



New South Wales

Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Bill 2013

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

This Bill is cognate with the *Evidence Amendment (Evidence of Silence) Bill 2013*.

Overview of Bill

The object of this Bill is to amend the *Criminal Procedure Act 1986*:

- (a) to expand the matters that must be disclosed by the defence and the prosecution before a trial for an indictable offence, and
- (b) to enable the court (and other parties with the leave of the court) to make proper comments in a trial for an indictable offence in circumstances where the accused person fails to comply with certain pre-trial disclosure requirements, and
- (c) to enable the court or the jury in such circumstances to then draw such unfavourable inferences as appear proper.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Criminal Procedure Act 1986 No 209

Schedule 1 [2], [3] and [5] omit provisions of the Act that currently require the prosecution and the defence to undertake mandatory pre-trial disclosure of specified matters in proceedings for indictable offences (other than indictable offences dealt with summarily) and that enable the court hearing such proceedings to order more intensive pre-trial disclosure.

Instead, provisions are included that expand the mandatory pre-trial disclosure requirements to include the matters that are currently required to be disclosed under the Act and certain additional matters some of which can currently be the subject of court ordered pre-trial disclosure under the Act. Also, the discretion of the court to require specified additional matters in the defence's pre-trial disclosure notice is retained.

Schedule 1 [8] enables the court (and other parties with the leave of the court) to make proper comments in a trial for an indictable offence in circumstances where the accused person fails to comply with the mandatory pre-trial disclosure requirements. The court or the jury may in such circumstances draw such unfavourable inferences as appear proper.

Schedule 1 [9] enables the accused person (with the leave of the court) to amend the defence pre-trial disclosure notice if the prosecution provides additional relevant material to the defence after the notice is given.

Schedule 1 [10] requires the court to be of the opinion that it is in the interests of the administration of justice to do so when deciding whether to waive any of the requirements for pre-trial disclosure.

Schedule 1 [11] requires the court when deciding whether to waive any of the requirements for pre-trial disclosure to take into account whether the accused person is represented by an Australian legal practitioner. Also, the court must give reasons if it makes an order waiving any pre-trial disclosure requirement.

Schedule 1 [13] enables regulations of a savings or transitional nature to be made consequent on the enactment of the proposed Act.

Schedule 1 [14] contains specific transitional provisions consequent on the enactment of the proposed Act and includes a requirement for the review of the operation of the amendments made by the proposed Act after a period of 2 years.

Schedule 1 [1], [4], [6], [7] and [12] make consequential amendments.

First print



New South Wales

Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Bill 2013

Contents

	Page
1 Name of Act	2
2 Commencement	2
Schedule 1 Amendment of Criminal Procedure Act 1986 No 209	3



New South Wales

Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Bill 2013

No. , 2013

A Bill for

An Act to amend the *Criminal Procedure Act 1986* in relation to mandatory pre-trial defence disclosure in indictable proceedings; and for other purposes.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013</i> .	3 4
2 Commencement	5
This Act commences on a day or days to be appointed by proclamation.	6

Schedule 1	Amendment of Criminal Procedure Act 1986 No 209	1 2
[1]	Section 136 Directions for conduct of proceedings	3
	Omit “, including a direction as to the time by which notice of the prosecution case is to be given under section 137 and notice of the defence response is to be given under section 138”.	4 5 6
[2]	Section 137 Notice of prosecution case to be given to accused person	7
	Omit the section.	8
[3]	Section 138 Notice of defence response to be given to prosecutor	9
	Omit the section.	10
[4]	Section 139 Pre-trial hearings	11
	Omit section 139 (3) (c). Insert instead:	12
	(c) determine the timetable for pre-trial disclosure under section 141,	13 14
[5]	Sections 141–143	15
	Omit the sections. Insert instead:	16
141	Mandatory pre-trial disclosure	17
(1)	After the indictment is presented or filed in proceedings, the following pre-trial disclosure is required:	18 19
(a)	the prosecutor is to give notice of the prosecution case to the accused person in accordance with section 142,	20 21
(b)	the accused person is to give notice of the defence response to the prosecution’s notice in accordance with section 143,	22 23
(c)	the prosecution is to give notice of the prosecution response to the defence response in accordance with section 144.	24 25 26
(2)	Pre-trial disclosure required by this section is to take place before the date set for the trial in the proceedings and in accordance with a timetable determined by the court.	27 28 29
	Note. Practice notes issued by the court will guide determinations of the timetable for pre-trial disclosures and related matters.	30 31
(3)	The court may vary any such timetable if it considers that it would be in the interests of the administration of justice to do so.	32 33

