

PRE-TRIAL DEFENCE DISCLOSURE IN SOUTH AUSTRALIAN CRIMINAL PROCEEDINGS: TIME FOR CHANGE?

ABSTRACT

The issue of defence disclosure in criminal proceedings has come under renewed focus as a result of the recent *Criminal Procedure Amendment (Mandatory Pre-Trial Defence Disclosure) Act 2013* (NSW) which imposes comprehensive duties similar to those that exist in Victoria and England. This article argues that South Australia also needs legislative reform to implement broader requirements for pre-trial defence disclosure. This article suggests that cultural change amongst lawyers and judges is also required. South Australia would benefit from such reforms as it would improve the efficiency of the criminal trial process. The increased complexity and length of modern criminal trials, combined with the current financial climate, means that criminal procedural reform must be shaped by considerations for efficacy. The legislature must be willing to take a more managerialist approach to criminal procedure, while still preserving an accused's rights within the adversarial system. It is suggested that the traditional arguments against defence disclosure are more rhetorical than real and that current resistance to South Australia's existing pre-trial defence disclosure regime is explicable by a wider cultural resistance within the legal community to mandated defence disclosure. In order for a stricter regime of defence disclosure to be successfully implemented, Parliament needs to be mindful of this culture and provide incentives for an accused to participate in pre-trial disclosure, rather than relying solely on sanctions for noncompliance. Despite the challenges in this controversial area, a scheme for fair, effective and enforceable pre-trial defence disclosure can be identified and should be adopted in South Australia.

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I INTRODUCTION

I believe we have long passed the point where the defence should be permitted to withhold disclosure of its intended trial approach. A criminal proceeding should not in this 21st century amount to a game where the players may keep their cards up their sleeves.¹

These comments, offered by de Jersey CJ of the Supreme Court of Queensland in 2013, typify the regular calls over recent years for increased pre-trial defence disclosure in criminal proceedings.² This longstanding debate³ has been given renewed impetus in Australia following the recent introduction in New South Wales of the *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013* (NSW) ('2013 NSW Act'). The 2013 NSW Act, reflecting similar approaches in England and Wales⁴ and Victoria,⁵ imposes comprehensive requirements for pre-trial defence disclosure.⁶ Managerial approaches to the administration of criminal justice

¹ Chief Justice Paul de Jersey (Speech delivered at the Queensland Law Society 2013 Symposium, Brisbane Convention and Exhibition Centre, 15 March 2013) <<http://archive.sclqld.org.au/judgepub/2013/dj150313.pdf>>.

² See, eg, Mark Aronson, *Managing Complex Criminal Trials: Reform of the Rules of Evidence and Procedure* (Australian Institute of Judicial Administration, 1992) 42–3; Michael Rozenes, 'The New Procedures for the Prosecution of Complex Fraud: Will They Work' (Paper presented at 28 Australian Legal Convention, 1 September 1993); *R v Ling* (1996) 90 A Crim R 376, 382; Wendy Abraham, 'The Duty of Disclosure on the Prosecution' (Paper presented at the Australian Institute of Judicial Administration Criminal Trial Reform Conference, Melbourne, 24 March 2000) 13; John Sulan, 'Defence and Legal Aid: Defence Co-Operation in the Trial Process' (Paper presented at the Australian Institute of Judicial Administration Criminal Trial Reform Conference, Melbourne, 25 March 2000) 9; Michael Rozenes, 'The Right to Silence in the Pre-Trial and Trial Stages' (Paper presented at the Australian Institute of Judicial Administration Criminal Trial Reform Conference, Melbourne, 25 March 2000) 4; New South Wales Law Reform Commission, *The Right to Silence*, Report No 95 (2000) xi-xii, 131–4; South Australia, *Parliamentary Debates*, Legislative Council, 24 November 2005, 3254–7 (Paul Holloway); Justice Peter McClellan, 'The Australian Justice System in 2020' (Paper presented to National Judicial College of Australia, Sydney, 25 October 2008) 11–2; Justice Hilary Penfold and Kathy Leigh, 'Discussion Paper: Review of Case Management and Listing Procedures in the ACT Supreme Court' (Discussion paper, ACT Justice and Community Safety Directorate, 2011) 28–9; Chief Justice De Jersey, above n 1, 5–7; Chief Justice Paul de Jersey, 'The Evolution of the Modern Criminal Trial: a Plethora of Change' (Paper presented at Expert Forensic Evidence Conference, Sydney, 24 August 2013) 4–5.

³ The debate can be traced back to at least the 1980s. See, eg, Gareth Griffith, 'Pre-Trial Defence Disclosure: Background to the Criminal Procedure Amendment (Pre-Trial Disclosure) Bill 2000' (Briefing Paper No 12/2000, NSW Parliamentary Library, 2000); Steven Greer, 'The Right to Silence: a Review of the Current Debate' (1990) 53 *Modern Law Review* 709, 717.

⁴ See *Criminal Procedure and Investigations Act 1996* (UK).

⁵ See *Crimes (Criminal Trials) Act 1999* (Vic).

⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 19 March 2013, 18831–2 (Greg Smith, Attorney-General).

have gained increased acceptance⁷ and inquisitorial characteristics have been increasingly adopted in recent years in pre-trial criminal case management.⁸ In this sense, criminal procedure reform may be seen as shifting away from a traditional and purely ‘adversarial’ approach.⁹

At present, there are few defence disclosure requirements in South Australian criminal proceedings.¹⁰ However, even these duties are rarely observed¹¹ and suffer problems with enforceability.¹² The comprehensive pre-trial obligations of the prosecution to disclose both the evidence that it intends to lead at trial, and any relevant material in its possession (whether it helps or hinders the prosecution case),¹³ is entrenched and regarded as ‘the foundation of a fair trial’.¹⁴ It is widely accepted

⁷ See, eg, Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Report No 92 (1999) 97 [12.1]; Justice Mark Weinberg, ‘The Criminal Trial Process and the Problem of Delay’ (Paper presented at the Australian Institute of Judicial Administration Australian Criminal Trial Reform Conference, Melbourne, 24 March 2000) 2; Chief Justice James Spigelman, ‘Case Management in New South Wales’ (Paper presented for the Judicial Delegation from India, Sydney, 21 September 2009) 3; Ray Finkelstein, ‘The Adversarial System and the Search for Truth’ (2011) 37 *Monash University Law Review* 135, 135; Abenaa Owusu-Bempah, *Penalising Defendant Non-Cooperation in the Criminal Process and the Implications for English Criminal Procedure* (PhD Thesis, University College of London, 2012) 227.

⁸ See, eg, Mike Redmayne, ‘Process Gains and Process Values: the *Criminal Procedure and Investigations Act 1996*’ (1997) 60 *Modern Law Review* 79, 93; Law Reform Commission of Western Australia, above n 7, 51 [7.2]; Justices P Johnson and M F Latham, ‘Criminal Trial Case Management: Why Bother?’ (Paper presented at Australian Institute of Judicial Administration Criminal Justice in Australia and New Zealand — Issues and Challenges for Judicial Administration Conference, Sydney, 1 September 2011) 4.

⁹ See Owusu-Bempah, above n 7, 15; Arie Freiberg, ‘Non-Adversarial Approaches to Criminal Justice’ (2007) 16 *Journal of Judicial Administration* 205.

¹⁰ See below Part II.

¹¹ See below Part VI.

¹² See *Criminal Law Consolidation Act 1935* (SA) ss 285BA–285C. See below Part V.

¹³ This prosecution duty arises under a complex combination of statutory and common law requirements and ethical and professional guidelines issued by professional associations and the Director of Public Prosecutions. See, eg, *Summary Procedure Act 1921* (SA) s 104(1); *R v Keane* [1994] 2 All ER 478; *R v Ulman-Naruniec* (2003) 143 A Crim R 531, 559–62 [136]–[146]; *R v Mallard* (2005) 224 CLR 125; *R v Andrews* (2010) 107 SASR 471, 474–5 [19]–[20]; South Australian Bar Association, *Barristers’ Conduct Rules* (at February 2010) r 86; Office of the Director of Public Prosecutions (SA), *Statement of Prosecution Policy and Guidelines*, issued July 1999, guideline 9; Office of the Commonwealth Director of Public Prosecutions, *Statement on Prosecution Disclosure*, issued November 1998.

¹⁴ Martin Moynihan, *Review of the Civil and Criminal Justice System in Queensland* (Queensland Government, 2008) 85. See also, eg, *R v H* [2004] 2 AC 134, 147; David Plater and Lucy de Vreeze, ‘Is the ‘Golden Rule’ of Full Prosecution Disclosure a Modern ‘Mission Impossible’?’ (2012) 14 *Flinders Law Journal* 133, 134; Abraham, above n 2, 1–2.

that the prosecutor's duty of disclosure is required to level the playing field between the prosecution and the defence in an adversarial criminal process where the defence typically lacks the investigative ability and power available to police and prosecutors.¹⁵ As Abraham notes, '[t]he existence of the [prosecution disclosure] obligation is now beyond question.'¹⁶ In contrast, the defence in South Australia plays a strictly limited disclosure role.

This article asserts that the current requirements of defence disclosure in South Australia are inadequate and that changes to present law and practice are appropriate. As early as 1998, Brian Martin QC observed that reform was necessary and that the ability of a well-resourced accused to put the prosecution to proof on every conceivable issue in a criminal trial without any notification of what was really in dispute 'involves a cost that the prosecution and community can no longer afford'.¹⁷ The failure to resolve what is really in issue in a criminal trial 'necessarily results in longer trials, confused juries and greater inconvenience and expense to victims, witnesses, police, prosecuting authorities and courts.'¹⁸

Martin argued that a 'realistic and balanced approach' to disclosure was necessary and that 'reform can be achieved without unfairly affecting the essential rights of defendants'.¹⁹ This article agrees with this view and suggests a more comprehensive framework for defence disclosure that is fair, realistic and effective.²⁰ In a contested indictable case, this framework would encourage the defence to identify any positive defence, the issues of fact or law that it intends to dispute at trial and the basis on which this is to be taken. This approach can be viewed as part of the paramount role of any lawyer to act as an officer of the court, to present issues as clearly and expeditiously as possible, to cooperate in order to reduce unnecessary disputes and to maximise the effective use of limited judicial time and resources.²¹

¹⁵ See, eg, *R v Winston Brown* [1994] 1 WLR 1599, 1606; *R v C* (2006) 244 LSJS 212 [45]; *Ragg v Magistrates' Court of Victoria* (2008) 179 A Crim R 568, 581.

¹⁶ Abraham, above n 2, 2.

¹⁷ Brian Martin, 'Prosecution Issues', (Speech delivered at Australian Institute of Judicial Administration Conference — Perspectives on White Collar Crime: Towards 2000, Adelaide, 27 February 1998); See also Chief Justice Paul De Jersey, 'Australia, Time to Follow Overseas Leads on Pre-Trial Disclosure and Judicial Discretion', *The Australian*, 15 March 2013.

¹⁸ Paul Rofe, 'Disclosure by Both Sides' (Paper presented at the Prosecuting Justice Conference, Melbourne, 18 April 1996) 23.

¹⁹ Martin, above n 17.

²⁰ Recent funding cuts and austerity measures impact on the ability of both the prosecution and the defence to meet their disclosure obligations. See Justices Peter Gross and Colman Treacy, 'Further Review of Disclosure in Criminal Proceedings: Sanctions for Disclosure Failure' (Review, Judiciary of England and Wales, November 2012) 13 [81].

²¹ See, eg, David Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63, 96.

This article covers six main topics. First, it outlines the current limited requirements for defence disclosure in South Australia. Second, it summarises and then dismisses the usual arguments against increased defence disclosure in criminal proceedings. Third, it discusses the benefits of increased defence disclosure in South Australia. Fourth, it critically examines the more comprehensive regimes of defence disclosure that exist in Victoria, England and New South Wales to identify what measures South Australia could successfully adopt. Fifth, it suggests that while reform to increase defence disclosure may initially prove unpopular, it will be an important step in declaring best practice and in fostering a cultural change among the legal profession over time regarding this issue. Sixth, it argues that any reform in South Australia in this area would be more successful if it provided incentives for increased defence disclosure, rather than simply relying upon penalties for noncompliance.

