NEW SOUTH WALES
BAR ASSOCIATION

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The Hon Mark Speakman SC MP
Attorney General
Department of Justice
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Dear Attorney,

Review of the Criminal Procedure Amendment (Mandatory Pre-Trial Defence Disclosure) Act 2013 ("the Review")

Thank you for the opportunity to participate in the workshops arising from the Statutory Review of the *Criminal Procedure Amendment (Mandatory Pre-Trial Defence Disclosure) Act 2013* (the legislation). We have been asked to comment on certain matters arising from the Discussion Paper concerning the Review including a proposal to expand defence disclosure requirements and the penalties that attach to non-compliance.

The New South Wales Bar Association (the Association) refers to our earlier correspondence containing our position in respect of the statutory review of the Act and its operation (dated 18 January and 22 June 2016) addressed to Mr Cappie-Wood, Secretary, Department of Justice, and Mr Brendan Thomas, Office of the Deputy Secretary Justice Strategy and Policy, respectively.

The proposal contained within the Discussion Paper is the expansion of the mandatory pre-trial disclosure by the Defence, as currently provided by the *Criminal Procedure Act* 1986, to the following seven areas of evidence:

(i) A copy of any defence expert reports;
(ii) Notice as to whether the defence disputes the continuity of custody of any proposed exhibit disclosed by the prosecutor;
(iii) Notice as to whether the defence disputes the form of the indictment;

(iv) Notice as to whether the defence proposes editing to audio and video evidence disclosed by the prosecutor;
(v) Notice as to whether the defence disputes any prosecution translations of transcripts or other documents from foreign languages into English;
(vi) Notice as to whether prosecution surveillance must be corroborated by witnesses; and
(vii) Notice as to whether the authenticity or accuracy of any prosecution documentary evidence or other exhibit is disputed.

The Department has further requested written comments on the proposals set out at (i)-(vii) above; examples of concerns about disclosure of defence expert reports (per item (i) above); the number of [pre-trial disclosure] applications to the Court under the existing discretionary pre-trial disclosure provisions; the results of applications to the court under the existing discretionary pre-trial disclosure provisions; and any evidence (statistical or anecdotal if unavailable) as to adjournments or other issues resulting from late disclosure of matters relating to the items (i)-(vii).

Whilst the Association supports reforms that improve the efficiency of the process of bringing a matter to trial, the Association's concern is that the current disclosure provisions, and the proposed extension of those provisions, do not address the underlying systemic issues such as late service of evidence and the appointment of prosecution and defence counsel close to trial. Late disclosure of matters pertinent to the defence case are a corollary of these systemic issues. Some of these systemic issues, we hope, will be addressed in the reforms incorporated in the *Justice Legislation Amendment (Committals and Guilty Pleas) Bill 2017* (see the Association's letter dated 6 June 2017 incorporating suggested amendments to this proposed legislation to address these issues).

The Association submits that the current provisions are sufficient to allow for defence disclosure where required, and that any expansion of these obligations is premature in light of the current early (appropriate) guilty pleas reforms. The Association encourages the Government to take a 'wait and see' approach, to consider and evaluate the effect of the early guilty plea reforms together with the funding of Crowns and defence counsel at the early stages of the criminal process.

Systemic issues: (1) Disclosure of evidence and (2) the timing of the involvement of Crown Prosecutors

Despite the best intentions of the legislation, mandating defence disclosure *on its own*, and imposing penalties for non-compliance with such requirements, is unlikely to result in the desired outcomes guiding these reforms, namely increased efficiency (and reduced cost) of criminal trials in this State. Before the current legislative requirements as to defence disclosure are further expanded, consideration ought be given to the reasons why the pre-trial disclosure reforms to date have only been of modest success.

As has been articulated in previous correspondence on this matter, the fundamental difficulty

concerning pre-trial defence disclosure (mandated or discretionary) is that in many criminal trial cases, the defence are not in a position in the months (or even weeks) leading up to trial, to respond to the Crown case or to disclose any aspect of their own case. The reasons for that are multifactorial and involve an appreciation as to the way the various agencies interact in the three-stage process leading up to trial, namely:

- Stage 1: the police and/or investigating agencies gather the relevant evidence and provide the evidence to the prosecuting authority;

- Stage 2: the prosecuting authorities consider the totality of the evidence and the Crown Prosecutor determines what evidence will be called, and in what manner, in order to make out the crown case; and

- Stage 3: for the defence in determining the issues arising from the Crown case (and its presentation) in accordance with their instructions and the application of legal principle.

The staged process is fundamental to the principle that it is for the prosecution to present its case and for the defence to respond to it. The defence are not in a position to comply with any obligations they have under the third stage, unless the prosecution has met its obligations in the second stage, and the investigating agencies, their obligations in the first stage.

The systemic practice of late service of evidence upon the defence means the full Crown case is frequently unknown until close to trial. The late allocation of a Crown Prosecutor necessarily means that in many cases the defence are not in a position to respond to an identified Crown case. Without the input of the Crown Prosecutor responsible for adducing the evidence at trial, and for making the forensic decisions about how a trial is to be run, pre-trial prosecution disclosure to date is often meaningless, and unfortunately, seen as such.

