **ADAMS** (Law Reform Commission of NSW)

Appendix 3 Witnesses

Date	Name	Position and organisation
Monday 7 June 2004	Mr Nicholas R Cowdery AM QC	Director of Public Prosecutions
		Office of the Director of Public Prosecutions
	Mr Mark Tedeschi QC	Senior Crown Prosecutor
		Office of the Director of Public Prosecutions
	Mr Peter R Zahra SC	Senior Public Defender
		NSW Public Defenders Office
	Mr Chris Craigie SC	Deputy Senior Public Defender
		NSW Public Defenders Office
	Mr Lloyd Babb	Director, Criminal Law Review Division
		NSW Attorney General's Department
	Mr Greg Chilvers	Director, Research & Resource Centre
		Police Association of NSW
	Mr Luke Hannon	Executive Member
		Police Association of NSW
	Ms Sandra Soldo	Research Officer
		Police Association of NSW
	Mr Brian Sandland	Director, Criminal Law Division
		Legal Aid Commission NSW

Appendix 4 *Criminal Procedure Act 1986*, ss 138, 139 and 140

138 Disclosure of case for the prosecution

The notice of the case for the prosecution is to contain the following:

(a) a copy of the indictment,

(b) an outline of the prosecution case,

(c) copies of statements of witnesses proposed to be called at the trial by the prosecutor,

(d) copies of any documents or other exhibits proposed to be tendered at the trial by the prosecutor,

(e) if any expert witnesses are proposed to be called at the trial by the prosecutor, copies of any reports by them that are relevant to the case,

(f) a copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness,

(g) a copy of any information, document or other thing provided by police officers to the prosecutor, or otherwise in the possession of the prosecutor, that may be relevant to the case of the prosecutor or the accused person, and that has not otherwise been disclosed to the accused person,

(h) a copy of any information, document or other thing in the possession of the prosecutor that is adverse to the credit or credibility of the accused person.

139 Defence response

(1) The notice of the defence response is to contain the following:

(a) notice as to whether the accused person proposes to adduce evidence at the trial of any of the following contentions:

(i) insanity,

(ii) self-defence,

(iii) provocation,

(iv) accident,

(v) duress,

(vi) claim of right,

(vii) automatism,

(viii) intoxication,

(b) if any expert witnesses are proposed to be called at the trial by the accused person, copies of any reports by them proposed to be relied on by the accused person,

(c) the names and addresses of any character witnesses who are proposed to be called at the trial by the accused person (but only if the prosecution has given an undertaking that any such witness will not be interviewed before the trial by police officers or the prosecutor in connection with the proceedings without the leave of the court),

(d) the accused person's response to the particulars raised in the notice of the case for the prosecution (as provided for by subsection (2)).

(2) The accused person's response to the particulars raised in the notice of the case for the prosecution is to contain the following:

(a) if the prosecutor disclosed an intention to adduce expert evidence at the trial, notice as to whether the accused person disputes any of the expert evidence and which evidence is disputed,

(b) if the prosecutor disclosed an intention to adduce evidence at the trial that has been obtained by means of surveillance, notice as to whether the accused person proposes to require the prosecutor to call any witnesses to corroborate that evidence and, if so, which witnesses will be required,

(c) notice as to whether the accused person proposes to raise any issue with respect to the continuity of custody of any proposed exhibit disclosed by the prosecutor,

(d) if the prosecutor disclosed an intention to tender at the trial any transcript, notice as to whether the accused person accepts the transcript as accurate and, if not, in what respect the transcript is disputed,

(e) notice as to whether the accused person proposes to dispute the accuracy or admissibility of any proposed documentary evidence or other exhibit disclosed by the prosecutor,

(f) notice as to whether the accused person proposes to dispute the admissibility of any other proposed evidence disclosed by the prosecutor and the basis for the objection,

(g) notice of any significant issue the accused person proposes to raise regarding the form of the indictment, severability of the charges or separate trials for the charges.

