

**Statutory Review of
Mandatory Pre-trial Defence
Disclosure**

Legal Aid NSW submission to the
Department of Justice

June 2017

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Legal Aid 
NEW SOUTH WALES

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority, Drug Court and the Youth Drug and Alcohol Court.

The Criminal Indictable Section provides representation in trials, sentences and

short matters listed at the Downing Centre District Court, complex committals in Local Courts throughout NSW, Supreme Court trials and sentence proceedings throughout NSW, fitness and special hearings in the District and Supreme Courts, and high risk offender matters in the Supreme Court.

Legal Aid NSW welcomes the opportunity to make a further submission to the Statutory Review of the *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013* (NSW).

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Introduction

Legal Aid NSW welcomes the opportunity to respond to the Discussion Paper dated 2 May 2017 on the *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013* (NSW).

At the outset, Legal Aid NSW is of the firm view that consideration of any proposed expansion of the current disclosure scheme should await the development and implementation of the recently announced Early Appropriate Guilty Pleas ('EAGP') reforms package. The package includes additional funding of the Office of Director of Public Prosecutions ('ODPP') and Legal Aid NSW to enable counsel to be involved earlier in proceedings. The earlier involvement of counsel has consistently been identified as fundamental to effective pre-trial disclosure. Should those reforms operate as intended, the number of cases proceeding to the District Court will be significantly reduced. Further consideration of the need for expansion of the current disclosure scheme would logically await the implementation of the EAGP reforms and their evaluation.

Legal Aid NSW's also considers that further expansion of the mandatory defence disclosure provisions in the *Criminal Procedure Act 1986* ('CPA') would undermine defendants' fundamental right to silence. It is not justified by available evidence, bearing in mind the following history of the reforms:

- mandatory disclosure for the prosecution and the defence was introduced for the first time in all District Court and Supreme Court criminal trials in NSW in 2010; and
- defence disclosure provisions were significantly expanded in 2013, including by way of a requirement that accused persons must give notice of any evidence that can be agreed, the nature of their defence, including particular defences to be relied on, the facts, matters or circumstances on which the prosecution intends to rely to prove guilt and with which the accused intends to take issue, and points of law that the accused intends to raise.

At the time of this significant expansion of mandatory defence disclosure, the Government highlighted the very sound reasons why other aspects of the defence case should only be required to be disclosed on order of the court:

Keeping certain elements of defence disclosure discretionary is suited to the practicalities of the conduct of trials in New South Wales' higher courts, which can range from simple single-issue cases with one accused, to highly complex cases involving many months of evidence and with multiple accused. Any mandatory model must reflect this reality and be capable of adapting to the circumstances of each case. The new discretionary defence provisions in the bill will allow the courts

*to tailor requirements on a case-by-case basis to avoid unnecessarily causing delays in the management of trials.*¹

Since that statement, BOCSAR research has found that District Court workloads and trial delays in recent years has been caused by:

- increased arrests for serious offences,
- more cases proceeding to trial (rather than plea), and
- a growth in trial duration.²

There appears to be no evidence concerning the operation of the current mandatory disclosure regime or its impact on trial delays and inefficiencies in the District Court.

The following detailed submission responds to the Discussion Questions and supplements our feedback to the Review in our submissions dated 29 January and 17 June 2016.

The right to a fair trial

1. Does the Commission's detailed consideration in its 2000 report *The Right to Silence*, as reiterated in its 2012 report *Jury Directions*, resolve concerns that mandatory pre-trial disclosure breaches general principle as to the fair conduct of criminal trials?

2. If not, why not?

Legal Aid NSW considers that these questions can only be addressed by close consideration of the findings of the NSW Law Reform Commission ("the Commission") in 2000 and 2012.

Concerns around the potential breach of the general principle as to the fairness of criminal trials were addressed by the Commission in the following way.