This article is confined to consideration of defence disclosure *after* the prosecution has complied with its pre-trial duties of disclosure of any relevant material,²² as it is accepted by all Australian Directors of Public Prosecutions that the defence cannot be expected to make any disclosure until after the prosecution has satisfied its disclosure obligations.²³ As Martin observes, whilst the notion of pre-charge investigative defence disclosure presents ‘obvious difficulties’, different considerations apply when the accused is before a court and through the committal and prosecution disclosure processes, is in a position ‘to see the full extent of the prosecution case’.²⁴

II THE EXISTING LAW IN SOUTH AUSTRALIA

The current defence duties of disclosure in South Australia are limited. If the defence wishes to raise an alibi during trial, it is required within seven days after an accused is committed for trial to provide the DPP with a ‘summary setting out with

²² The highly contentious issue of defence disclosure in the police interview stage will not be considered in this article.

²³ See, eg, Michael Rozenes, ‘Who Needs a Fair Trial’ (Speech delivered at the Sixth International Criminal Law Congress, Melbourne, 9 October 1996); Abraham, above n 2, 1–2; Martin, above n 17. It is accepted that significant problems remain in practice in both Australia (see, eg, Moynihan, above n 14, 93, 95–7; *R v Mallard* (2005) 224 CLR 125; *Western Australia v JWRL* [2010] WASCA 179 (10 September 2010) [91]) and England (see, eg, Gross and Treacy, above n 20, iv [14], 9 [62]; Plater and De Vreeze, above n 14, 146–53; Chris Taylor, ‘Advance Disclosure and the Culture of the Investigator: the Good Idea that never quite caught on’ (2005) 33 *International Journal of the Sociology of Law* 118; Chris Taylor, ‘The Disclosure Sanctions Regime: Another Missed Opportunity’ (2013) 17 *International Journal of Evidence and Proof* 272, 273, 279–81) as to the prosecution’s performance of its modern duties of disclosure.

²⁴ Brian Martin, ‘Defence Disclosure, Points of Discussion: Summary of Personal Views’ (Paper presented at ‘Reforming Court Process for Law Enforcement — New Directions’, Australian Institute of Judicial Administration Conference on Reform of Court Rules and Procedures in Criminal and Civil Law Enforcement Cases, Brisbane, 3 July 1998); See also New South Wales Law Reform Commission, above n 2, 122 [3.112], where it was highlighted that an accused is in a ‘completely different’ position in relation to investigative, as opposed to pre-trial, defence disclosure.

reasonable particularity the facts sought to be established by the evidence'. The name and address of the alibi witness must also be provided.²⁵

Various additional requirements of defence disclosure came into operation in South Australia on 1 March 2007 through amendments to the *Criminal Law Consolidation Act 1935* (SA) ('*CLCA*'), effected through the *Statutes Amendment (Defence Disclosure) Act 2005* (SA). These changes were introduced in the aftermath of the Kapunda Road Royal Commission,²⁶ amidst concern as to 'ambush defences'²⁷ (arising from a criminal trial in 2005 in which the accused was controversially acquitted after adducing mid trial expert evidence to explain his flight from the scene of a fatal collision).²⁸ The duties in the 2005 Act are confined to the trial of an indictable offence before either the Supreme or District Courts.²⁹

The defence may be asked under s 285BA of the *CLCA* to agree with specified facts nominated by the prosecution.³⁰ The defence are then under a duty to respond. If an accused unreasonably fails to make an admission of facts, 'the court should take the failure into account in fixing sentence'.³¹ A defendant may unreasonably fail to make an admission if he or she claims privilege against self-incrimination as a reason for not making the admission, and puts the prosecution to proof of facts that are not seriously contested at the trial.

Under s 285BB of the *CLCA*, a court may also on the application of the prosecutor, require the defence to provide the DPP with written notice of an intention to introduce evidence relevant to certain defences. These are namely mental incompetence or unfitness to stand trial, self-defence, provocation, automatism, accident, necessity or duress, claim of right, or intoxication.³² When the defence intends to introduce

²⁵ See *Criminal Law Consolidation Act 1935* (SA) s 285C. Similar duties exist throughout Australia and in other common law jurisdictions.

²⁶ South Australia, Kapunda Road Royal Commission, *Report* (2005).

²⁷ See, eg, South Australia, *Parliamentary Debates*, House of Assembly, 20 September 2005, 3465 (Michael Atkinson); South Australia, *Parliamentary Debates*, Legislative Council, 29 November 2005, 3315 (Ian Gilfillan); South Australia, *Parliamentary Debates*, Legislative Council, 29 November 2005, 3315–6 (Nick Xenophon).

²⁸ See below n 179.

²⁹ It is usually considered that it would not be cost effective to introduce a mandated system of defence disclosure in summary proceedings. See, eg, New South Wales Law Reform Commission, above n 2, 134 [3.14]. It is generally accepted that any disclosure scheme for the Magistrates' Court needs to be simpler than that applying in the higher courts. See, eg, Senior District Judge (Chief Magistrate) Howard Riddle and Judge Christopher Kinch, 'Magistrates Courts Disclosure Review' (Review, Judiciary of England and Wales, May 2014) 43 [203]–[206].

³⁰ *Criminal Law Consolidation Act 1935* (SA) s 285BA(1).

³¹ *Ibid* s 285BA(6).

³² *Ibid* s 285BB(1). A court may also under s 285BB(4) at the application of the DPP ask the defence whether it consents to dispensing with the calling of witnesses proposed to be called by the prosecution to establish the admissibility of evidence of a technical nature such as surveillance or interview.

expert evidence at either trial or sentencing, it is required under s 285BC of the *CLCA* to provide the prosecution with the name and qualifications of the expert and must describe the general nature of the evidence and what it tends to establish.³³ Additional requirements apply if the expert evidence is of a psychiatric or medical nature and relates to an accused's mental state or medical condition at the time of an alleged offence.

These reforms were heralded by the then South Australian Attorney-General as 'exciting' and 'controversial'.³⁴ The Attorney declared it was 'a major step forward in criminal trial reform'³⁵ and amounted to 'the most important changes proposed to the criminal justice system since the major changes to the courts structure passed by parliament in 1992'.³⁶ However, the practical effect of the 2005 Act, despite the Attorney's enthusiasm, has proved modest at best. The existing powers under ss 285BA and BB of the *CLCA* 'are very rarely used'.³⁷

III ARGUMENTS AGAINST REFORMS INCREASING PRE-TRIAL DEFENCE DISCLOSURE IN SOUTH AUSTRALIA

Arguments in favour of maintaining the defence's limited disclosure obligations emphasise the protection of fundamental principles including the right to a fair trial, the right to silence, the presumption of innocence and the privilege against self-incrimination.³⁸ However, the arguments against increased defence disclosure in criminal proceedings are often more rhetoric than substance.

The elements constituting a fair trial cannot be exhaustively defined.³⁹ It is often claimed that pre-trial defence disclosure somehow infringes the defendant's 'right

³³ Ibid s 285BC(2). The defence is not required to furnish the prosecution with the actual report of the expert it proposes to call. See *R v Rice* [2008] SADC 49 (2 May 2008) [26].

³⁴ South Australia, *Parliamentary Debates*, House of Assembly, 20 September 2005, 3465 (Michael Atkinson).

³⁵ Ibid 3470.

³⁶ Ibid 3465.

³⁷ Attorney-General's Department (SA), *Transforming Criminal Justice Consultation Paper: Efficient Progression and Resolution of Major Indictable Matters* (2015) 13. See also South Australia, *Parliamentary Debates*, House of Assembly, 1 March 2012, 489 (John Rau, Attorney-General), noting that s 285BA, which encourages the use of agreed facts in criminal trials, is 'underused'. Though there are no publicly available court statistics on this issue, Tim Preston of the South Australian DPP made a similar point to the authors.

³⁸ See, eg, Geoff Flatman and Mirko Bagaric, 'Accused Disclosure — Measured Response or Abrogation of the Presumption of Innocence' (1999) 23 *Criminal Law Journal* 327, 329–32; New South Wales Law Reform Commission, above n 2, 120–1 [3.109]; South Australia, *Parliamentary Debates*, Legislative Council, 24 November 2005, 3256 (Paul Holloway); Abenaa Owusu-Bempah, 'Defence Participation through Pre-trial Disclosure: Issues and Implications' (2013) 17 *International Journal of Evidence and Proof* 183, 192.

³⁹ See, eg, *Dietrich v The Queen* (1992) 177 CLR 292, 300.

to silence'.⁴⁰ This argument is simplistic.⁴¹ As was noted in *R v Director of Serious Fraud Office, ex parte Smith*⁴² by Lord Mustill, the 'right to silence' is imprecise and means different things to different people and includes immunities 'from being compelled ... to answer questions the answers to which may incriminate them' and for 'persons who have been charged with a criminal offence, from having questions ... addressed to them by police officers or persons in a similar position of authority'.⁴³ Lord Justice Auld asserts that simply obliging the defence to disclose what he or she will only admit later at trial is not an attack on an accused's right to silence.⁴⁴ An accused remains entitled to not provide the details of their defence if they wish to put the prosecution to strict proof at trial.⁴⁵

Those who oppose increased defence disclosure also argue that the notion of defence disclosure 'degrades the presumption of innocence, the foundation principle of Anglo-American accusatorial criminal law'.⁴⁶ This view asserts that defendants, who are presumed innocent, are compelled to contribute to their own conviction and they (or the State) are required to remunerate their lawyer to comply with pre-trial disclosure obligations.⁴⁷ This argument is unconvincing. To require the defence to indicate prior to trial what aspect of the prosecution case is disputed, does not alter the fact that the burden of proof remains firmly on the prosecution, and the defence remains free to decide what its case will be, including to put the prosecution to proof of everything.⁴⁸

⁴⁰ See, eg, John Nicholson, 'The Right to Silence — Only Half a Right' (Paper presented at the Government Lawyers CLE Convention Dinner, NSW Parliament House, 18 October 2000); New South Wales Law Reform Commission, above n 2, 120–1 [3.109]; Sulan, above n 2, 9. See generally Mirko Bagaric, 'The Diminishing "Right" of Silence' (1997) 19 *Sydney Law Review* 366.

⁴¹ See, eg, Sulan, above n 2, 9; Sir Robin Auld, *Review of the Criminal Courts in England and Wales* (Stationery Office, 2001) 396 [5].

⁴² [1993] AC 1.

⁴³ Ibid 30–1; See also Anthony Gray, 'Constitutionally Heeding the Right to Silence in Australia' (2013) 39 *Monash University Law Review* 156, 157.

⁴⁴ Auld, above n 41, 459 [153]; See also Flatman and Bagaric, above n 38, 330.

⁴⁵ Though with the qualification that there should be potential adverse consequences if the accused later raises a positive defence; See *R v Rochford* [2011] WLR 534, 540–1 [24].

⁴⁶ Barton L Ingraham, 'The Right to Silence, the Presumption of Innocence, the Burden of Proof and a Modest Proposal: a Reply to O'Neill' (1996) 86 *Journal of Criminal Law and Criminology* 559, 559.

⁴⁷ Law Reform Commission of Western Australia, above n 7, 201; Victoria, *Parliamentary Debates*, Legislative Council, 26 May 1999, 1038 (Don Nardella); Griffith, above n 3, 16.

⁴⁸ Auld, above n 41, 459 [153]; United Kingdom, Royal Commission on Criminal Justice, *Report of the Royal Commission on Criminal Justice* (1993) 84–101, [2].

The privilege against self-incrimination is also raised as an objection to greater pre-trial defence disclosure.⁴⁹ It is claimed that insisting upon pre-trial defence disclosure ‘conscripts a defendant into aiding his [or her] adversary’.⁵⁰ However, as the English Royal Commission on Criminal Justice argued, requiring an accused to disclose the substance of their defence early on, ‘will no more incriminate the defendant nor help prove the case against him or her than it does when it is given in evidence at the hearing’.⁵¹ Every accused who raises a positive defence at trial (as opposed to simply putting the prosecution to strict proof to establish each element of the alleged offence) can be said to have waived any privilege against self-incrimination.⁵² It is, as the Royal Commission on Criminal Procedure found, simply a matter of timing.⁵³

There is a lack of reason explaining, practically, how defence disclosure may undermine fair trial rights.⁵⁴ Whether defence disclosure contravenes such fundamental rights may come down to the detail of the particular regime in place.⁵⁵ However, when obligations are limited to requiring the defence to disclose only what they will later raise during the trial, the usual arguments against defence disclosure are overstated. Fair trial considerations do not create a complete shield against any capacity for the accused to assist the State.⁵⁶ Pre-trial defence disclosure may occur without encroaching on the essential rights of an accused.⁵⁷

The effects of defence disclosure on fair trial rights at the pre-trial stage compared to the police interview stage are minimal. At the pre-trial stage, an accused has had time to consider the nature and strength of the prosecution case, reflect on their position and obtain informed legal advice.⁵⁸ As the New South Wales Law Reform Commission notes, ‘[t]he importance of the right to silence after the defendant has been committed for trial does not ... rest upon the same basis as that which exists before the event.’⁵⁹ Much of the criticism on defence disclosure is more applicable to

⁴⁹ See, eg, Owusu-Bempah, ‘Defence Participation’, above n 38, 193; John Epp, *Building on the Decade of Disclosure in Criminal Procedure* (Cavendish Publishing Ltd, 2001) 270. See also Yvonne Marie Daly, ‘The Right to Silence: Inferences and Interference’ (2014) 47 *Australian and New Zealand Journal of Criminology* 59.