140 Prosecution response to defence response

The notice of the prosecution response to the defence response is to contain the following:

(a) if the accused person has disclosed an intention to adduce expert evidence at the trial, notice as to whether the prosecutor disputes any of the expert evidence and, if so, in what respect,

(b) if the accused person has disclosed an intention to tender any exhibit at the trial, notice as to whether the prosecutor proposes to raise any issue with respect to the continuity of custody of the exhibit,

(c) if the accused person has disclosed an intention to tender any documentary evidence or other exhibit at the trial, notice as to whether the prosecutor proposes to dispute the accuracy or admissibility of the documentary evidence or other exhibit,

(d) notice as to whether the prosecutor proposes to dispute the admissibility of any other proposed evidence disclosed by the accused person, and the basis for the objection,

(e) a copy of any information, document or other thing in the possession of the prosecutor, not already disclosed to the accused person, that might reasonably be expected to assist the case for the defence,

(f) a copy of any information, document or other thing that has not already been disclosed to the accused person and that is required to be contained in the notice of the case for the prosecution.

141 Disclosure requirements are ongoing

(1) The obligation to undertake pre-trial disclosure continues until any of the following happens:

(a) the accused person is convicted or acquitted of the charges in the indictment,

(b) the prosecution is terminated.

Appendix 5 Matters in which pre-trial disclosure orders have been made (at March 2004)

Source: Submission 5, Office of the Director of Public Prosecutions

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

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

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

ACCUSED, CASES N0 & COURT	PARTICULARS OF APPLICATION	LAWYERS	COMMENTS
8. YAMMINE, Youssef & CHAMI, Walid **9913829 & 9916160** **District Court**	Defence application by Notice of Motion on 28.4.03 before the list judge at Parramatta. (Matter then listed for trial on 12.5.03). HH directed the DPP to disclose to the defence no later than 2.5.03 information in its possession in relation to: 1. medical and psychiatric conditions diagnosed re the principal Crown witness from 1997 to date; 2. names and addresses of medical practitioners, counsellors and hospitals attended by this witness or from which the witness had received treatment from January 1997 to date; 3. all medication prescribed or taken by this witness from January 1997 to date including the name of the prescribing medical practitioner.	Eric Balodis, Crown Prosecutor Samantha Mitchell, Solicitor	This matter involved a re-trial after the CCA upheld a conviction appeal on 23.7.02 [see R v Yammine & Chami [2202] NSW CCA 289]. Yammine and Chami were charged with supply of prohibited drugs, and with the detention of a Crown witness with intent to hold him for advantage, use of offensive weapon with intent to commit an indictable offence, namely assault and assault of that witness. The Crown witness was a drug addict who had been employed allegedly by Yammine and Chami in the sale of drugs. The witness was a schizophrenic. After the list judge made the disclosure orders against the prosecution on 28.4.03 the matter was stood over for call over on 8.5.03. The defence then indicated that the orders previously made would not be pursued. The matter was stood over to 14.5.03. Prior to the trial a Deputy DPP directed no further proceedings in relation to Yammine & Chami. The matter was then vacated before the trial date. The reason for the matter not proceeding to trial was the unwillingness of the Crown witness to give evidence and issues relating to his unreliability.
9. GILLETT, Ross **2315227** **District Court**	Crown application on 27.2.04. HH declared matter to be complex and ordered: 1. defence to serve on DPP any reports of Dr Beran by 4pm on 26.3.04; 2. defence to serve any other reports obtained thereafter from medical practitioners which they propose to rely upon at trial within 48 hours of receipt; 3. the DPP to serve any medical reports in response to Dr Beran's report by 4pm on 23.4.04. Matter adjourned to 26.3.04 for mention in arraignments list.	Paul Leask, Crown Prosecutor Derek Lee, Solicitor	The accused is charged with drive manner dangerous cause death (3 counts) and negligent driving as the result of an accident on 2 May 2003 at Manly Vale. The accident resulted in the death of a couple and their young daughter (Cameron and Michaela Howie and Shannon Howie). The defence foreshadowed that it would be calling neurological evidence to support the proposition that the accused suffers blackouts. The Crown Prosecutor anticipated that the trial would involve complex medico-legal issues and accordingly made an application on 27.2.04 for the making of pre-trial disclosure orders. The matter is next listed for mention on 26.3.04. The original trial date of 22.3.04 was vacated when the pre-trial disclosure orders were made.