The Commission's 2000 findings concerning the right to a fair trial

In 2000, the Commission indicated that it did not consider that compulsory defence pre-trial disclosure infringes fundamental principles regarding the presumption of innocence, the burden of proof, and the right to silence, 'depending on the extent of the disclosure required'.³ The Commission also noted that defence disclosure would only be required:

- When 'the defendant would be aware of the whole of the prosecution case as a result of the police and prosecution pre-trial disclosure duties'⁴

¹ Hon Greg Smith Second Reading Speech to the Evidence Amendment (Evidence of Silence) Bill 2013 Criminal Procedure Amendment (Pre-Trial Defence Disclosure) Bill 2013 (13 March 2013)

² NSW Bureau of Crime Statistics and Research ('BOCSAR') *Trial court delay and the NSW District Criminal Court* (2015). BOCSAR also commented that it is difficult to determine whether the District Court could be made more efficient, as there is no data available - which suggests that there is little evidence that greater mandatory disclosure would relieve court delay.

³ Law Reform Commission *The Right to Silence* (2000) [3.109]-[3.111]

⁴ Law Reform Commission *The Right to Silence* (2000) [3.111]

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- When 'the defendant will have had adequate time to reflect on his or her position and obtain appropriate legal advice'⁵ and
 - In the context of judicial supervision.⁶

Legal Aid NSW submits that in practice, the three pre-conditions listed above are not satisfied under the current disclosure regime. As discussed in response to Question 3 below, prosecution disclosure of statements of facts, lists of witnesses and documents does not amount to 'the whole of the prosecution case'. The Law Society indicated to the Commission that 'it is often not possible to evaluate the prosecution case satisfactorily until it is presented at trial'.⁷ Legal Aid NSW considers that this is still the case today. The Commission acknowledged this point, saying that 'the situation will vary from case to case, and the Commission's recommendations assume that appropriate adjustments can be made'.⁸ The status quo, where orders can be sought from the court in appropriate cases in respect of the matters prescribed in section 143(2) of the CPA is more consistent with the Commission's 2000 report.

Legal Aid NSW does not accept the analysis in the Discussion Paper that mandatory defence to disclosure is 'simply a matter of timing', as the defence would have disclosed its case at trial anyway.⁹ As a consequence of the prosecution's burden of proof, and the presumption of innocence, the prosecution puts its case first, and the defence answers it. This order of events is at the heart of the matter. As the High Court has noted: '*the principle, fundamental in our criminal law, [is] that the onus of proving a criminal offences lies upon the prosecution and that in discharging that onus it cannot compel the accused to assist it in any way*'.¹⁰

The Commission's 2012 findings concerning right to a fair trial

In 2012, the Commission noted that the scheme at that time did not threaten the fairness of a trial because it did not require the defence to disclose its case, with the exception of alibi, substantial mental impairment and expert evidence contradicting the prosecution expert evidence.¹¹ It emphasised that the success of pre-trial disclosure depends on the investment of resources at an early stage, and did not call for further mandatory requirements.¹² The Commission found:

Any scheme for pre-trial defence disclosure needs to have sufficient safeguards built in to ensure that it does not threaten the fairness of the resulting trial. The

⁵ Law Reform Commission *The Right to Silence* (2000) [3.112]

⁶ Law Reform Commission *The Right to Silence* (2000) [3.112]

⁷ Law Reform Commission *The Right to Silence* (2000) [3.113]

⁸ Law Reform Commission *The Right to Silence* (2000) [3.114]

⁹ Viscount Runciman, *Report of the Royal Commission on Criminal Justice* London: HMSO, 98; Law Reform Commission *The Right to Silence* (2000) [3.111]

¹⁰ *Environment Protection Authority v Caltex Refining Co Pty Ltd* [1993] HCA 74 [12] per Deane, Dawson and Gaudron JJ

¹¹ NSW Law Reform Commission *Jury Directions* (2012) [7.44]

¹² NSW Law Reform Commission *Jury Directions* (2012) [7.45]

current NSW scheme addresses this issue in placing the focus on identifying those parts of the prosecution case that are in dispute, and on the prosecution evidence that will be the subject of an objection. It does not require the defence to disclose its case, except in relation to alibi and substantial mental impairment, and except so far as the defence intends to rely on expert evidence contradicting the prosecution expert evidence.¹³ [Our emphasis]

Compliance with current requirements

3. To what extent have current pre-trial disclosure requirements been complied with by the prosecution and the defence?
4. What can be done to improve compliance?

It is the experience of Legal Aid NSW solicitors practising in the District Court that prosecution compliance with disclosure obligations is often formulaic. The prosecution's notice usually includes a statement of facts which largely replicates the police facts sheet, and lists every witness in the police brief, even when it is apparent that not all of them will be called.