⁵⁰ Kevin Dawkins, ‘Defence Disclosure in Criminal Cases’ [2001] *New Zealand Law Review* 35, 38.

⁵¹ Royal Commission on Criminal Justice, above n 48, 84 [2].

⁵² Cosmas Moisisdis, *Criminal Discovery: From Truth to Proof and Back Again* (Institute of Criminology, 2008) 60.

⁵³ Royal Commission on Criminal Justice, above n 48, 97–8 [60].

⁵⁴ Flatman and Bagaric, above n 38, 327, 330.

⁵⁵ Griffith, above n 3, 9.

⁵⁶ Brian Martin, ‘The Adversarial Model of the Criminal Justice System: what change is happening?’ (Speech delivered at the Heads of Prosecuting Agencies in the Commonwealth Conference, Wellington, 24 September 1997) 1.

⁵⁷ Sulan, above n 2, 3.

⁵⁸ New South Wales Law Reform Commission, above n 2, 121 [3.112].

⁵⁹ New South Wales Law Reform Commission, *The Right to Silence*, Discussion Paper No 41(1998) [4.80].

the police interview stage.⁶⁰ At that stage, an accused may be legally unrepresented and have little, if any, knowledge of the accusations against them.

IV ARGUMENTS FOR REFORMS INCREASING PRE-TRIAL DEFENCE DISCLOSURE IN SOUTH AUSTRALIA

A Reducing the Length and Complexity of Criminal Trials

Efficiency is a common theme in modern rules and practices for criminal procedure.⁶¹ As Spigelman CJ stated:

Throughout the common law world, over recent decades, the judiciary has accepted a considerably expanded role in the management of the administration of justice, both with respect to the overall caseload of the court and in the management of individual proceedings.⁶²

This purpose is reflected in various court rules.⁶³ The South Australian *Supreme Court Criminal Rules 2013*, for example, promote the ‘just and efficient determination’ of the court’s business.⁶⁴ The Rules endorse ‘a system of positive case-flow management’ under the court’s supervision to maximise ‘the efficient use of the available judicial and administrative resources’ and ‘[facilitate] the timely disposal of business at a cost affordable by the parties and the community generally.’⁶⁵ Similar Rules apply to the South Australian District Court.⁶⁶ Asking the defence to disclose before trial the points of fact or law that they intend to rely upon is integral to modern proposals to streamline and improve the effectiveness of the criminal trial process.⁶⁷

The issue of defence disclosure is inevitably contentious. Whilst there is strong support for the ‘golden rule’ of modern criminal procedure that the prosecution should disclose to the defence in any criminal case any ‘relevant’ material in its

⁶⁰ Most of the parliamentary opposition to the 2013 NSW Act focussed on the ‘right to silence’ during police interview as opposed to the enhanced requirements for pre-trial defence disclosure; See, eg, New South Wales, *Parliamentary Debates*, Legislative Council, 20 March 2013, 18856–72, 18886–904.

⁶¹ See, eg, *Magistrates Court Criminal Rules 1992* (SA) r 8.01; *District Court Criminal Rules 2013* (SA) r 13.06; *Supreme Court Criminal Rules 2013* (SA) rr 4.01, 4.02, 13.06; *Magistrates Court Act 1989* (Vic) s 1(c); *Crimes (Criminal Trials) Act 1999* (Vic) s 1; *Criminal Procedure Rules 2013* (UK) r 1.1(2)(e).

⁶² James Spigelman, ‘Case Management in New South Wales’ (Paper Prepared for the Judicial Delegation from India, Sydney, 21 September 2009) 3.

⁶³ See, eg, *Criminal Procedure Rules 2013* (UK).

⁶⁴ *Supreme Court Criminal Rules 2013* (SA) r 4.01.

⁶⁵ *Ibid* r 4.02.

⁶⁶ *District Court Criminal Rules 2013* (SA) r 13.

⁶⁷ Rozenes, ‘The Right to Silence’, above n 2, 4.

possession,⁶⁸ ‘any hint of reciprocating the disclosure obligation draws nothing less than howls of protest from the defence bar.’⁶⁹ It is asserted by opponents that the notion of pre-trial defence disclosure is unfair, being at odds with the traditional paradigm of the adversarial criminal trial that requires no cooperation or assistance from an accused, and being inconsistent with the presumption of innocence.⁷⁰

However, this view is increasingly untenable and concerns for efficiency provide the momentum for modern procedural reform in this area.⁷¹ The efficient use of resources in a climate of financial stringency and the timely resolution of disputes are vital objects of the modern criminal justice system.⁷² The increasing number of defendants and associated delays in a climate of economic austerity that confront the South Australian (and other Australian)⁷³ higher courts are conspicuous.⁷⁴ The most recent statistics highlight an 18-month backlog in criminal trials before the District

⁶⁸ See, eg, *R v H* [2004] 2 AC 134, 147; Plater and de Vreeze, above n 14, 134; Abraham, above n 2, 1–2.

⁶⁹ Brian Edward Maude, ‘Reciprocal Disclosure in Criminal Trials: Stacking the Deck against the Accused, or Calling Defence Counsel’s Bluff’ (1999) 37 *Alberta Law Review* 715; See also Rofe, above n 18, 23.

⁷⁰ Moisisdis, above n 52, 58.

⁷¹ See, eg, Chief Justice De Jersey, above n 2, 5; Roger Leng, ‘Losing Sight of the Defendant: the Government’s Proposals on Pre-trial Disclosure’ [1995] *Criminal Law Review* 704, 711; Flatman and Bagaric, above n 38, 329; Jenny McEwan, ‘From Adversarialism to Managerialism: Criminal Justice in Transition’ (2011) 31 *Legal Studies* 519, 520; Owusu-Bempah, ‘Defence Participation’, above n 38, 200.

⁷² Attorney-General’s Department (SA), *Transforming Criminal Justice Strategic Overview* (2015); See, eg, *Magistrates Court Criminal Rules 1992* (SA) rr 8.01, 8.02.

⁷³ Similar pressures exist elsewhere in Australia; See, eg, Nicola Berkovic, ‘Fewer Judges equals more Delays, says Wayne Martin’, *The Australian*, 19 May 2014; Emily Moulton, ‘Resources Shortage Delays Trials in WA Supreme Court, Magistrate Court hurt Victims’, *Perth Now*, 23 August 2014.

⁷⁴ See, eg, South Australia Court Administration Authority, ‘Annual Report 2012–2013’ (Report, Court Administration Authority, October 2013), 20–3; Judges of the Supreme Court of South Australia, ‘Report of the Judges of the Supreme Court of South Australia to the Attorney-General Pursuant to Section 16 of the Supreme Court Act 1935 (SA) for the Year ended 31 December 2012’ (Annual Report, Courts Administration Authority, 2013) 12; Director of Public Prosecutions, ‘Annual Report 2012–2013’ (Annual Report, Government of South Australia, 2013) 7; See also Nigel Hunt, ‘Chief Justice Kourakis Warns that he Cannot Make Budget Cuts fearing Case Backlog’, *The Advertiser*, 15 February 2013; Sean Fewster, ‘SA Chief Justice Chris Kourakis Says Retiring Judges will not be Replaced due to Funding Cuts’, *The Advertiser*, 25 June 2013; Sean Fewster, ‘Top Barrister David Edwardson, QC, says SA’s Courts are Worst in Nation Because of Labor Government’, *The Advertiser*, 5 January 2014; ‘Four South Australian Courts to Close under Cost-Cutting Measures’, *ABC News* (online), 15 September 2014 <<http://www.abc.net.au/news/2014-09-15/four-south-australian-courts-to-close/5745264>>; Attorney-General’s Department (SA), ‘*Transforming Criminal Justice Strategic Overview*’ above n 72, 14–6.

Court of South Australia.⁷⁵ It is said that modern criminal litigation has descended into an ‘almost Dickensian procedural morass’.⁷⁶ Pre-trial disclosure is a vital aspect of modern criminal procedure, shaping a trial’s nature, content and duration.⁷⁷ Reform to pre-trial defence disclosure obligations in South Australia is necessary and overdue. ‘It is beyond argument that reform is needed’.⁷⁸ Increased pre-trial defence disclosure would improve the efficiency of the criminal justice system.

Judicial officers and practitioners running modern criminal trials grapple with increased complexities and demands.⁷⁹ This results both from the growing scope and sophistication of the evidence now led by the prosecution⁸⁰ and the increased volume and complexity of the modern law, whether from Parliament⁸¹ or appellate courts.⁸²

It is no coincidence that the average length of criminal trials has drastically heightened over recent years.⁸³ For example, the New South Wales Attorney-General

⁷⁵ Sean Fewster, ‘SA District Court’s Backlog of 577 Cases Would Take More Than 18 Months To Hear, Court Reveals’, *The Advertiser*, 27 March 2015.

⁷⁶ *R v Durette* (1992) 72 CCC 3(d) 421, 440.

⁷⁷ Rozenes, ‘The Right to Silence’, above n 2, 1.

⁷⁸ Attorney-General’s Department (SA), *Transforming Criminal Justice Consultation Paper*, above n 37, 3.

⁷⁹ Patrick LeSage and Michael Code, ‘Report of the Review of Large and Complex Criminal Case Procedures’ (Report, Ontario Ministry of the Attorney-General, 2008) 5–7, 14.

⁸⁰ See, eg, Rozenes, ‘The Right to Silence’, above n 2, 2; Johnson and Latham, above n 8, 5–6.

⁸¹ See, eg, Joseph Charles Campbell and Richard Campbell, ‘Why Statutory Interpretation is Done as it is Done’ (2014) 39 *Australian Bar Review* 1; John Spencer, ‘The Drafting of Criminal Legislation: Need It Be So Impenetrable’ (2008) 67 *Cambridge Law Journal* 585; Justice Mark Weinberg, ‘The Criminal Law — a “Mildly Vituperative” Critique’ (2011) 35 *Melbourne University Law Review* 1177, 1179–91, 1195; *R v R* (*Video recording: Admissibility*) [2008] 1 WLR 2044; *R v Bradley* [2005] EWCA Crim 20, [38]–[39]. As Lord Judge has observed, ‘for too many years now the administration of criminal justice has been engulfed by a relentless tidal wave of legislation. The tide is always in flow: it has never ebbed’ (*R (Noone) v The Governor of HMP Drake Hall* [2010] 1 WLR 1743, 1768 [80]).

⁸² See, eg, Farah Farouque, ‘Judge and Jury’, *The Age* (online), 16 February 2012 <<http://www.theage.com.au/victoria/judge-and-jury-20120215-1t6em.html>>; Victorian Law Reform Commission, *Jury Directions: Final Report* (Final Report No 17) (2009) ch 3 [2.35]–[2.41]; Weinberg, ‘Mildly Vituperative Critique’, above n 81, 1191–6.