Appendix 6 Commonwealth prosecutions were pre-trial disclosure orders have been made (at June 2004)

Source: Document tendered by Mr Lloyd Babb, Director, Criminal Law Review Division, NSW Attorney General's Department, Evidence, 7 June 2004

R V Michael BUSKSH – Sydney District Court. Plea on the first day of trial 28 April 2003. The Commonwealth said that because of the disclosure their estimate was revised from 4 weeks to 2 weeks.

R v Richard FRAWLEY – Supreme Court. The matter was declared a complex trial by Justice Hidden. The trial has not yet commenced.

R v Nikytas PETROULIAS – Supreme Court. The matter was declared a complex trial by Justice Bell. The trial has not yet commenced.

Appendix 7 Matters in which pre-trial disclosure orders sought but not made (at March 2004)

Source: Submission 5, Office of the Director of Public Prosecutions

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

Appendix 8 Case studies of the impact of pre-trial disclosure orders

Source: Submission 5, Office of the Director of Public Prosecutions

1. Prosecution of Kathleen Folbigg (CASES 2114320)

(a) Background

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

(b) Nature of Pre-Trial Disclosure Orders

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

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

(c) Impact of the Orders

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

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

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

is probable that at least some of these inquiries became known to Dr D and/or the defence; and the Crown infers that, as a result, Dr D. decided not to give evidence in the matter, or alternately the defence decided not to call him.

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

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

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

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

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

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

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

(a) Background

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

(b) Nature of Orders

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

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

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

(c) Impact of the Orders

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

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

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

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

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

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

The trial lasted between three and four weeks. The Crown Prosecutor who conducted the matter estimates that the use of the pre-trial disclosure orders reduced the overall time taken for the trial by at least one week i.e. it reduced the length of the trial by about 20%. The prosecutor also estimates that use of the orders saved a total of 1½ days in addresses by the prosecutor and defence counsel and summing-up.

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

(a) Background

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

(b) Nature of the Orders

In June 2002 Barr J directed that:

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

2. a defence response be served by 9.8.02; and

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

(c) Impact of the Orders

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

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

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

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

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

As is evident from this case, the making of orders for pre-trial disclosure does not in practice preclude the defence from pursuing an issue which the defence had indicated during pre-trial disclosure proceedings was not in dispute, in the light of fresh developments during the course of the trial itself.

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

The use of the pre-trial disclosure orders did reduce inconvenience to witnesses. The original prosecution brief contained statements from approximately one hundred and thirty-five witnesses. Through consultation between the parties and with the assistance of the pre-trial disclosure regime the parties were able to limit the list to approximately one hundred. However, as noted above, it became necessary to call a further 15 witnesses in relation to the

search and continuity of exhibits when this emerged as an issue after the cross-examination of the crime scene officer.

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

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

Appendix 9 Minutes

Meeting No 2
1.30pm, Wednesday 3 September 2003
Room 1153, Parliament House, Macquarie Street, Sydney

1. Present

Ms Robertson (in the Chair)
Ms Fazio
Mr Clarke
Ms Rhiannon

2. Apologies

Mr Burke
Mr Pearce

3. Minutes

Resolved, on the motion of Ms Fazio, that the Minutes of Meeting No 1 be adopted.

4. xxx

5. Inquiry into the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001* and the system of pre-trial disclosure in New South Wales

The Committee considered the receipt of terms of reference from the Attorney General, the Hon Bob Debus MP, to inquire into and report on the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001* and the system of pre-trial disclosure in New South Wales.

The Chair advised that on 2 September 2003 she informed the House of the receipt of the terms of reference, as required by paragraph 6 of the resolution establishing the Committee.

The Committee deliberated.

Resolved, on the motion of Ms Fazio, to defer the commencement of the inquiry until February 2004 in order to ensure that the provisions of the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001* have been in operation for a sufficient period to permit effective assessment of the Act and the system of pre-trial disclosure in New South Wales.