- *Anecdotal experience: The prosecution solicitor is currently required under s 141-142 of the Criminal Procedure Act 1986 to provide, inter alia, a statement of facts and all material which the prosecution proposes to adduce at the trial. In practice this can result in simply a recitation of the police facts and a list of all the witnesses contained in the Crown brief of evidence, evidencing no forensic decision making as to how in fact, the trial will be run.*

Systemic issue (3): Late involvement of defence counsel

In circumstances where the above steps have taken place an accused may be in a position to identify the areas of dispute including how evidence might be properly and efficiently presented. However the ability of the defence to disclose matters relies itself upon a number of events having taken place, namely:

(1) Defence counsel have been appointed (in that there is a grant of aid in those matters where an accused is eligible for aid, allowing for advice and representation by counsel at the time defence pre-trial disclosure is sought);

- *Example 1: An accused person may not have sufficient funds to retain counsel by the time the matter is committed for trial. An application for legal aid can sometimes take time where various financial documents need to be provided to verify the accused's financial position and ascertain their eligibility for aid;*

- *Example 2: Defence counsel previously appointed may become unavailable by virtue of being held up in another trial; due to an ethical issue; or other reason resulting in late change of counsel;*

- *Example 3: Defence counsel may be retained but unavailable to consider the trial at an early stage due to other trial commitments.*

(2) Defence counsel have access to their client in order to obtain instructions (including counsel having access to the accused, their client having access to the brief of evidence, and the counsel being able to properly communicate with their client including for reasons arising from any mental health or intellectual capacity of the accused).

- *Example 1: the accused is in custody and moved between regional gaols resulting in the necessity to apply for an inmate to be transferred to a metropolitan gaol for the purposes of meeting in an appropriate setting conducive to obtaining instructions;*

- *Example 2: an accused person may be suffering from a developmental or intellectual issue or mental illness that make communication difficult and necessitating assessment prior to taking instructions and consideration of fitness;*

- *Example 3: an accused person may be suffering from a developmental or intellectual issue or mental illness necessitating many conferences resulting in a longer than anticipated period in which to obtain instructions.*

(3) The defence counsel have time to retain and consider evidence that may be obtained from third parties (such as witnesses and experts) as to matters raised by the Crown evidence, or arising from defence evidence or instructions.

- *Example 1: the Crown evidence includes opinion evidence from a computer expert based on meta data retrieved from a forensic image of a computer. The evidence is indecipherable to the barrister and an expert is required to determine the meaning of the Crown evidence.*

- *Example 2: The Crown expert evidence provides evidence (for example DNA evidence indicating contact with the accused) contrary to defence instructions (that there was no contact). The evidence is crucial and requires consideration as to the accuracy of the testing procedure, or the meaning of the results.*

To date the late involvement of defence counsel until close to trial, is explained in large part, by the lack of available legal aid funds for the early preparation of matters for trial.

Sanctions: Avoiding unfairness and miscarriages of justice by penalising the defence for non disclosure

The recognition by the judiciary of these complexities and realities, in part explains why sanctions are seldom imposed upon defence who do not comply strictly, or at all, with requirements for disclosure as are currently prescribed (per s 146 of the *Criminal Procedure Act* 1986).[1] Criminal cases are infinitely variable in nature and scope: despite the best intentions, evidence relevant to either party's case can become available late necessitating a late change to the Crown and/or the defence case. For this reason the Association opposes any proposal that inflexible rules be adopted providing for the prohibition of the admission of such evidence, in respect of either case, lest it result in injustice. The retention of judicial discretion to allow for the admission of evidence served late, or to grant an adjournment of proceedings to allow fairness to both parties is necessary in the process of balancing the interests of efficiency and fairness to the accused, whilst also giving due regard to protecting the integrity of the trial from appellate review.

The Association notes the current Practice Notes in operation in the District and Supreme Courts allow for matters to be brought back before the Court where there have been failures to comply with directions made to ensure trial readiness on the application of the Court, or either party.[2]

Allowing for flexibility in the process of case management: one size does not fit all

The Association supports the practice whereby the accused or the ODPP (or other prosecuting authority) may apply for a suitable order for disclosure in those matters where disclosure is required generally or specifically in circumstances where a Crown prosecutor and defence counsel have been allocated to appear in the trial proceedings. In those matters, useful orders can be made which will result in a more efficiently run and streamlined trial. It ought be recognised that some matters are more appropriate for case management and disclosure orders than others. General lists can be clogged with the listing of matters that are reasonably straightforward where such orders are not required whereas others are appropriate for closely monitored compliance, aimed to ensure the matter is ready for trial on the date listed. The following are examples of cases that might be targeted for participation in the case management system:

> *Example 1: Where the issues in dispute involve expert evidence to be called before the jury (subject to the issues referred to below concerning disclosure of expert reports);*
>
> *Example 2: Where the Crown evidence includes a quantity of surveillance device material requiring many witnesses and agreement as to issues in dispute may reduce the number of witnesses or simplify*

[1] The Discussion Paper reports there are no reported cases of sanctions being applied in NSW or Victoria.