In part, this reflects section 142 of the CPA which requires the prosecution to provide the indictment, statements of facts, copies of documents and lists of things, but does not require it to reveal its case theory or strategy. It also reflects the fact that the Crown is often not briefed at the time the prosecution's notice must be served, and the prosecution is unwilling to bind itself without counsel's advice. Similar challenges are experienced by defence solicitors. For example, editing of audio or video evidence often occurs by agreement with the Crown, but only once a Crown Prosecutor is appointed. Until that practice of the ODPP can change, difficulties would arise for the defence to comply with inflexible disclosure requirements.

Section 143, particularly subsections (b), (c), and (d) require the defendant's representative to undertake a deeper level of analysis of its case, and to reveal that analysis to the prosecution. However, because the prosecution disclosure is usually insufficient to identify the real issues, it is sometimes difficult or impossible for the defence to respond appropriately.

¹³ NSW Law Reform Commission *Jury Directions* (2012) [7.44]

As observed by the Court itself, late or non-compliance with prosecution disclosure obligations in section 142 of the CPA is also not uncommon.¹⁴ Legal Aid NSW solicitors have also observed that while the prosecution notice is usually served on time, the prosecution continues to serve material on the defence up to the day of the trial and, on occasions, during the trial. We have previously raised concerns with the Department of Justice about the service of evidence in proceedings in the Child Sexual Assault Pilot following pre-recording of the complainant's evidence.

It is also our experience that there is rarely a dispute when a prosecutor seeks defence disclosure of matters under section 143(2), either informally or by way of court orders. Continuity of counsel, as occurs in the rolling list court, facilitates early and informal disclosure.

Based on the above observations, we suggest that compliance with disclosure obligations would be improved by:

- Earlier briefing of counsel by both the prosecution and the defence. This will be addressed by the EAGP reforms, discussed further below.
- More intensive case management of proceedings in the District Court. Section 149E of the CPA provides the court with broad discretion for the efficient management and conduct of the trial, including an express power (in addition to the powers in section 143(2)) to order that *any of the parties to the proceedings disclose any matter that was, or could have been, required to be disclosed under this Division before the commencement of the trial.*
- Legal Aid NSW welcomes the recent extension of readiness hearings pursuant to District Court Practice Note 12 which enables the court to order pre-trial hearings, pre-trial conferences and further pre-trial disclosure. We also note the sanction for non-compliance with Supreme Court Practice Note SCCL 2 concerning pre-trial disclosure (at [12]).¹⁵
- changes to Justicelink to enable disclosure orders to be recorded on that system.

¹⁴ See, for example, comments of the Court in *R v LN; R v AW (No. 2)* [2017] NSWSC 153 at [17] – [33]

¹⁵ In the event of non-compliance by a party with this Practice Note, or with any other direction made by the court, the court may contact the offending party directly, or list the matter for mention, either of its own motion or at the request of either party.

Sanctions for non-compliance

5. Are the existing sanctions appropriate?
6. Can the sanctions be improved, or added to, to promote compliance?

Legal Aid NSW does not consider reforms of existing sanctions is necessary.

As noted above, the main barrier to disclosure is the late briefing of counsel, rather than the inadequacy of current sanctions.

Indeed, the Trial Efficiency Working Group did not support the use of adverse comments as sanctions given the ‘significant problems in framing such comments in a manner that does not distract the jury from a proper consideration of the evidence’.¹⁶ The Group also noted that the UK judiciary has been reluctant to use this sanction, and that ‘a fundamental problem with the use of adverse comment as a sanction is that it may have the effect of unduly punishing the defendant for a failure that may lie with his legal representative.’¹⁷

We also note that intentional misleading of the court as to the nature of evidence to be led by either party may lead to referrals to appropriate professional bodies: see for example, *R v Fardad Qaumi (No 23)*.¹⁸ In that case, late defence disclosure of a defence of duress did not invite court sanction, because of the possibility that counsel may have been concerned that raising the matter would create a situation of danger for the accused, and that counsel for the accused may have taken a forensic decision that they believed was necessary. The imposition of sanctions is appropriately left to the discretion of the court; as with the powers of the court to order disclosure of any matter in section 143(2) of the CPA, we consider that available powers to sanction are adequate.

¹⁶ *Report of the Trial Efficiency Working Group* (2009) at 87.