Resolved, on the motion of Mr Clarke, that the Chair write to all people who made a submission to the inquiry into the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001* undertaken by the Standing Committee on Law and Justice during the 52nd Parliament, advising of the Attorney General's re-referral of the terms of reference and advising of the Committee's intention to commence the inquiry in February 2004.

6. xxx

7. xxx

8. xxx

9. Adjournment

The Committee adjourned at 2.00 pm *sine die*.

Rachel Callinan
A/Committee Director

Meeting No 6
2.00pm, Tuesday 3 February 2004
Room 1153, Parliament House, Macquarie St, Sydney

1. Present

Ms Robertson (in the Chair)
Mr Burke
Mr Clarke
Ms Fazio
Ms Rhiannon

2. Apologies

No apologies

3. Minutes

Resolved, on the motion of Ms Fazio, that the Minutes of Meeting No 5 be adopted.

4. xxx

5. Inquiry into the *Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001* and the system of pre-trial disclosure in NSW

The Committee considered the briefing note drafted by the Secretariat concerning the commencement of the Inquiry.

The Committee deliberated.

Resolved, on the motion of Mr Burke, to adopt the draft time line set out in the briefing note.

Resolved, on the motion of Mr Clarke, that the Committee advertise to call for submission for the Inquiry on 14 February 2004, with a closing date for submissions of 26 March 2004.

Resolved, on the motion of Mr Clarke, that the Committee invite relevant stakeholders to make a submission to the Inquiry.

6. xxx

7. Next meeting

The Committee adjourned at 2.17pm to reconvene at 10.00am on Monday 16 February 2004.

Rachel Callinan
Senior Project Officer

Meeting No 8
1.00pm Monday 29 March 2004
Room 1153 Parliament House, Macquarie St, Sydney

1. Present

Ms Robertson (in the Chair)
Mr Burke
Mr Clarke
Ms Fazio
Mr Pearce

2. Apologies

Ms Rhiannon

3. Minutes

Resolved, on the motion of Ms Fazio, that the Minutes of Meeting No 7 be adopted.

4. xxx

5. xxx

6. Pre-Trial Disclosure Inquiry

The Secretariat provided an update on the progress of the Pre-Trial Disclosure Inquiry.

The Chair tabled submissions received from the following:

- The Hon Justice RO Blanch AM, Chief Judge, District Court
- Judge Derek Price, Chief Magistrate, Local Courts
- Mr Ashok Kumar
- Mrs Patricia Wagstaff
- Mr N R Cowdery AM QC, Director of Public Prosecutions

- Mr Greg Chilvers, Director Research & Resource Centre, Police Assoc. of NSW
- Mr Gordon Salier, President, Law Society of NSW
- Mr PR Zahra SC, Senior Public Defender

Resolved, on the motion of Mr Pearce, that in order to better inform all those who are participating in the inquiry process, the Committee make use of the powers granted under paragraph 21(1) of the resolution of the House dated 21 May 2003 establishing the Standing Committees, and section 4(2) of the *Parliamentary Papers (Supplementary Provisions) Act 1975*, to publish the submissions received to date, subject to each participant being given the opportunity to request that their submission be regarded as confidential.

7. xxx

8. Adjournment

The Committee adjourned at 1.30pm *sine die*.

Rachel Callinan
Senior Project Officer

Meeting No 9

1.00pm Friday 7 May 2004
Room 1153, Parliament House, Macquarie St, Sydney

1. Present

Ms Robertson (in the Chair)
Mr Burke
Mr Clarke
Ms Rhiannon

2. Apologies

Mr Pearce

3. Minutes

Resolved, on the motion of Mr Burke, that the Minutes of Meeting No 8 be adopted.

4. xxx

5. Pre-Trial Disclosure Inquiry

Resolved, on the motion of Ms Rhiannon, that in order to better inform all those who are participating in the inquiry process, the Committee make use of the powers granted under paragraph 21(1) of the resolution of the House dated 21 May 2003 establishing the Standing

Committees, and section 4(2) of the *Parliamentary Papers (Supplementary Provisions) Act 1975*, to publish submissions 9, 10 and 11.