⁸³ Chris Corns, *Anatomy of Long Criminal Trials* (Australian Institute of Judicial Administration Inc, 1997) 1; Weinberg, ‘Criminal Trial Process’, above n 7, 11; South Australia, *Parliamentary Debates*, Legislative Council, 29 November 2005, 3313 (Robert Lawson); McClellan notes that 30 years ago many murder trials took only a couple of days but now two and even four weeks were not uncommon; See McClellan, above n 2, 12. Average trial lengths in the NSW District Court increased from approximately 4.6 days in 1996 to 7.25 days in 2007 (see New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 May 2009, 14677 (John Hatzistergos)). The average length of a criminal trial before the District Court of South Australia is 6.5 days (see Fewster, ‘SA District Court’s Backlog of 577 cases’, above n 75).

commented during the passage of the *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013* (NSW) that the average length of criminal trials at the New South Wales District Court had increased in length from two and a half days in the 1970s, to four days in the late 1980s, to over eleven days in 2011.⁸⁴ The ill effects of prolonged and drawn-out trials and the demands that such cases place on an overstretched criminal justice system are inestimable.⁸⁵ Concerns about the volume, length and complexity of modern criminal trials support the argument for increased defence disclosure.⁸⁶ There is, as Chief Justice De Jersey observes, ‘a seriously recognised need to keep trials within reasonable limits.’⁸⁷

The complexity and length of modern criminal trials is compounded by the fact that much time and resources may be expended in arguing issues that are not even in dispute. This was manifest in *R v Wilson*,⁸⁸ a notorious fraud trial that took nearly two years and remains the longest criminal trial in Victorian history. The two accused were charged with the creation of a false prospectus. The defence of one of the accused was that he had not seen, nor was he aware of, the prospectus. Nevertheless, all of the prosecution evidence establishing the fact that the prospectus was false was challenged despite the fact that it was irrelevant to that accused’s defence. The other accused declined to admit anything, leaving all matters in issue. The result was that the prosecution was required to strictly prove each and every bit of evidence

⁸⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 18580 (Greg Smith, Attorney-General); The average trial length at the District Court had increased from 8.3 days in 2002, to 9.03 days in 2008 and to 11.62 days in 2011; See also New South Wales, *Parliamentary Debates*, Legislative Council, 20 March 2013, 18858–9 (Michael Gallacher).

⁸⁵ See, eg, Janet Chan and Lynne Barnes, *The Price of Justice?: Lengthy Criminal Trials in Australia* (Hawkins Press, 1997) 1–4, 13–20, 44–6; Corns, above n 83, 1, 4–10; Chief Justice’s Advisory Committee on Criminal Trials, ‘New Approaches to Criminal Justice: Report of the Chief Justice’s Advisory Committee on Criminal Trials in the Superior Court of Justice’ (Report, Superior Court of Justice, May 2006) [3]; Brian Martin, ‘Adversarial Model’, above n 56, 1, 12. See, eg, *R v Lonsdale and Holland* (District Court of NSW, Judge Zahra, June 2008); see also McClellan, above n 2, 11; *R v Higgins* (1994) 71 A Crim R 429; *R v Petroulias [No 36]* [2008] NSWSC 626 (20 June 2008). A recent example of such a case was the six month trial of 12 defendants charged of terrorist offences in 2008 in *R v Benbrika* [2008] VSC 80 (20 March 2008) at the Supreme Court of Victoria. There were 27 barristers involved in the trial and the jury deliberated for 23 days. The exhaustive police investigation covered 18 months and generated 402 eight hour surveillance shifts by the police and 224 by ASIO. There were 16 400 hours of recordings including 98 000 telephone intercepts of which 62 968 related to the 12 defendants. These were eventually whittled down to 482 which were played at the trial and of which just three were arguably pivotal to the prosecution case; See Gary Hughes, ‘Lies, Bombs and Jihad’, *The Australian*, 16 September 2008.

⁸⁶ See, eg, Rozenes, ‘Fair Trial’ above n 23; *R v Ling* (1996) 90 A Crim R 376, 382 (Doyle CJ).

⁸⁷ Chief Justice de Jersey, above n 2, 5.

⁸⁸ [1995] 1 VR 163 (*Wilson*). See also New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 May 2009, 14677 (John Hatzistergos); McClellan, above n 2, 11.

irrespective of whether it was in dispute.⁸⁹ Similarly, in *Director of Public Prosecutions v Sarosi*⁹⁰ in 2000, the indiscriminate taking and argument by the defence of every point, whether bad or good, and their ‘inexcusable obfuscation’ in a straightforward case of obstructing police made a ‘travesty of the adversarial system’ and prolonged what should have been a one day trial into an ‘ungovernable monster’ of 27 days in duration.⁹¹

Whilst *Wilson* and *Sarosi* may be extreme examples, they are not unique. One trial judge as early as 1994 deplored the ‘alarming culture’ at the Victorian Bar that dictated that no case was too long or too costly, no issue too small to explore at inordinate length, no number of questions too many, no speech too long and that concessions and admissions should never be made.⁹² It is not unusual for defence lawyers to refuse to admit anything and insist that the prosecution establish each element of the alleged offence, whether or not those elements are in dispute.⁹³ A former Commonwealth DPP similarly remarked that there are defence lawyers (both privately funded and legally aided) ‘who simply instruct their counsel to leave no stone unturned’.⁹⁴

A recent example of this approach is the South Australian case of *R v Mustac*⁹⁵ (even though the accused belatedly pleaded guilty on the first day of trial). The South Australian Court of Criminal Appeal was critical of the unreasonable failure of the defence in that case to respond to a notice to admit facts. The court commented that well before the trial, the DPP had filed a notice to admit facts pursuant to s 285BA of the *CLCA* and was granted leave to serve the notice on the defence.⁹⁶ The notice identified several straightforward facts surrounding the circumstances of the charge, such as whether the accused owned a particular mobile phone found in a vehicle he

⁸⁹ Martin, ‘The Adversarial Model’, above n 56. See also Corns, above n 83, 95–101; Criminal Law Review Division, Attorney General’s Department (NSW), *Report of the Trial Efficiency Working Group* (2009) 21–3. For a recent English example, see *R v Farooqi* [2014] 1 Cr App R 8.

⁹⁰ [2000] VSC 71 (10 March 2000) (*‘Sarosi’*).

⁹¹ *Ibid* [3], [16]; See also *R v Lonsdale and Holland*, where the trial judge was compelled to abort the trial after 66 days of testimony from 100 witnesses after it was discovered that several of the jurors had been playing Sudoku during the trial. The defence had contended that the police acted improperly during a search and insisted upon the jury listening to the entire tape recording of the search (even though many hours of it was only silence) and a large amount of surveillance tapes being played. See McClellan, above n 22, 11; Criminal Law Review Division, above n 89, 19.

⁹² John Phillips, ‘The Duty of Counsel’ (1994) 68 *Australian Law Journal* 834.

⁹³ See, eg, Advisory Committee on Criminal Trials, above n 85, [62]; Criminal Law Review Division, above n 89, 72–3; Rozenes, ‘The New Procedures for the Prosecution of Complex Fraud’, above n 2; Standing Committee of Attorneys-General, ‘Working Group on Criminal Trial Procedure: Report’ (Report, Standing Committee of Attorneys-General, September 1999) 70.

⁹⁴ Rozenes, ‘The Right to Silence’, above n 2, 4.

⁹⁵ (2013) 115 SASR 461 (*‘Mustac’*).

⁹⁶ *Ibid* 467 [27].

was said to have driven.⁹⁷ The defence, once served, replied that it did not admit the facts. The Court of Criminal Appeal noted that ‘in the course of sentencing submissions, the judge asked defence counsel why facts which were “so venial as to really not interfere or should not interfere with the proper defence of the matter” should not be admitted by the defence.’⁹⁸ Defence counsel had responded at an earlier stage that it was not his role to provide the DPP with ‘assistance in proving their case’ and intimated his practice was never to respond to a notice to admit agreed facts.⁹⁹

Chief Justice Kourakis was critical of the approach of defence counsel, ruling that there was no valid reason for not admitting any facts which were capable of proof by business records or police witnesses and that were true and not genuinely in dispute.¹⁰⁰ The Chief Justice held that the failure to admit these straightforward and non-contentious facts was material to sentencing under s 285BA and reflected an unwillingness on the part of the accused ‘to facilitate the course of justice’.¹⁰¹

Mustac exemplifies the judiciary’s emphasis on reasonable efficiency and serves as a warning that a defence lawyer’s ill-considered adherence to silence may not be well received. In this case, the Appeal Court invoked s 285BA (its first apparent use in South Australia) and treated the defendant’s failure to admit facts as a factor weighing against a reduction of sentence when it considered other factors that may otherwise have had a mitigating effect, such as *Mustac*’s belated guilty plea on the first day of the trial.

Pre-trial defence disclosure is likely to improve efficiency at a time when the criminal courts are struggling to deal with the volume of work before them.¹⁰² Pre-trial defence disclosure should provide for the early identification of the issues to be contested between the parties.¹⁰³ Prosecution disclosure of ‘relevant’ material may proceed on a speculative basis in ignorance of the real issues at trial, and reciprocal pre-trial defence disclosure has the potential to make prosecution disclosure more accurate and comprehensive.¹⁰⁴ It will also serve to reduce the length and complexity of the

⁹⁷ Ibid 468–9 [28].

⁹⁸ Ibid 469 [30].

⁹⁹ Ibid 469 [30]–[31]. See also *R v Gannon* (2012) 113 SASR 1, 3[9], where the defence failed to even respond to the prosecution’s application to agree facts under s 285BA.

¹⁰⁰ (2013) 115 SASR 461, 469 [32].

¹⁰¹ Ibid 470 [36]. This aspect of the decision was appealed to the High Court. The High Court refused leave to appeal. See Transcript of Proceedings, *Mustac v The Queen* [2013] HCATrans 326 (13 December 2013).

¹⁰² New South Wales Law Reform Commission, *Report No 95*, above n 2, 118 [3.107].

¹⁰³ See, eg, Royal Commission on Criminal Justice, above n 48, 100 [73]; Leng, above n 71, 708; Martin, ‘Defence Disclosure’, above n 23, [1]; Flatman and Bagaric, above n 38, 329, 334; Abraham, above n 2, 3, 6, 14; New South Wales Law Reform Commission, ‘Report No 95’, above n 2, 118–9 [3.107]; Auld, above n 41, 460 [156]; Sulan, above n 3, 3.

¹⁰⁴ See, eg, Abraham, above n 2, 6, 13; Plater and de Vreeze, above n 14, 166; Rofe, above n 18, 1, 23.

trial to ensure that it only focuses on contested issues.¹⁰⁵ The necessary evidence to be adduced will also be limited once the real issues become clear.¹⁰⁶ Confining the issues is likely to benefit the jury's understanding of the case and evidence presented at trial.¹⁰⁷ Increased defence disclosure may lead to the charge being withdrawn or an earlier resolution of the case through guilty pleas.¹⁰⁸ The early identification and determination of issues also provides certainty as to the content and duration of a criminal trial.¹⁰⁹

Though some delay in the progress of criminal proceedings is both necessary and inevitable (such as until the prosecution satisfies its duty of disclosure), it is avoidable delay that should be addressed.¹¹⁰ Brian Martin QC states that 'carefully managed' changes to the adversarial system will not unfairly affect the interests of the accused.¹¹¹ Procedural reforms must recognise the interests of all parties within the criminal justice system, while maintaining the accused's right to a fair trial. While it is permissible for the defence to insist that the prosecution prove each element of the alleged offence (if that is the approach the defence wish to follow), care should be taken to ensure that the defence's conduct remains responsive, considered and reasonable in the circumstances. As McEwan argues, it is not a fundamental defence right to be able to compel prosecutors to operate in the dark and to force them to spend their limited time and resources amassing evidence to rebut a range of possible defences, which may not even be pleaded, or otherwise risk an 'unmeritorious acquittal' arising from a distorted or inadequate presentation of the facts.¹¹²

To require the defence to disclose its broad case before trial is also consistent with the wider purpose of a criminal trial. Though it is understandable why, as a matter

¹⁰⁵ Martin, 'Prosecution Issues', above n 17, 8; South Australia, *Parliamentary Debates*, Legislative Council, 24 November 2005, 3256 (Paul Holloway); New South Wales, *Parliamentary Debates*, Legislative Council, 20 March 2013, 18858 (Michael Gallacher).

¹⁰⁶ See, eg, Aronson, above n 2, 98; McClellan, above n 22, 187; Joanna Glynn, 'The Royal Commission on Criminal Justice: Part 4: Disclosure' [1993] *Criminal Law Review* 841, 845; *Mustac* (2013) 115 SASR 461, 470 [35].

¹⁰⁷ See, eg, New South Wales Law Reform Commission, 'Report No 95', above n 2, 117 [3.105]; Christopher Craigie, 'Management of Lengthy and Complex Counter Terrorism Trials: an Australian Prosecutor's Perspective' (Speech delivered at the Australian Institute of Judicial Administration Criminal Justice in Australia and New Zealand — Issues and Challenges for Judicial Administration Conference, Sydney, 8 September 2011) 12; Criminal Law Review Division, above n 89, 92; McClellan, above n 2, 186; New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 18537 (Greg Smith, Attorney-General).

¹⁰⁸ Royal Commission on Criminal Justice, above n 48, 97 [59]; See also Glynn, above n 106, 841; NSW Law Reform Commission, 'Report No 95', above n 2, 118 [3.107].