¹⁷ *Report of the Trial Efficiency Working Group* (2009) at 88.

¹⁸ [2016] NSWSC 429

Impact of appropriate early guilty plea reform

7. Will the appropriate early guilty plea reform facilitate improved compliance?

Legal Aid NSW refers to its recent comments on the draft Justice Legislation Amendment (Committals and Guilty Pleas) Bill 2017 Bill. As highlighted in those comments, a number of issues are crucial to the successful implementation of the reforms and their overriding objective to encourage early appropriate guilty pleas. The extent to which the reforms meet this objective following mandatory case conferencing will be very much influenced by early and adequate disclosure of the prosecution case. We would expect, however, that earlier briefing of counsel by both parties, and continuity of counsel, will facilitate improved compliance with the disclosure requirements.

In any event, as noted at the outset, these reforms should be implemented and evaluated before changes to pre-trial disclosure requirements are considered.

Item 1: expert reports

8. Is mandating pre-trial disclosure of defence expert reports appropriate?
9. If mandated, is the Court's supervisory power sufficient to ensure fairness and the integrity of the judicial process? If not, why not?

Legal Aid NSW reiterates its earlier submissions to the Department dated 17 June 2016 concerning this proposal and makes the following additional comments.

Mandating pre-trial disclosure of defence expert reports is not appropriate, for the reasons outlined to the Commission in 2000:

... the decision to lead evidence might not be made until the close of the prosecution case at trial. Forensic experts may not be able to produce reports any sooner due to their own work pressures. In cases where the defence strategy changes during the course of the trial, expert material disclosed to the prosecution may not ultimately be relied on and disclosure may harm the defence case. Late briefing of counsel can also cause difficulties.¹⁹

There are many matters where an accused will have a potential defence available, but will chose not to run it until either shortly before the hearing or as the prosecution case unfolds during the course of evidence. Even a qualified blanket requirement that the defence disclose only those reports from 'experts the accused intends to call at trial' (that is, in the

¹⁹ Law Reform Commission *The Right to Silence* (2000) [3.118]

same terms as the current section 143(2)(a) of the CPA risks significant injustice to an accused, as demonstrated by the following hypothetical scenario:

Scenario: mandatory requirement to disclose expert report

Robert is charged with wounding with intent to cause grievous bodily harm under section 33 of the *Crimes Act 1900* (NSW). His solicitor obtains a psychiatric report on the question of Robert's capacity to form intent. The solicitor subsequently obtains a second report from the same psychiatrist, the findings of which could support a potential defence of mental illness. Robert instructs his lawyer to run only the first defence, and not to raise the defence of mental illness. However, as the second report falls within the mandatory disclosure requirement, his solicitor is obliged to provide the prosecution with copies of both reports. During the hearing, the prosecution cross examines the defence expert on the matters disclosed in their second report and succeeds in establishing that Robert was mentally ill at the time of the offence. As a consequence, he is found not guilty by reason of mental illness and indefinitely detained as a forensic patient. The question of whether the mental illness defence is raised is taken out of his hands, with significant consequences.

A similar scenario could arise in respect of other cases involving expert evidence, where an expert's opinion concerning the accused's state of intoxication at the time of the offence, for example, is amended or revised in light of further instructions from the accused.

A mandatory disclosure requirement would not merely shift the timing of disclosure, but would force disclosure when it might not have occurred. This is a serious infringement on the right to silence and one which is not justified, particularly where:

- The proposal is justified by reference to delays in the District Court. In our experience however, expert reports are used more often in Supreme Court trials.
- Currently, orders for the disclosure of expert reports are made under section 143(2) of the CPA, most often without contest from the defence.

In response to the concerns raised, the Commission remarked that these arguments 'highlight the need for trial judges to take into account the circumstances of the case'. This discretion is appropriately reflected in section 143(2) of the CPA.

Item 2: continuity of custody of prosecution exhibits

10. Is mandating pre-trial disclosure of whether the accused disputes the continuity of custody of prosecution exhibits appropriate?
11. If mandated, would the appropriate early guilty plea reform contribute to ensuring that 'formulaic' responses do not occur?
12. Are there other measures which would assist in precluding 'formulaic' responses?