6. xxx

7. xxx

8. Next meeting

The Committee adjourned at 1.35pm *sine die*.

Rachel Callinan
Senior Project Officer

Meeting No 10
10.45am Monday 7 June 2004
Room 814/815, Parliament House, Macquarie St, Sydney

1. Present

Ms Robertson (in the Chair)
Mr Clarke
Ms Fazio
Mr Pearce
Ms Rhiannon

2. Apologies

Mr Burke

3. Minutes

Resolved, on the motion of Ms Rhiannon, that the Minutes of Meeting No 9 be adopted.

4. xxx

5. xxx

6. Inquiry into pre-trial disclosure

The Chair opened the public hearing.

The media were admitted.

The Committee resolved, on the motion of Mr Pearce, to authorise the broadcasting of proceedings in accordance with the *Guidelines for the Sound and Video Broadcasting of Proceedings of the Legislative Council.*

Mr Nicholas Cowdery AM QC, Director of Public Prosecutions and Mr Mark Tedeschi, Senior Crown Prosecutor, NSW Department of Public Prosecutions were affirmed and was examined.

Questioning concluded and the witnesses withdrew.

Mr Peter Zahra SC, Senior PubliC Defender and Mr Christopher Craigie, Deputy Senior Public Defender, Public Defenders, were sworn and examined.

The Chair noted that the witnesses had taken questions on notice during the hearing.

The witnesses agreed to provide answers to the questions on notice to the Committee within 10 working days of receipt of those questions from the Secretariat.

Questioning concluded and the witnesses withdrew.

Mr Lloyd Babb, Director, Criminal Law Review Division, NSW Attorney General's Department, was sworn and examined.

Mr Babb tendered a document.

The Committee resolved, on the motion of Ms Fazio, to accept the document tendered by Mr Babb.

The Chair noted that the witnesses had taken questions on notice during the hearing.

The witnesses agreed to provide answers to the questions on notice to the Committee within 10 working days of receipt of those questions from the Secretariat.

Questioning concluded and the witnesses withdrew.

Mr Greg Chilvers, Director, Research and Resource Centre, Mr Luke Hannon, Executive Member and Ms Sandra Soldo, Research Officer, Police Association of NSW were sworn and examined.

Questioning concluded and the witnesses withdrew.

Mr Brian Sandland, Director, Crime, NSW Legal Aid was affirmed and examined.

The Chair noted that the witnesses had taken questions on notice during the hearing.

The witnesses agreed to provide answers to the questions on notice to the Committee within 10 working days of receipt of those questions from the Secretariat.

Questioning concluded and the witnesses withdrew.

The Committee resolved, on the motion of Ms Fazio that, in order to better inform all those participating in the inquiry process, the Committee make use of the powers granted under

Standing Order 223(1) and section 4(2) of the *Parliamentary Papers (Supplementary Provisions) Act 1975*, to publish the transcript of the public hearing held on 7 June 2004 and tabled documents.

7. Next meeting

The Committee resolved, on the motion of Ms Fazio, to meet in the last week of July on a day and at a time determined by the Secretariat in consultation with the Committee.

The Committee adjourned at 5:15 *sine die*.

Rachel Simpson
Senior Project Officer

Meeting No 11
1:00pm Tuesday 16 November 2004
Room 1153, Parliament House, Macquarie St, Sydney

1. Present

Ms Robertson (in the Chair)
Ms Fazio
Mr Pearce

2. Apologies

Mr Clarke
Ms Rhiannon
Mr Roozendaal

3. Inquiry into pre-trial disclosure

Resolved, on the motion of Mr Pearce, that the Chair write to the Attorney General requesting an extension of the reporting date for the inquiry to Friday 24 December 2004.

4. xxx

5. Next meeting

The Chair advised of her intention to call the 12th deliberative meeting in the first sitting week of December at a time and date to be determined by the Secretariat in consultation with the Committee.

The Committee adjourned at 1:10pm *sine die*.