¹⁰⁹ Rozenes, 'The Right to Silence', above n 2, 6.

¹¹⁰ Weinberg, 'Criminal Trial Process', above n 7, 3.

¹¹¹ Martin, 'Adversarial Model', above n 56, 8.

¹¹² Jenny McEwan, 'Truth, Efficiency and Cooperation in Modern Criminal Justice' (2013) 66 *Current Legal Problems* 203, 209.

of tactics, a defendant and/or his or her lawyers might prefer to keep their case close to their chest, that is not a valid reason for preventing a full and fair hearing on the issues canvassed at trial.¹¹³ As Auld LJ observes:

A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculcate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of those principles.¹¹⁴

B *Reducing Costs*

Improving the efficiency of criminal trials should benefit all parties, namely victims, the accused and the public that the court serves.¹¹⁵ The reduction of costs, delays and backlogs in the court system will spare victims, witnesses and jurors the time and emotional stress of unnecessarily prolonged proceedings.¹¹⁶ An accused may also enjoy sentencing benefits for early cooperation if found guilty, as well as decreased legal costs.¹¹⁷ Indeed, a level of informal pre-trial disclosure by the defence currently often exists in criminal proceedings,¹¹⁸ indicating that it may well be in the interests of the accused for his or her lawyer to divulge certain material at an early stage.

C *Increased Pre-Trial Defence Disclosure is Consistent with Counsel's Duty to Assist the Court*

Traditionally, the parties in an adversarial trial are viewed as opponents, battling to promote the interests of their client above all else.¹¹⁹ The Supreme Court of

¹¹³ *R v Gleeson* [2004] 1 Cr App R 406, 416.

¹¹⁴ Auld, above n 41, Ch 10 [154].

¹¹⁵ See, eg, Craigie, above n 107, 4; Abraham, above n 2, 14.

¹¹⁶ Standing Committee of Attorneys-General, above n 93, 36; Victoria, *Parliamentary Debates*, Legislative Council, 2 June 1999, 1041 (Carlo Furletti); New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 18537 (Greg Smith, Attorney-General).

¹¹⁷ Victoria, *Parliamentary Debates*, Legislative Council, 2 June 1999, 1041 (Carlo Furletti); Sulan, above n 2, 3. See also *Criminal Law (Sentencing) Act 1988* (SA) s 10B.

¹¹⁸ See, eg, Weinberg, 'Criminal Trial Process', above n 7, 14; Kathy Mack and Sharyn Roach Anleu, 'Reform of Pre-Trial Criminal Procedure: Guilty Pleas' (1998) 22 *Criminal Law Journal* 263, 274; Law Reform Commission of Western Australia, above n 7, 205 [24.15]; New South Wales Law Reform Commission, 'Report No 95', above n 2, 84 [3.25]; Rozenes, 'The Right to Silence', above n 2, 3–5.

¹¹⁹ Carrie Menkel-Meadow, 'The Trouble with the Adversary System in a Post-Modern Multi-Cultural World' (1996) 38 *William and Mary Law Review* 5, 13; Finkelstein, above n 7, 135–6.

Canada in *R v Stinchcombe*¹²⁰ observed that under such a model, the defence had ‘no obligation to assist the prosecution’ in a criminal trial in the context of disclosure and was ‘entitled to assume a purely adversarial role toward the prosecution’.¹²¹ This approach is reflected in a number of decisions of the High Court of Australia which emphasise the accusatorial nature of a criminal trial and that the defence is entitled to say and do nothing and is entitled to put the prosecution to strict proof and establish each element of the alleged offence beyond reasonable doubt.¹²² The Victorian Bar *Practice Rules* provide that ‘a barrister appearing for the accused is under no duty, other than by compulsion of law, to disclose to the court or the prosecution the nature of the defence case’.¹²³

The overriding duty of counsel to act diligently and expeditiously has become increasingly prominent over recent years.¹²⁴ The paramount duty of all lawyers to promote the efficient use of public resources and court time has been emphasised in both English¹²⁵ and Australian¹²⁶ Court Rules (though the Australian Rules do not do this to the same extent as the English Rules) and endorsed in numerous Australian

¹²⁰ [1991] 3 SCR 326.

¹²¹ *Ibid* 332. See also Dawkins, above n 50, 38.

¹²² See, eg, *Petty v The Queen* (1991) 173 CLR 95, 99; *Azzopardi v The Queen* (2001) 205 CLR 50, 64 [34]; *Dyers v The Queen* (2002) 210 CLR 285.

¹²³ Victorian Bar, *Practice Rules — Rules of Conduct and Compulsory Continuing Professional Development Rules* (at 22 September 2009) r 153.

¹²⁴ Standing Committee of Attorneys-General, above n 93, 70; Hannah Quirk, ‘The Significance of Culture in Criminal Procedure Reform: Why the Revised Disclosure Scheme Cannot Work’ (2006) 10 *International Journal of Evidence and Proof* 42, 55–6.

¹²⁵ *Criminal Procedure Rules* 2013 (UK). The objectives of the English Rules include: acquitting the innocent and convicting the guilty; dealing with the prosecution and defence fairly; respecting the interests of witnesses and dealing with the case in a way that takes into account the gravity of the offence, the complexity of what is in issue, the severity of the consequences to the defendant and others affected and the needs of other cases. Rule 1.2 imposes upon all the participants in a criminal case a duty to prepare and conduct the case in accordance with the overriding objective; to comply with the rules; importantly, to inform the court and all parties of any significant failure, whether or not the participant is responsible for that failure and to take any procedural step required by the Rules. Rule 3.2 imposes upon the court a duty to further that overriding objective by actively managing the case. These Rules apply to all criminal courts and all stages of the criminal process and, as observed in *R (On the Application of the DPP) v Chorley Justices* [2006] EWHC Admin 1795 [20], ‘have effected a sea change in the way in which cases should be conducted ... The rules make clear that the overriding objective is that criminal cases be dealt with justly; that includes ... dealing with the case efficiently and expeditiously.’ See also *Newcombe v Crown Prosecution Service* [2013] EWHC 2160 (Admin) [7]; *R v Clarke* [2013] EWCA Crim 162 [75]; *R v Siddall* [2006] EWCA Crim 1353 [57]; See also McEwan, ‘From Adversarialism to Managerialism’, above n 61.

¹²⁶ See above n 61.

cases.¹²⁷ For example, in Victoria, it has been held that: ‘... part of the responsibility of all counsel in any trial, criminal or civil, is to co-operate with the court and each other so far as is necessary to ensure that the system of justice is not betrayed.’¹²⁸ In the High Court of Australia, Mason CJ observed:

notwithstanding that the client may wish to chase every rabbit down its burrow ... a barrister’s duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client’s success, but also to the speedy and efficient administration of justice.¹²⁹

This approach is confirmed in the South Australian *Barristers’ Conduct Rules*, which provide that a barrister must promote the efficient administration of justice by confining the case to those issues genuinely in dispute and occupying ‘as short a time in court as is reasonably necessary to advance and protect the client’s interests’.¹³⁰ This approach has gained wide acceptance.¹³¹ As Ipp J points out, in light of modern conditions and an overburdened legal system, it is no longer open for defence counsel to argue or take every point indiscriminately. The paramount duty of lawyers to be officers of the court means they should make only points that are reasonably arguable and should co-operate to reduce or resolve unnecessary disputes.¹³² The criminal jurisdiction cannot be immune from this approach.

The duty to act expeditiously may raise issues of conflict with a lawyer’s duties to their client,¹³³ notably the duty to ‘promote and protect fearlessly and by all proper and lawful means the lay client’s best interests’.¹³⁴ The Victorian Court of Appeal requires that *both* duties must be served, stating that a legal practitioner must ensure

¹²⁷ See, eg, *Richardson v The Queen* (1974) 131 CLR 116, 123; *Wollongong City Council v FPM Constructions Pty Ltd* [2004] NSWSC 523 (10 June 2004) [54] (Einstein J); *A Team Diamond Headquarters Pty Ltd v Main Road Property Group Pty Ltd* [2009] VSCA 208 (24 September 2009) [15] (Redlich JA and Beach AJA); *Virgtel Ltd v Zabusky [No 2]* [2009] QCA 349 (10 November 2009) [30] (McMurdo P); See further, Ipp, above n 21, 95–7; Chief Justice Marilyn Warren, ‘The Duty Owed to the Court — Sometimes Forgotten’ (Speech delivered at the Judicial Conference of Australia Colloquium, Melbourne, 9 October 2009) 6–7.

¹²⁸ *Wilson* [1995] 1 VR 163, 180.

¹²⁹ *Giannarelli v Wraith* (1988) 165 CLR 543, 556.

¹³⁰ South Australian Bar Association, *Barristers’ Conduct Rules* (at February 2010) r 57(a), (e).

¹³¹ See, eg, *R v Mellifont* (1992) 64 A Crim R 75, 80; James Spigelman, ‘The “New Public Management” and the Courts’ (2001) 75 *Australian Law Journal* 748, 749; Freiberg, above n 9, 218; Warren, above n 127, 6.

¹³² Ipp, above n 21, 99.

¹³³ See, eg, *Rondel v Worsley* [1969] 1 AC 191, 227 (Lord Reid); Owusu-Bempah, ‘Defence Participation’, above n 38, 191–2.

¹³⁴ South Australian Bar Association, *Barristers’ Conduct Rules* (14 November 2013) r 37(a).

that the ‘course chosen in the interests of the client is compatible with this overarching duty (to the court)’.¹³⁵

These apparently competing duties can be reconciled. Increased pre-trial defence disclosure can assist an accused and does not necessitate abandoning a robust defence. As Warren CJ points out, the interests of the client are usually served best by the presentation of only the real issues in dispute.¹³⁶ Defence counsel can and should be ‘adversarial’ while appreciating that the defence’s strongest possible argument is likely to be the one that focuses the judge and/or jury’s minds directly and concisely on the defence’s best points and does not irritate or confuse with protracted or wasteful tactics. As such, cooperation with the prosecution in identifying the issues in dispute and the defences to be raised is useful and beneficial for all parties. Finally, it is clear that counsels’ duty to the court is paramount, and the obligation to effectively use the limited time and resources of the court precludes reliance upon such devices.¹³⁷

V LESSONS FROM OTHER JURISDICTIONS’ PRE-TRIAL DISCLOSURE SCHEMES

This article now examines the comprehensive regimes of defence disclosure that exist in Victoria, England and New South Wales to identify what measures South Australia could successfully adopt. Unfortunately, in the various jurisdictions, efforts at successful reform have proved elusive.¹³⁸ The formulation of a fair yet efficient and workable disclosure regime has been described as impossible.¹³⁹ No disclosure scheme attracts universal acceptance.¹⁴⁰ Nevertheless, this should not deter efforts to establish the best possible system, which should be continually reviewed and improved as practice norms and attitudes evolve.

A 1993 Reforms in Victoria

The first extensive pre-trial disclosure regime in Australia was established in Victoria by the *Crimes (Criminal Trials) Act 1993*. This Act was introduced to ‘facilitate the efficient conduct of criminal trials’.¹⁴¹ Under this Act, the defence was obliged to disclose elements of the alleged offence which were not admitted and notify the

¹³⁵ *A Team Diamond Headquarters Pty Ltd v Main Road Property Group Pty Ltd* (2009) 25 VR 189, 193–4 [15]; See also Ipp, above n 21, 103.

¹³⁶ Warren, above n 127, 6.

¹³⁷ *Ibid.*

¹³⁸ Plater and de Vreeze, above n 14, 183–5.

¹³⁹ Martin Zander, ‘Mission Impossible’ (2006) 156 *New Law Journal* 518. See also Mike Redmayne, ‘*Criminal Justice Act 2003: (1) Disclosure and its Discontents*’ [2004] *Criminal Law Review* 441, 461–2.