Legal Aid NSW reiterates its earlier submissions to the Review concerning this proposal. Since that submission, changes to the *Drug Misuse and Trafficking Act 2016* ('DMTA') have gone some way to addressing the ODPP's concerns about the burden of preparing the Crown case concerning proof of continuity of custody. Specifically, new Division 5 of the DMTA provides for an evidentiary presumption that certificates from police officers and exhibit detail sheets certified by police officers can be relied upon as evidence of continuity.²⁰

Item 3: Form of the indictment etc

13. Is mandating that the accused give notice of whether he or she disputes the form of the indictment or severability of the charges, or seeks separate trials for the charges, appropriate?

Legal Aid NSW does not oppose this proposal. We note that this would be consistent with the obligation in section 143(1)(d) of the CPA for the defence to raise any point of law that the accused intends to raise.

Item 4: Editing of prosecution audio and video evidence

14. Is mandating that the accused give notice of whether he or she proposes editing to audio and video evidence disclosed by the prosecutor appropriate?
15. Are ss 142(1)(f) and (g), as currently drafted, sufficient to require the prosecution to disclose any audio and video recordings (including transcripts of recordings)?

²⁰ Section 16M applies to matters larger than trafficable quantity.

As previously submitted, Legal Aid NSW does not oppose this proposal on the basis that the current potential ambiguity about the obligation on the prosecution to serve transcripts is removed. We suggest this occur by inserting the phrase 'including transcripts of recordings' in section 142(g).

Section 144 should also be amended to require the prosecution to provide a timely response to proposed defence edits so as to narrow any areas of dispute as soon as possible.

Item 5: Prosecution translations of transcripts

16. Is mandating that the accused give notice of whether he or she disputes any prosecution translations of transcripts or other documents from foreign languages into English appropriate?

Legal Aid NSW does not support this proposal.

A person's right to an interpreter during the investigatory process is a fundamental part of the accused's right to a fair trial: see section 23N of the *Crimes Act 1914* (Cth).²¹ In the experience of solicitors practising in Commonwealth criminal matters, errors in translation are not uncommon, particularly where police have relied on a telephone interpreter in the record of interview rather than deferring questioning to arrange for an appropriately accredited interpreter to be present. Telephone interpreters are more likely to lack NAATI accreditation and may, for example, speak a different dialect from the accused.

In our view, the goal of efficient case management identified by the Commonwealth DPP is best addressed much earlier in the process, through measures to improve compliance by investigating police with section 23N of the *Crimes Act*. This could include, for example, amendment to section 23N to mandate the physical presence of an interpreter.

Item 5 raises a number of other practical difficulties. Three are outlined below.

First, translations of transcripts are most likely to be tendered in serious indictable matters, particularly Commonwealth matters including terrorism, people smuggling and drug importation. In such cases, the accused is often in custody, including in immigration detention, and has difficulties accessing the disks of records of interviews. Instructions concerning translations can be very difficult to obtain in these circumstances.

Second, the brief may include voluminous translations of transcripts of documents in the brief, but the prosecution may only tender a portion of them at trial. Requiring the defence to positively assert that it has no dispute with the translation would require a great deal of

²¹ See also section 219ZD *Customs Act 1901* (Cth). It is also recognised at international law: *International Covenant on Civil and Political Rights* (1966) (which Australia has signed and ratified), Article 14(3)

time and expense which would ultimately be wasted. If time was not available (for example, if the translations were served late), Legal Aid NSW solicitors would have to dispute every translation to protect their clients' interests until they were able to obtain their own translation. By contrast, Legal Aid NSW does not currently pay interpreters to go through the prosecution translation in full, but will only raise matters with an interpreter that have been identified as contentious once full instructions from an accused have been obtained. Due to the practical issues identified above, this may not be until shortly before, or even during the trial.

Third, identifying a 'dispute' as to a translation may be difficult, when a translated statement can involve either a mistake in the transcription of the original investigative interview, and/or issues concerning differences in meaning of particular words or expressions in context. Even highly qualified interpreters may differ on the interpretation of certain words or concepts. Often it will be difficult to say when a different interpretation by one party of a certain word or phrase is a dispute about the evidence.

By contrast, under the current disclosure regime, some disputes about incorrect translations will be uncontroversial, or identified in the lead up to trial by opposing counsel who routinely discuss what will be contested and reach agreement on how much time will be needed for voir dire arguments. Where a dispute about a translation arises mid-trial – which, in our experience, rarely occurs – it can be resolved relatively quickly because interpreters are usually present in court for the witness or defendant.