Rachel Callinan
Director

Meeting No 12

12:30pm Tuesday 7 December 2004
Room 1153, Parliament House, Macquarie St, Sydney

1. Present

Ms Robertson (in the Chair)
Mr Clarke
Ms Fazio
Mr Pearce
Ms Rhiannon
Mr Roozendaal

2. Minutes

Resolved, on the motion of Ms Fazio, that Minutes of Meeting Nos 10 and 11 be adopted.

3. xxx

4. Inquiry into pre-trial disclosure

Correspondence

The Chair tabled the following items of correspondence:

1. 10 June 2004 – to Committee from Mr Zahra SC, Senior Public Defender, answers to questions on notice taken during pre-trial disclosure hearing.

2. 24 June 2004 – to Committee from Mr Babb, Attorney General's Department, answers to questions on notice taken during pre-trial disclosure hearing.

3. 25 June 2004 - to Committee from Mr B Sandland, Director, Criminal Law, Legal Aid NSW, answers to questions on notice taken during pre-trial disclosure hearing.

Chair's draft report

The Chair submitted her draft report titled '*Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001*, Second Report', which had been previously circulated to Members of the Committee.

The Committee considered the draft report.

Chapter 1 read.

Resolved, on the motion of Ms Fazio, that Chapter 1 be adopted.

Chapter 2 read.

Resolved, on the motion of Ms Rhiannon, that Chapter 2 be adopted.

Chapter 3 read.

Resolved, on the motion of Mr Pearce, that paragraph 3.4 be amended to delete the words:

> At the time of finalising this report the Committee was not aware of any further pre-trial disclosure orders being made.

and replace them with the following words and footnote:

> Shortly before this report was finalised the Committee was advised by both the Supreme Court and the District Court of NSW that no further pre-trial disclosure orders had been made in the intervening time.[199]

Resolved, on the motion of Mr Pearce, that paragraph 3.66 be amended to replace the final sentence with the following sentence:

> The Committee is of the view that the Attorney General should consider the issue of sanctions available under section 148 of the *Criminal Procedure Act 1986* in the context of his review.

Resolved, on the motion of Mr Pearce, that Recommendation 3 be deleted.

Resolved, on the motion of Mr Roozendaal, that Chapter 3 as amended be adopted.

Chapter 4 read.

Resolved, on the motion of Mr Pearce, that paragraph 4.36 be amended to:

- delete the word "theoretical"
- delete the words "view expressed during this inquiry is" and replace them with "of inquiry participants expressed the view"
- add after the final sentence, the following sentence: "The Committee has therefore not formed its own view on this issue."

Resolved, on the motion of Mr Pearce, that Chapter 4 as amended be adopted.

Chapter 5 read.

Resolved, on the motion of Mr Pearce, that Recommendation 6 be amended to:

- delete the word "understanding" and replace it with "awareness"
- delete the sentence "Any deficiency in knowledge should be supplanted with educational material to ensure that officers fully understand their disclosure obligations" and replace it with "and whether there is a need for additional educational resources".

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199 Telephone conversation between Ms Tonya Wood, Associate to Justice Blanch, District Court of NSW and Committee Secretariat Director, 19 November 2004 and telephone conversation between Ms Megan Greenwood, CEO and Principal Registrar, Supreme Court of NSW and Committee Secretariat Director, 19 November 2004

Resolved, on the motion of Mr Pearce, that Chapter 5 as amended be adopted.

Executive summary read.

Resolved, on the motion of Ms Rhiannon, that the Executive Summary, as amended to reflect changes in the report, be adopted.

Resolved, on the motion of Ms Fazio, that the draft report, as amended, be the report of the Committee and be signed by the Chair and presented to the House, together with the transcript of evidence, submissions, documents and correspondence in relation to the Inquiry, in accordance with standing order 230.

Resolved, on the motion of Ms Fazio, that the Secretariat be permitted to correct typographical and grammatical errors in the report prior to tabling.

Resolved, on the motion of Mr Roozendaal, to make public Submission 12 from the NSW Law Reform Commission (previously circulated).

5. xxx

6. xxx

7. xxx

8. xxx

9. Next meeting

The Committee adjourned at 1.20pm *sine die*.

Rachel Callinan
Director