¹⁴⁰ *Ibid.*

¹⁴¹ *Crimes (Criminal Trials) Act 1993* (Vic) s 1.

prosecution of facts and inferences within the prosecution statement with which issue was taken. They were also required to divulge any expert witness statements, reply to propositions of law within the prosecution statement and disclose any propositions of law the defence intended to rely on at trial.¹⁴² These duties did not apply in all cases and were only invoked when ordered by a judge.¹⁴³ The obligations proved controversial and were rarely used in practice.¹⁴⁴ The scheme was frustrated by the combative approach of participants, notably defence lawyers.¹⁴⁵ The scheme was amended in 1999 by the *Crimes (Criminal Trials) Act 1999* (Vic) to narrow the matters that the defence needed to disclose. The Victorian Attorney-General explained that the 1999 Act was designed to build upon the 1993 Act and allow effective judicial case management, enable the issues in dispute to be defined prior to the trial and facilitate effective discussion between the parties.¹⁴⁶

B 1996 Reforms in England, Wales and Northern Ireland

The *Criminal Procedure and Investigations Act 1996* ('CPIA') introduced comprehensive defence disclosure requirements in England and Wales.¹⁴⁷ Changes in 2003 detail the contents of a defence statement in response to prosecution disclosure.¹⁴⁸ This includes the disclosure of any particular defence or defences an accused tends to rely upon, as well as a response to whether the defence takes issue with aspects of the prosecution's case.¹⁴⁹

The English disclosure system has attracted support.¹⁵⁰ Lord Justice Auld, for example, stated that the English requirements were a fair way to identify the issues and may have the effect of allowing the prosecution to disclose further material that could assist the defence, once the prosecution is put on notice of the defence's case.¹⁵¹ Conversely to the situation in Victoria, the British Parliament has not only retained

¹⁴² Ibid ss 4, 5(1)(f), 11.

¹⁴³ Ibid s 5(1)(f). See *R v Garner* [1994] 1 VR 400, 403–4.

¹⁴⁴ Victoria, *Parliamentary Debates*, Legislative Assembly, 5 May 1999, 812 (Jan Wade, Attorney-General); New South Wales Law Reform Commission, 'Report No 95', above n 2, 86 [3.31].

¹⁴⁵ See Dawkins, above n 50, 48–9, 52; Corns, above n 83, 38.

¹⁴⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 5 May 1999, 812 (Jan Wade, Attorney-General). The 1999 Act has also encountered obstacles and strong opposition from the legal profession; See Moisidis, above n 52, 75.

¹⁴⁷ *Criminal Procedure and Investigations Act 1996* (UK) ss 5–6E.

¹⁴⁸ *Criminal Justice Act 2003* (UK) s 33(2).

¹⁴⁹ *Criminal Procedure and Investigations Act 1996* (UK) s 6A(1)(a)–(c).

¹⁵⁰ See, eg, McEwan, 'Truth, Efficiency and Justice' above n 112, 204–6, 209–10; Gross and Treacy, above n 20, 1–2 [23].

¹⁵¹ Auld, above n 41, 455 [142].

the 1996 disclosure model but has strengthened the defence disclosure requirements on more than one occasion.¹⁵²

However, the English defence disclosure regime has often been described as a failure.¹⁵³ Defence statements have often been noted to be inadequate and failing to meet the requirements of the *CPIA*.¹⁵⁴ Commentators note that the English system has been frustrated by the adversarial culture of defence lawyers and their perhaps unsurprising reluctance to co-operate with a process that they consider incriminates defendants.¹⁵⁵

C 2013 Reforms in New South Wales

The 2013 NSW Act is broadly based on the Victorian and English provisions. Previously, the court could order pre-trial disclosure obligations on the prosecution and defence on a case-by-case basis.¹⁵⁶ Though these powers were only sparingly used,¹⁵⁷ there is some indication that such pre-trial disclosure reduced trial time by narrowing the issues in dispute.¹⁵⁸ However, there were continued concerns in New South Wales over the length of criminal trials and delays.¹⁵⁹ The New South Wales Trial Efficiency Working Group stated that, despite some progress in addressing

¹⁵² The first amendments through s 33 of the *Criminal Justice Act 2003* that came into operation on 4 April 2005 require the accused to set out the nature of the defence in general terms, to indicate the matters upon which the accused takes issue with the prosecution case and to set out in relation to each such matter why issue is taken. The *CPIA* was further tightened by s 60 of the *Criminal Justice and Immigration Act 2006* that came into operation on 3 November 2008 and requires the defence to notify the prosecution of the particulars of any matters of fact on which the accused intends to rely on in his or her defence. There is an additional requirement for the defence to provide to the prosecution the names, addresses and dates of birth of any defence witnesses.

¹⁵³ See, eg, Criminal Law Review Division, above n 89, 45–6; Auld, above n 41, 447 [121]; David Ormerod, ‘Improving the Disclosure Regime’ (2003) 7 *International Journal of Evidence and Proof* 102, 102; Plater and de Vreeze, above n 14, 183; Taylor, ‘Disclosure Sanctions Regime’, above n 23, 272–4.

¹⁵⁴ See, eg, Quirk, above n 124, 42–59; Joyce Plotnikoff and Richard Woolfson, ‘A Fair balance?’ Evaluation of the Operation of Disclosure Law’ (Occasional Paper No 76, Research, Development and Statistics Directorate, 2001) 131, 136. For an illustration see *R v Bryant* [2005] EWCA Crim 2079 [12].

¹⁵⁵ Quirk, above n 124, 46; Plotnikoff and Woolfson, above n 154, 131.

¹⁵⁶ *Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001* (NSW) sch 1 [2].

¹⁵⁷ See, eg, Criminal Law Review Division, above n 89, 6–7, 28–9; Johnson and Latham, above n 8, 10; New South Wales, *Parliamentary Debates*, Legislative Council, 20 March 2013, 18859 (Michael Gallacher).

¹⁵⁸ Standing Committee on Law and Justice, ‘Criminal Procedure Amendment (Pre-Trial Disclosure) Act 2001’ (Report No 26, NSW Legislative Council, 8 December 2004) 34 [4.10].

¹⁵⁹ Criminal Law Review Division, above n 89, 10; Standing Committee on Law and Justice, above n 158, 7, 32; New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 March 2013, 18578 (Greg Smith, Attorney-General).

delays, ‘there are nevertheless compelling grounds to suggest that the efficiency of criminal trials could be improved’.¹⁶⁰

Though there was support for the 2013 NSW Act,¹⁶¹ there was also criticism.¹⁶² Ian Barker QC, for example, argued that enhanced defence disclosure was unnecessary. He noted that more than 95% of criminal cases involve guilty pleas and of those that eventually proceed to trial before a jury, more than 90% are straightforward and speedy.¹⁶³ Barker states that agreements and informal disclosures between the prosecution and defence occur frequently and should lead to voluntary disclosure protocols, rather than any mandatory disclosure scheme.¹⁶⁴ However, Barker’s view overlooks the importance of defence disclosure in those 10% of criminal cases that are lengthy and complex in nature. It also overlooks the fact that even comparatively straightforward cases may give rise to subtle issues of disclosure¹⁶⁵ and the undesirable consequences of ‘trial by ambush’. As Smith argues:

It should be noted that the problems associated with defence by ambush are not confined to those cases where it manifests itself in a way which necessarily catches the prosecution off guard. The fact that the defence ... is not obliged to serve a defence statement means that the prosecution must prepare itself for every conceivable defence. If the prosecution simply prepares for the obvious defence it risks being taken by surprise and being ‘headed off at the pass’. Usually preparation for the obscure, undisclosed, defence will turn out to have been overcautious and unnecessary. If the defence were required to give advance notice of the issues ... it would not simply avoid ambush defences but would save the prosecution’s time (and the public’s money) in preparing to counter phantom

¹⁶⁰ Criminal Law Review Division, above n 89, 15.

¹⁶¹ See, eg, Jason Ardit, ‘Criminal Trial Efficiency’ (E-brief No 11/09, Parliamentary Library Research Service, Parliament of NSW, 2009); Megan Latham, ‘How will the new Cognate Legislation Affect the Conduct of Criminal Trials in NSW?’ (2013) 25 *Judicial Officers Bulletin* 57.

¹⁶² See, eg, David Dixon and Nicholas Cowdery, ‘Silence Rights’ (2013) 17 *Australian Indigenous Law Review* 23, 25–6, 34; David Hamer, ‘Mandatory Defence Disclosure in NSW’ (2013) 38 *Alternative Law Journal* 129. Of the interested parties on the relevant Working Group, it was reported that only Latham and McClellan JJ supported the enhanced defence disclosure requirements whilst the new regime was opposed by the DPP, the Chief Judge of the NSW District Court and defence lawyers as unnecessary and bureaucratic. See Harriet Alexander, ‘Push for Unpopular Laws that Reduce Safeguards’, *Sydney Morning Herald* (online), 14 March 2013 <<http://www.smh.com.au/nsw/push-for-unpopular-laws-that-reduce-safeguards-20130313-2g0t7.html>>.

¹⁶³ Griffith, above n 3, 24.

¹⁶⁴ *Ibid.*

¹⁶⁵ Colin Wells, *Abuse of Process: A Practical Approach* (Legal Action Group, 2006) 70. Prosecutors ‘cannot be expected to know what might be useful to the defence at trial’ (Quirk, above n 124, 52).

defences that were never contemplated. It would also save the court wasting time on hearing evidence on matters which are not in dispute.¹⁶⁶

A disclosure regime is likely to not have the effect of stifling voluntary disclosure between parties, but, by making defence disclosure more common, should rather normalise and encourage it in the culture of criminal practice. Reforms should be drafted in a way to make it clear that any mandatory requirements do not prohibit the parties making further additional disclosure arrangements should they desire.

D Lessons to be Learnt From the Other Jurisdictions

From examining the regimes in the jurisdictions above, it can be readily concluded that to be successful, pre-trial disclosure schemes should improve efficiency. Without this, including time and cost savings, their purpose will be frustrated. A main concern is that increased pre-trial defence disclosure may result in an increase in pre-trial applications or interlocutory proceedings, thus leading to more delay before any trial.¹⁶⁷ The criminal trial process should not become more cumbersome as a result of pre-trial disclosure.¹⁶⁸

It cannot, however, be expected that pre-trial disclosure will increase efficiency in all cases. It might cause further delay in some matters. However, this possibility does not weaken the argument for an improved scheme with a practical focus. It is suggested that defence disclosure requirements could be effective overall in reducing the length of proceedings. Pre-trial defence disclosure obligations should not be limited to being imposed by court order. This would risk the possibility that courts may rarely order defence disclosure. In order to achieve consistency and real effect, it is preferable that a statutory duty of defence disclosure exists, which should arise in *any* contested indictable case to be heard before a superior court.

Defence disclosure obligations could apply automatically to all defendants charged with an indictable offence. This article argues that defence disclosure obligations should arise in any contested indictable case to be heard before a superior court but that the summary courts should be exempted from such a requirement. A blanket rule of mandatory defence disclosure in all criminal cases, whether or not they are actually needed, is likely to prove an unnecessary and even unhelpful bureaucratic formality and any such rules may have the effect of causing greater delays and costs.

¹⁶⁶ Victor Smith, 'Defence by Ambush' (2004) 168 *Justice of the Peace Notes* 24. Though Smith argues in favour of extending mandated defence disclosure to summary proceedings, his underlying themes are of general application.

¹⁶⁷ Royal Commission on Criminal Justice, above n 48, 222 [9]; Dawkins, above n 50, 41–2; NSW Standing Committee on Law and Justice, above n 158, 36–7 [4.14]–[4.15]; Criminal Law Review Division, above n 89, 29; Craigie, above n 107, 13.

¹⁶⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 26 May 1999, 1254–5 (Robert Hulls).

Of course, without the acceptance of the judiciary and prosecution and defence lawyers, new statutory procedures and duties are of little use.¹⁶⁹ The inflexibility of such obligations compared to nuanced voluntary disclosure between skilful lawyers means that they may well fail to be accepted by the legal profession. In both Victoria and England, the reluctance of defence lawyers to comply with statutory disclosure obligations and the unwillingness or inability of judges to enforce such statutory obligations was notable.¹⁷⁰

Critically, a feasible level of defence disclosure must be required for any reforms to be successful. To understand what level is appropriate, it is helpful to grasp that defence disclosure may include the divulging of a wide range of fact, law, evidence or responses to the prosecution's case. The options fall into three categories.¹⁷¹

First, the defence may be required to state the general terms of their case, including an identification of the aspects of the prosecution's case with which they take issue and perhaps the facts of the case they intend to present.¹⁷² Requiring the defence to state the general terms of their case is controversial. Any such proposal is likely to attract opposition from defence lawyers and the judiciary may prove reluctant to enforce strict compliance.