[2] District Court Practice Note 12 and Supreme Court PN SCCL2.

the way the evidence is to be adduced;

Example 3: Where the Crown evidence involves lengthy listening device or telephone intercept material and agreement as to the issues in dispute might reduce the number of calls to be called, or the length of the calls;

Example 4: Where the Crown intends to adduce transcripts of calls or listening device material and the identification of any asserted inaccuracies in the transcription (or translation) of the transcripts will assist in the preparation of the transcripts for trial;

Example 5: Cases involving multiple co-accused.

Example 6: Where the case involves the calling of witnesses from overseas or interstate whereby extensive funds will be lost if the matter does not commence on the anticipated trial date.

The Association does not believe that these categories need to be specifically prescribed by expanding the current categories of evidence required to be disclosed (per s 143 of the *Criminal Procedure Act 1986*), as the legislation already incorporates general powers for the presiding judge to give appropriate directions in respect to the "future conduct of a trial" and the "efficient management and conduct of the trial" (see Ss 136, 143(2) and 149E of the *Criminal Procedure Act 1986*).

Response to issues raised by the Department

In response to the specific areas identified by the Department, the Association responds as follows:

Response to items (i)-(vii) (generally):

Until the systemic issues are addressed as set out above, the Association submits that the legislation ought not be expanded to require additional mandatory requirements for defence disclosure on these issues other than what is already provided by s 143 of the *Criminal Procedure Act 1986* specifically, and by s 149E generally. Even if the systemic issues are addressed, a "one size fits all" requirement for disclosure is not appropriate for all cases. Rather, the desirable process is that certain matters be streamlined into a case management process allowing for the Crown to make an application for defence disclosure in those cases where particular circumstances arise (such as the complexity and volume of the material, or expense of overseas witnesses). This will allow for judicial oversight, and a practice where orders are sought and obtained specific to the needs of the particular case going to trial.

Item 1: Mandatory requirement to disclose defence expert reports:

The Association opposes any order that there be a mandatory requirement that defence disclose "any expert reports". Expert reports may be obtained by the defence for a number of reasons, without determining that the evidence will be positively called in the defence case. By way of examples:

- *The defence might obtain an expert report for the purposes of clarifying Crown evidence (for example obtaining a second opinion on the expert opinion given; or*

clarifying areas for cross-examination),

- *The defence might obtain an expert opinion on the possibility of an available defence, or a particular concerning an element of an offence.*
- *The defence might obtain a report from an expert who supports, or goes further, than the expert for the Crown.*[3]

Where however, expert evidence is positively known to be relied upon in the defence case, the defence ought be required to produce it at the time that decision is made. The Association does not see the need to make any amendment to the current legislative provisions in this regard and submits that s 143(2)(a) of the *Criminal Procedure Act 1986*, covers this issue adequately.

Items (ii)-(vii)

The Association believes that these categories need not be specifically prescribed as a mandatory category, but may be the focus of specific orders where relevant to the particular case (as is currently provided by s 143(2), or s 149E of the *Criminal Procedure Act 1986).*

The experience of members of the Criminal Law Committee of the Association of disclosure provisions

The experience of members of the Criminal Law Committee of the Association is that prosecution and defence disclosure requirements (as prescribed) are often not complied with, or only partially so. On occasions where specific disclosure requirements are called for, the Court has participated in the making of directions where specifically sought. These directions are generally more focused (than the pro-forma defence response provided by s 143 of the *Criminal Procedure Act 1986*) and are more likely to be complied with.

The experience of members of the Criminal Law Committee of the Association (on the basis of anecdotal rather than statistical experience) is that adjournments of trials often result following late disclosure of evidence by prosecution and/or defence to the other party.

Proposed reforms are premature

The fundamental issues concerning the disclosure of evidence and the involvement of seniority of counsel for both parties early in the criminal proceedings have been previously identified, and are central to the Early Appropriate Guilty Pleas and Case Conferencing reforms. The Association has commented upon those reforms in correspondence dated 6 June 2017 to your Office, including recommendations aimed to improve the early disclosure of prosecution evidence. The early disclosure of evidence as articulated in our correspondence, together with the early involvement of counsel, will greatly improve the systemic issues resulting in many of the delays and inefficiencies of the current system. In this respect the Association believes that

[3] An example of this is where the defence obtains a second opinion on an opinion given by a Crown expert. Where the second opinion supports the opinion of the Crown expert, the defence no doubt will determine not to challenge the finding of the expert by not calling an expert in response.

any further amendments to the current legislation is at this point premature, and undesirable. It is hoped that the current reforms can be given adequate time to settle in and specific improvements made to streamlining the current disclosure requirements, and ensuring compliance therewith, before consideration is given to expanding them.

Should you or a member of your office require any further information please contact Greg Tolhurst, the Executive Director of the Association on 9232 4055 or by email at gtolhurst@nswbar.asn.au.

Yours sincerely

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President

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