(4)	The regulations may make provision for or with respect to the timetable for pre-trial disclosure.	1 2
142	Prosecution's notice	3
(1)	For the purposes of section 141 (1) (a), the prosecution's notice is to contain the following:	4 5
(a)	a copy of the indictment,	6
(b)	a statement of facts,	7
(c)	a copy of a statement of each witness whose evidence the prosecutor proposes to adduce at the trial,	8 9
(d)	a copy of each document, evidence of the contents of which the prosecutor proposes to adduce at the trial,	10 11
(e)	if the prosecutor proposes to adduce evidence at the trial in the form of a summary, a copy of the summary or, where the summary has not yet been prepared, an outline of the summary,	12 13 14 15
(f)	a copy of any exhibit that the prosecutor proposes to adduce at the trial,	16 17
(g)	a copy of any chart or explanatory material that the prosecutor proposes to adduce at the trial,	18 19
(h)	if any expert witness is proposed to be called at the trial by the prosecutor, a copy of each report by the witness that is relevant to the case,	20 21 22
(i)	a copy of any information, document or other thing provided by law enforcement officers to the prosecutor, or otherwise in the possession of the prosecutor, that would reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed to the accused person,	23 24 25 26 27 28
(j)	a list identifying:	29
(i)	any information, document or other thing of which the prosecutor is aware and that would reasonably be regarded as being of relevance to the case but that is not in the prosecutor's possession and is not in the accused person's possession, and	30 31 32 33 34
(ii)	the place at which the prosecutor believes the information, document or other thing is situated,	35 36
(k)	a copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness,	37 38 39

(l)	a copy of any information, document or other thing in the possession of the prosecutor that would reasonably be regarded as adverse to the credit or credibility of the accused person,	1 2 3 4
(m)	a list identifying the statements of those witnesses who are proposed to be called at the trial by the prosecutor.	5 6
(2)	The regulations may make provision for or with respect to the form and content of a statement of facts for the purposes of this section.	7 8 9
(3)	In this section, <i>law enforcement officer</i> means a police officer, or an officer of one of the following agencies:	10 11
(a)	the Police Integrity Commission,	12
(b)	the New South Wales Crime Commission,	13
(c)	the Independent Commission Against Corruption.	14
143	Defence response	15
(1)	For the purposes of section 141 (1) (b), the notice of the defence response is to contain the following:	16 17
(a)	the name of any Australian legal practitioner proposed to appear on behalf of the accused person at the trial,	18 19
(b)	the nature of the accused person's defence, including particular defences to be relied on,	20 21
(c)	the facts, matters or circumstances on which the prosecution intends to rely to prove guilt (as indicated in the prosecution's notice under section 142) and with which the accused person intends to take issue,	22 23 24 25
(d)	points of law which the accused person intends to raise,	26
(e)	notice of any consent that the accused person proposes to give at the trial under section 190 of the <i>Evidence Act 1995</i> in relation to each of the following:	27 28 29
(i)	a statement of a witness that the prosecutor proposes to adduce at the trial,	30 31
(ii)	a summary of evidence that the prosecutor proposes to adduce at the trial,	32 33
(f)	a statement as to whether or not the accused person intends to give any notice under section 150 (Notice of alibi) or, if the accused person has already given such a notice, a statement that the notice has been given,	34 35 36 37

Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure)
Bill 2013

Schedule 1 Amendment of Criminal Procedure Act 1986 No 209

(g)	a statement as to whether or not the accused person intends to give any notice under section 151 (Notice of intention to adduce evidence of substantial mental impairment).	1 2 3
(2)	The notice of the defence response is also to contain such of the following matters (if any) as the court orders:	4 5
(a)	a copy of any report, relevant to the trial, that has been prepared by a person whom the accused person intends to call as an expert witness at the trial,	6 7 8
(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,	9 10 11 12 13
(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,	14 15 16
(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,	17 18 19 20
(e)	notice as to whether the accused person proposes to dispute the authenticity or accuracy of any proposed documentary evidence or other exhibit disclosed by the prosecutor,	21 22 23 24
(f)	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,	25 26 27
(g)	notice of any consent the accused person proposes to give under section 184 of the <i>Evidence Act 1995</i> .	28 29
[6]	Section 144	30
	Omit “— court-ordered pre-trial disclosure ” from the heading to the section.	31
[7]	Section 145 Dispensing with formal proof	32
	Omit “section 143 (d)” from section 145 (2).	33
	Insert instead “section 143 (1) (c)”.	34

[8] Section 146A	1
Insert after section 146:	2
146A Drawing of inferences in certain circumstances	3
(1) This section applies if:	4
(a) the accused person fails to comply with the requirements for pre-trial disclosure imposed by or under this Division on the accused person, or	5 6 7
(b) the accused person is required to give a notice under section 150 (Notice of alibi) and fails to do so.	8 9
(2) If this section applies:	10
(a) the court, or any other party with the leave of the court, may make such comment at the trial as appears proper, and	11 12
(b) the court or jury may then draw such unfavourable inferences as appear proper.	13 14
(3) A person must not be found guilty of an offence solely on an inference drawn under this section.	15 16
(4) Subsection (2) does not apply unless the prosecutor has complied with the requirements for pre-trial disclosure imposed by or under this Division on the prosecution.	17 18 19
(5) This section does not limit the operation of section 146.	20
[9] Section 147 Disclosure requirements are ongoing	21
Insert after section 147 (2):	22
(3) An accused person may, with the leave of the court, amend the notice of the defence response given under section 143 if any information, document or other thing is obtained from the prosecution after the notice of the defence response was given that would affect the contents of that notice.	23 24 25 26 27
(4) The accused person must give the amended notice of the defence response to the prosecutor.	28 29
[10] Section 148 Court may waive requirements	30
Insert “, but only if the court is of the opinion that it would be in the interests of the administration of justice to do so” after “Division” in section 148 (1).	31 32

[11] Section 148 (4) and (5)	1
Insert after section 148 (3):	2
(4) The court is to take into account whether the accused person is represented by an Australian legal practitioner when considering whether to make an order under this section.	3 4 5
(5) The court is to give reasons for the making of an order under this section.	6 7
[12] Section 149 Requirements as to notices	8
Insert after section 149 (5):	9
(6) A reference in this section to a notice includes a reference to an amended notice.	10 11
[13] Schedule 2 Savings, transitional and other provisions	12
Insert at the end of clause 1 (1):	13
<i>Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013</i>	14 15
[14] Schedule 2	16
Insert at the end of the Schedule with appropriate Part and clause numbering:	17
Part Provisions consequent on enactment of Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013	18 19 20 21
Definition	22
In this Part, <i>amending Act</i> means the <i>Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013</i> .	23 24
Case management provisions	25
(1) An amendment of Division 3 of Part 3 of Chapter 3 by the amending Act applies only in respect of proceedings in which the indictment was presented or filed on or after the commencement of the amendment.	26 27 28 29
(2) Accordingly, a provision of Division 3 of Part 3 of Chapter 3, as in force before its amendment by the amending Act, continues to apply in respect of proceedings in which the indictment was presented or filed before the commencement of the amendment.	30 31 32 33

Review of policy objectives of amending Act

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(1) The Minister is to review the amendments made by the amending Act to determine:	2
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(a) whether they have been effective in reducing delays in proceedings on indictment, and	4
	5
(b) whether they have been effective in promoting the efficient management and conduct of trials, and	6
	7
(c) whether the interests of justice have been affected in relation to parties to proceedings on indictment, and	8
	9
(d) the cost impacts of the procedures.	10
(2) The review is to be undertaken as soon as possible after the period of 2 years from the commencement of this clause.	11
	12
(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 2 years.	13
	14
	15