Second, the defence may be required, (as under s 285BB of the *CLCA*), to specify any defences they intend to rely on at trial.¹⁷³ The necessity of requiring the accused to disclose particular defences is sometimes questioned. It is argued that any competent prosecutor can anticipate most defences before a trial as they are generally identifiable from the relevant evidence¹⁷⁴ (especially as most accused volunteer their account in interview with the police)¹⁷⁵ and that so called 'ambush' defences that

¹⁶⁹ Wade, above n 114, 812, 813; Criminal Law Review Division, above n 89, 47. See also below Chapter V: Enforceability and Sanctions — *A Trial Participants Influencing Enforceability*.

¹⁷⁰ Wade, above n 144, 812; Plotnikoff and Woolfson, above n 154, 131; Criminal Law Review Division, above n 89, 46; Quirk, above n 124, 46; Plater and de Vreeze, above n 14, 165–6.

¹⁷¹ NSW Law Reform Commission, 'Report 95', above n 2, 128–30 [3.129]–[3.135].

¹⁷² *Ibid* 128 [3.129]; Criminal Law Review Division, above n 89, 83.

¹⁷³ NSW Law Reform Commission, Report 95, above n 2, 129 [3.131]. Under the UK regimes, the defence must disclose both the general nature of their defence and any particular defences that they intend to raise at trial (see *Criminal Procedure and Investigations Act 1996* (UK) s 6A(1)(a); *Criminal Procedure (Scotland) Act 1995* s 70A(9)(a)).

¹⁷⁴ See, eg, Redmayne, 'Process Gains and Process Values', above n 8; Editorial, 'Unacceptable Disclosure' (1992) 142 *New Law Journal* 1529; Rozenes, 'The Right to Silence', above n 2, 7–8.

¹⁷⁵ Roger Leng, 'The Right to Silence Debate' in David Morgan and Geoffrey Stephenson (eds) *The Right to Silence in Criminal Investigations* (Blackstone Press, 1994) 19, 22–8 (only 5% of defendants refused to answer questions); John Pearse and Gisli Gudjonsson, 'Police Interviewing and Legal Representation: a Field Study' (1997) 8 *Journal of Forensic Psychiatry* 200, 200–8 (the majority of suspects in a survey where the majority had been legally represented in interview not only answered all

take the prosecution by surprise are rare in practice.¹⁷⁶ However, it is by no means always possible to anticipate what defence will be mounted at trial.¹⁷⁷ A significant number of accused exercise their right to silence in interview with the police.¹⁷⁸ Also ambush defences, whilst not routine, are far from unknown in both Australia¹⁷⁹ and

questions but even admitted their guilt); NSW Law Reform Commission, Report No 95, above n 2, 15 [2.15] (noting ‘most’ suspects answered questions in interview and quoting three Australian studies showing only 4, 7 and 9% of suspects failed to answer questions: at 16 [2.16].

¹⁷⁶ See, eg, Roger Leng, *The Right to Silence in Police Interrogation: A Study of Some of the Issues Underlying the Debate* (Her Majesty’s Stationary Office, 1993) 58; Mr G Flatman QC, Director of Public Prosecutions, Office of the Director of Public Prosecutions (Vic), Submission to Scrutiny of Acts and Regulation Committee, Parliament of Victoria, *Inquiry into the Right to Silence*, 1998, 8, quoted in Scrutiny of Acts and Regulation Committee, Parliament of Victoria, *Inquiry into the Right to Silence — Final Report* (1999) 6 [2.3.3]; NSW Law Reform Commission, Discussion Paper No 41, above n 59, [3.46].

¹⁷⁷ For example in 2003 in *R v Huntley* [2005] EWHC 2083 (QB) (29 September 2005), the Soham murder trial, it was not until the end of the third week of the trial that the accused first volunteered his ‘preposterous’ defence that the two young female victims had been accidentally killed by him: see Editorial, ‘Accounting for Huntley’, *The Guardian* (online), 18 December 2003, <<http://www.theguardian.com/uk/2003/dec/18/soham.ukcrime9>>. In a similar vein, the trial of two of the individuals responsible for the foiled July 2005 London terrorist bombing was delayed by nine months after they, came up with a completely new defence at the start of the original date fixed for trial, and, in the words of the trial judge, ‘attempted cynically to manipulate the process of this court’ (Lord Justice Brian Leveson, ‘Criminal Justice in the 21st Century’, the Roscoe Lecture, Liverpool, 29 November 2010).

¹⁷⁸ See, eg, NSW Law Reform Commission, *The Right to Silence*, Research Report No 10 (2000) [2.12]–[2.18]; Coretta Phillips and David Brown, *Entry into the Criminal Justice System: a Survey of Police Arrests and their Outcomes* (HO Research Study 185, Home Office, 1998) xiv (13% of suspects refused to answer any questions and 10% refused to answer some questions); Tom Bucke, Robert Street and David Brown, *The Right of Silence: The Impact of the Criminal Justice and Public Order Act 1994* (Home Office Research Study 199, Home Office, 2000) 29–31 (noting that their survey had found 16% of suspects declined, either wholly or in part, to answer questions in interview and quoting other surveys that had found 22% and 23% of defendants did likewise). One Northern Irish survey even found over half of the suspects had refused to answer questions (see Ian Dennis, ‘The *Criminal Justice and Public Order Act*: the Evidence Provisions’ [1995] *Criminal Law Review* 4, 11). This trend is more pronounced for suspects facing more serious crimes: see Greer, above n 3, 723; David Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon Press, 1997) 231, 235.

¹⁷⁹ See NSW Law Reform Commission, *Research Report*, above n 194, [3.64]–[3.65]. It was also noted that ambush defences were not ineffectual when used, but contributed to the outcome of the trial: at [3.69]–[3.70]. For examples of ambush defences, see *R v Clark* [2005] VSCA 294 (9 December 2005) [11]; *DPP v Cummings* [2006] VSC 327 (11 September 2006) [69]–[70]; *R v Stoten* [2010] QSC 136 (27 January 2010). The expert evidence adduced at the controversial trial of Eugene McGee in South Australia in 2005 explaining his flight from the scene of a fatal accident due to automatism can be seen as an ‘ambush’ defence. Prosecution counsel described it as a ‘good ambush’

even England (where such defences, despite strong statutory and judicial censure, persist).¹⁸⁰

Increased certainty promotes prosecutorial efficiency, which is in the public interest. Requiring an accused to disclose their defence before a trial should require the provision of a good reason at trial if they wish to amend the defence or raise a different one.

Third, there exists a category of disclosure that may be described as ‘machinery provisions’ concerned with expert and other technical evidence that will often be in dispute.¹⁸¹ Sections 285BB¹⁸² and 285BC¹⁸³ of the *CLCA* can be seen as examples of this form of defence disclosure.

Finally, if the defence wishes to put the prosecution to strict proof on each element of the offence and raise no positive defence, this entitlement should be retained under any disclosure regime. The English Court of Appeal found that an accused may satisfy the defence statement requirements under the *CPIA* by simply stating that it puts the prosecution to proof and raises no positive defence.¹⁸⁴ However, the vital qualification to this entitlement (as was made clear in *R v Rochford*)¹⁸⁵ is that an accused should not raise a positive defence and, if the accused does so, potential adverse consequences should result.

E *The Take-Away for South Australia*

Defence disclosure in South Australia should be limited to the present obligations in the *CLCA* as well as the requirement that the defence also disclose the aspects of the prosecution case with which they have issue (including the basis of that issue) and any positive defence that they intend to raise. This obligation should arise in any contested indictable case to be heard before a superior court. This is the most pragmatic and effective solution, which aims to assist the prosecution and promote

that he had had ‘little effective opportunity’ to counter (see James, above n 26, 124, 128), though it should be noted the approach of defence counsel was entirely within the then South Australian law: at 120.

¹⁸⁰ See, eg, *R v Pydar Justices Ex parte Foster* (1995) 160 JP 87; *R v Gleeson* [2004] 1 Cr App R 406, *Murphy v DPP* [2006] EWHC 1753; *Malcolm v DPP* [2007] 1 WLR 1230; *R v Penner* [2010] Crim LR 936, *R v Norwich Magistrates’ Court* [2011] EWHC Admin 82; *R v Farooqi* [2013] 1 Cr App R 8.

¹⁸¹ NSW Law Reform Commission, Report 95, above n 2, 130 [3.134]; Criminal Law Review Division, above n 89, 83.

¹⁸² The defence in South Australia must notify the prosecution under s 285BB if it is willing to agree to various technical types of evidence to be led by the prosecution. See also above n 32.

¹⁸³ The defence in South Australia must provide the prosecution under s 285BC with details of any expert evidence it proposes to adduce. See also above Part II.

¹⁸⁴ See *R v Rochford* [2011] WLR 534, 540–1 [24]; Owusu-Bempah, ‘Defence Participation’, above n 38, 187.

¹⁸⁵ [2011] WLR 534.

efficiency while also recognising the accusatorial characteristic of the common law criminal trial and striking an appropriate balance. As the Standing Committee of Attorneys-General summarises, '[i]t must be recognised that a defendant should not be expected to identify the defence case to the same depth and breadth as the Crown.'¹⁸⁶

Another option to consider in conjunction with stronger statutory requirements is the appointment of specialist judges to conduct and oversee pre-trial conference or directions hearings.¹⁸⁷ Such judges may have particular expertise in facilitating disclosure and agreement on issues in dispute.¹⁸⁸ The judge's prospects of encouraging agreement on issues not in dispute may be affected by factors such as the judge's familiarity with the case,¹⁸⁹ the judge's acquaintance with the practitioners¹⁹⁰ and the attitude of counsel.¹⁹¹

VI A CULTURAL CHANGE

Legal representatives may fearlessly advocate their client's interests, but only so far as it is consistent with the proper and effective use of court resources and time.¹⁹² The cooperation of counsel in complying with disclosure obligations is imperative to the success of fair and efficient criminal proceedings.¹⁹³ A fundamental cultural change is needed so all lawyers regard it as part of their professional duty to fully comply with disclosure obligations and promote the fair and efficient administration

¹⁸⁶ Standing Committee of Attorneys-General, above n 93, 48.

¹⁸⁷ Criminal Law Review Division, above n 89, 77; Griffith, above n 3, 32, 35; Standing Committee of Attorneys-General, above n 93, 8; WA Law Reform Commission, above n 7, 97 [12.2].

¹⁸⁸ Standing Committee of Attorneys-General, above n 93, 8; Victoria, *Parliamentary Debates*, Legislative Council, 2 June 1999, 1042 (Carlo Furletti); Griffith, above n 3, 32, 35.

¹⁸⁹ Criminal Law Review Division, above n 89, 77.

¹⁹⁰ *Ibid.*

¹⁹¹ *A Team Diamond Headquarters Pty Ltd v Main Road Property Group Pty Ltd* (2009) 25 VR 189, 193 [15].

¹⁹² See, eg, Dawkins, above n 50, 48–9; Martin, 'Adversarial Model', above n 56, 2; Criminal Law Review Division, above n 89, 7, 18; Lord Justice Peter Gross, 'Review of Disclosure in Criminal Proceedings' (Review, Judiciary of England and Wales, September 2011) 75.

¹⁹³ See, eg, *A Team Diamond Headquarters Pty Ltd v Main Road Property Group Pty Ltd* [2009] VSCA 208 (24 September 2009) [15]; *Wilson* [1995] 1 VR 163, 180, 185; Aronson, above n 2, 28; Martin, 'Adversarial Model', above n 56, 8; Redmayne, 'Process Gains and Process Values', above n 8, 86; Martin, 'Prosecution Issues', above n 17, 3; Standing Committee of Attorneys-General, above n 93, 43; Abraham, above n 2, 14; Criminal Law Review Division, above n 89, 17, 18, 70–4; Chief Justice de Jersey, above n 1, 7.

of justice.¹⁹⁴ Professional obligations to outline disclosure requirements and the consequences of compliance and noncompliance should be expressly included in practice rules.¹⁹⁵

Aronson states that the ‘Achilles’ heel’ of any disclosure regime ‘turns on persuading counsel to co-operate’.¹⁹⁶ Justice Sulan observes that changing the habits and attitudes of legal practitioners will require ‘tangible incentives and/or real penalties’.¹⁹⁷ Education is another means to secure change in practice habits and attitudes.¹⁹⁸ The success of any disclosure regime also depends on the relationship between individual prosecutors and defence lawyers and the nature of informal communication.¹⁹⁹ Uncooperative defendants and counsel will always exist under any system.²⁰⁰ However, as long as the majority of participants recognise their overriding duty to the court and embrace objectives to improve the efficiency of trials, a disclosure regime should be successful in promoting efficient practices.