Item 6: Prosecution surveillance evidence

17. Is mandating that the accused give notice of whether he or she requires prosecution surveillance evidence to be corroborated by witnesses appropriate?
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Legal Aid NSW would not support this option.

In his Second Reading speech introducing the 2013 reforms, the responsible Minister said:

Keeping certain elements of defence disclosure discretionary is suited to the practicalities of the conduct of trials in New South Wales's higher courts, which can range from simple single issue cases with one accused to highly complex cases involving many months of evidence and with multiple accused. Any mandatory model must reflect this reality and be capable of adapting to the circumstances of each case. The new discretionary defence provisions in the bill will allow the courts to tailor requirements on a case-by-case basis to avoid unnecessarily causing delays in the management of trials.

Proposed subsection (2) (b), for example, requires the defence to confirm whether the prosecution is required to call witnesses to corroborate any surveillance on which it is intended to rely. Surveillance evidence within the meaning of the subsection is intended to have a broad meaning. It can include traditional

surveillance evidence, such as physical observations of suspects recorded in logs by police, as well as that obtained under warrant, such as evidence resulting from the placing of a listening device in a particular location. This evidence may not be relevant in some cases, and allowing the court to make an order means that the judge can tailor its terms to fit the type of evidence in question.

Legal Aid NSW considers that, for the above reasons, defence notice as to whether corroboration of prosecution surveillance evidence is required should be considered by courts on a case by case basis, on application of the prosecution.

Item 7: Authenticity or accuracy of prosecution documentary evidence

18. Is mandating that the accused give notice of whether he or she disputes the authenticity or accuracy of any prosecution documentary evidence or other exhibit appropriate?

Legal Aid NSW opposes this proposal, for similar reasons to those set out in response to item 2. It is the responsibility of the prosecution to prove the authenticity or accuracy of its documents and exhibits. Provisions of the *Evidence Act 1995* already facilitate admission of documentary evidence by allowing a court to draw inferences as to the authenticity of a document.²²

We note that the criminal justice system is now entering a new era of electronic documentary evidence where, for example, the authenticity or origin of a screenshot of a snapchat message may be a key issue in the trial.

Concluding comments: trial efficiency

As noted in the introduction, Legal Aid NSW is concerned that the policy justification for mandatory pre-trial disclosure is to reduce delays and costs in criminal trials, although no evidence has been provided that the adoption of broader mandatory disclosure requirements, in United Kingdom, Victoria, New South Wales or elsewhere, has produced reductions in delays and costs.

United Kingdom

In the UK, the 2011 *Review of Disclosure in Criminal Proceedings* found that the defence continued to have a lack of confidence in the prosecution's performance of its disclosure

²² Section 58(1) provides: 'If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.'

obligations, and that prosecutors fail to narrow the issues.²³ The Review found that ‘too much time and money appears to be devoted to peripheral and disproportionate paper exercises’.²⁴

Victoria

Victoria has had mandatory pre-trial defence disclosure requirements since 1999. The current scheme was introduced in 2009 and requires extensive disclosure.²⁵ However, Victoria’s courts continue to struggle with delays and are now focussing on case management to facilitate early and quality disclosure, rather than strengthening disclosure requirements.²⁶

Legal Aid NSW is concerned that proposals 1, 2, 5, 6 and 7 have the potential to add to the workload of both prosecution and defence, create costs, risking unnecessary contests and contributing to delays. This may undermine the positive and cooperative working relationship between Legal Aid NSW and the ODPP. A further risk is that, to the extent that costs are saved by the prosecution, they will merely shift to Legal Aid NSW. The benefits of the flexibility of the current disclosure regime, the potential for more intensive case management and the pending EAGP reforms weigh strongly in favour of maintenance of the status quo.

²³ Lord Justice Gross, *Review of Disclosure in Criminal proceedings* (2011) at 61.

²⁴ *Ibid* at [114]

²⁵ *Criminal Procedure Act 2009* (Vic), section 183

²⁶ Department of Justice & Regulation (Victoria) Discussion Paper on *Proposed reforms to criminal procedure: Reducing trauma and delay for witnesses and victims* (2017):

<https://engage.vic.gov.au/reducing-trauma-and-delay-for-witnesses-and-victims>