Despite the unpopularity of some of the reforms in other jurisdictions that have increased pre-trial defence disclosure obligations, if such reforms are introduced in South Australia, it is argued that their mere existence will promote the beginnings of cultural change. This is because such reforms will set the benchmark for future practice. It will give a framework for mandated disclosure that will provide defence lawyers, who may be reluctant to embrace self-directed cultural change, a ‘safety net’. Such reforms will further signal to young lawyers that pre-trial defence disclosure is a beneficial and permissive element of modern criminal procedure. It will help to shape new norms and cultures that are incompatible with traditional objections to pre-trial defence disclosure.

VII ENFORCEABILITY OF A PRE-TRIAL DEFENCE DISCLOSURE REGIME

A Sanctions

The potential sanctions for noncompliance with defence disclosure are in abundance. These include adverse comment or inference on the defence’s noncompliance being

¹⁹⁴ See, eg, Standing Committee of Attorneys-General, above n 93, 69, 73; Roderick Denyer, ‘Non-Compliance with Case Management Orders and Directions’ (2008) 10 *Criminal Law Review* 784, 784, 792; Chief Justice de Jersey, above n 1, 7. Martin, ‘Adversarial Model’, above n 56, 10.

¹⁹⁵ Standing Committee of Attorneys-General, above n 93, 5, 11, 50, 71.

¹⁹⁶ Aronson, above n 2, 39.

¹⁹⁷ Sulan, above n 2, 11.

¹⁹⁸ *Ibid* 3, 13.

¹⁹⁹ See *Ibid* 7, 8; Jason Payne, ‘Criminal Trial Delays in Australia: Trial Listing Outcomes’ (Research and Public Policy Series No 74, Australian Institute of Criminology, January 2007) 46.

²⁰⁰ Standing Committee of Attorneys-General, above n 93, 48.

made by the judge and/or prosecution to the jury,²⁰¹ a factor to take into account in sentencing,²⁰² wasted costs orders against an accused and/or their lawyer,²⁰³ staying or adjourning the proceedings to allow the defence to comply with disclosure orders and/or for the prosecution to gather further material,²⁰⁴ exclusion of the undisclosed evidence to be led,²⁰⁵ professional disciplinary action against the lawyer involved²⁰⁶ and even a finding of contempt against the accused and/or their lawyer.²⁰⁷

However, these various sanctions are riddled with complications.²⁰⁸ There are inherent practical²⁰⁹ and philosophical difficulties associated with sanctions for noncooperation to enforce any disclosure regime.²¹⁰ Sulan states that generally sanctions are ‘difficult to enforce and their effectiveness is questionable’.²¹¹ Denyer also argues that

²⁰¹ See, eg, *Criminal Procedure Act 1986* (NSW) s 146A(2)(a); *Criminal Law Consolidation Act 1935* (SA) ss 285BB(3), 285BC(4), 285C(4); *Crime (Criminal Trials) Act 1999* (Vic) s 16(1); *Criminal Procedure Act 2004* (WA) s 97(4); *Criminal Procedure and Investigations Act 1996* (UK) s 11(5)(a).

²⁰² See, eg, *Crimes (Sentencing) Act 2005* (ACT) ss 33(1)(k), 35A; *Sentencing Act 2009* (Vic) ss 5(2C), (2D); *Criminal Law Consolidation Act 1935* (SA) s 285BA(6). The obligation to take into account in sentence an unreasonable failure under s 285BA arises whether the defendant is found guilty following trial or pleads guilty; See *Mustac* (2013) 115 SASR 461, 469 [33], 470 [35].

²⁰³ See, eg, *Crime (Criminal Trials) Act 1999* (Vic) ss 24–6; *Criminal Code Act 1899* (Qld) s 590AAA(4)(b)–(c); *Prosecution of Offences Act 1985* (UK) s 19A; *Costs in Criminal Cases (General) Regulations 1986* (UK). See also Standing Committee of Attorneys-General, above n 93, 51. See *R v SVS Solicitors* [2012] EWCA Crim 319 for a recent example of a wasted costs order arising from the defence lawyer’s noncompliance with pre-trial defence disclosure.

²⁰⁴ See, eg, *Criminal Procedure Act 1986* (NSW) s 146(3); *Criminal Law Consolidation Act 1935* (SA) s 285BC(7); *Criminal Procedure Act 2004* (WA) s 97(2). See also Griffith, above n 3, 36.

²⁰⁵ See, eg, *Criminal Procedure Act 1986* (NSW) ss 146(1)–(2); *R v Ensor* [2009] EWCA Crim 2519.

²⁰⁶ See, eg, *Criminal Law Consolidation Act 1935* (SA) s 285BC(8); *Criminal Procedure Act 2009* (Vic) s 250. A defence lawyer cannot advise their client to not comply with a statutory disclosure requirement. See, eg, *R v Essa* [2009] EWCA Crim 43 [18]; *R v Rochford* [2011] WLR 534, 540 [23].

²⁰⁷ See, eg, *R v Rochford* [2011] WLR 534. See further Gross and Treacy, above n 20, 4 [36]–[38].

²⁰⁸ Aronson, above n 2, 30; Standing Committee of Attorneys-General, above n 93, 43, 49; Griffith, above n 3, 35; Dawkins, above n 50, 38.

²⁰⁹ In particular, practically pinpointing who is to blame for noncompliance between an accused and their lawyer will often prove difficult. See, eg, Auld, above n 41, 471 [181]; Sulan, above n 2, 12.

²¹⁰ Standing Committee of Attorneys-General, above n 93, 43.

²¹¹ Sulan, above n 2, 13. See also Riddle and Hinch, above n 29, 39 [189]; Grosse and Treacy, above n 20, 8 [56].

‘procedure mistakes or non-compliance with orders by or on behalf of a defendant cannot be allowed to affect that defendant’s right to a fair trial.’²¹² There should not be reliance upon sanctions alone. Rather, the focus should be placed on incentives for compliance rather than sanctions.

However, with the appropriate caution and safeguards or limits placed on the use of sanctions, they may offer effective options for a successful disclosure regime. Though sanctions should not be the sole means of securing compliance with duties of disclosure, they still have a valid place. Sanctions may be appropriate in cases of patent or gross negligence or misconduct by the legal practitioner²¹³ or unnecessary delaying tactics by an accused.

B The Accused’s Role in Influencing Enforceability of Sanctions

The notion of an accused and/or his or her lawyer freely divulging details of their case is not something that is likely to come naturally to either accused or defence lawyers.²¹⁴ An accused is likely to be unwilling to do anything that may assist the prosecution to prove their case or put them at a disadvantage on a tactical level. Often an accused may have a misunderstanding of the level of cooperation required between the prosecution and the defence or the ways in which early disclosure will benefit the accused and the overall trial. If the accused has not provided their lawyer with sufficient instructions due to a lack of contact or understanding, this will inhibit the ability of the defence to comply with disclosure obligations.²¹⁵

It is necessary that defence lawyers provide detailed advice and obtain proper instructions from their clients before making any disclosure or admissions.²¹⁶ The client should be advised that legal professional privilege and the accused’s privilege against self-incrimination survive disclosure requirements.²¹⁷ It is likely an accused will require further encouragement when it comes to complying with disclosure obligations.²¹⁸ An accused should be informed not only by counsel, but also by the court, about any sanctions for noncompliance as well as the incentives or benefits for complying with disclosure requirements.²¹⁹ It is preferable that such warnings be given at an early stage to promote maximum efficiency and compliance. This

²¹² Denyer, above n 194, 791.

²¹³ Standing Committee of Attorneys-General, above n 93, 51.

²¹⁴ See, eg, Justice Anthony Whealy, ‘Terrorism and the Right to a Fair Trial: Can the Law Stop Terrorism? A Comparative Analysis’ (Paper presented to the British Institute of International and Comparative Law, London, 28 April 2010) 31.

²¹⁵ Weinberg, ‘Criminal Trial Issues’, above n 7, 13; Griffith, above n 3, 6–7.

²¹⁶ Craigie, above n 107, 14.

²¹⁷ *R v Rochford* [2011] WLR 534, 540 [21].

²¹⁸ Standing Committee of Attorneys-General, above n 93, 50.

²¹⁹ *Ibid* 5, 11, 50.

obligation to inform the client and the potential sanctions for noncompliance should be expressly included in any relevant professional conduct rules.²²⁰

C The Judiciary's Role in Influencing Enforceability of Sanctions

The judiciary may be reluctant or even unwilling to impose disclosure obligations or orders on the defence, even if they have the statutory power.²²¹ Lax judicial enforcement will only frustrate the effectiveness of pre-trial disclosure.²²² It may also decrease the public's faith in the administration of court processes.²²³ Strong judicial leadership is necessary to encourage the parties to work together to determine or resolve issues early, and grant incentives or enforce sanctions if necessary.²²⁴ Active judicial management will promote the acceptance of any reforms by the legal profession.²²⁵

D Feasibility of the Reforms Themselves; Emphasise Incentives to Comply

The feasibility and acceptability of any defence disclosure reforms in South Australia must be carefully considered if they are to be a success. Any reforms must be drafted with an appreciation of the conflicting interests that arise between the legitimate public interest in promoting the efficiency and effectiveness of the criminal justice system and the protection of fundamental rights.²²⁶ Efficiency can be taken too far.²²⁷ Any disclosure regime must find a compromise between the level of participation asked of the defence and recognition of the burden of proof; namely between 'managerialism' and a strict adversarial approach. One way to assist in the success of the reforms is to emphasise incentives for accused and their representatives to comply with broader defence disclosure obligations.

²²⁰ See Standing Committee of Attorneys-General, above n 93, 11, 50. Such an obligation may fall under rules 39 and 40 of the South Australian *Barristers' Conduct Rules*. See also Council of the Law Society of South Australia, *Australian Solicitors' Conduct Rules* (at June 2011) r 7.1.

²²¹ Glynn, above n 106, 843–4; Redmayne, 'Process Gains and Process Values', above n 8, 86; Auld, above n 41, 455 [144]; Plotnikoff and Woolfson, above n 154, 72–3; Redmayne, *Criminal Justice Act 2003*, above n 139, 445; New Zealand Law Reform Commission, *Criminal Pre-Trial Processes: Justice through Efficiency* (NZLRC R89, 2005) 117 [395]; Criminal Law Review Division, above n 89, 28, 47, 88.

²²² Gross, above n 192, 44–5.

²²³ Johnson and Latham, above n 8, 6–7.

²²⁴ See, eg, Glynn, above n 106, 844; Corns above n 83, 117; Criminal Law Review Division, above n 89, 47; Craigie, above n 107, 14–5; Johnson and Latham, above n 8, 7; Gross, above n 192, 8, 9, 95.

²²⁵ Standing Committee of Attorneys-General, above n 93, 73.

²²⁶ See, eg, Weinberg, 'Criminal Trial Issues', above n 7, 2; Chief Justice de Jersey, above n 1, 6.

²²⁷ Lord Igor Judge, 'The Criminal Justice System in England and Wales: Greater Efficiency in the Criminal Justice System, Time for Change?' (Speech, Sydney, 15, August 2007) 1.

For example, in South Australia, sentence reductions could be given when an accused has complied with defence disclosure obligations. Legislation exists in Victoria,²²⁸ the Australian Capital Territory,²²⁹ and New South Wales²³⁰ to the effect that a court may impose a lesser penalty having regard to the degree to which the administration of justice has been facilitated by the defence (whether by disclosures made pre-trial or during the trial).

Though incentives in sentence for pre-trial cooperation are not without difficulty in terms of both principle and application,²³¹ the idea of a reduction in sentence for complying with defence disclosure is consistent with the existing established doctrine that an accused who pleads guilty to an offence is entitled to a discount in sentence. It is now accepted by both courts²³² and legislators²³³ that an offender remains entitled to a discount in sentence for pleading guilty, regardless of any ‘remorse’, on the strictly utilitarian basis that they have spared any victim from the likely stress of testifying and the State from the cost and trouble of a contested trial.²³⁴

Section 10 of the *Criminal Law (Sentencing) Act 1988* (SA) already allows a court to take into consideration in sentence ‘the degree to which the defendant has cooperated in the investigation of the offence.’²³⁵ An incentive by way of a discount in sentence for compliance with pre-trial defence disclosure is a logical extension of this provision and is both reasonable and necessary to encourage greater defence cooperation and disclosure. Such an incentive should apply to both compulsory and voluntary defence disclosure.²³⁶ There should not be reliance purely upon sanctions for noncompliance.

²²⁸ *Sentencing Act 1991* (Vic) ss 5(2C)–(2D).

²²⁹ *Crimes (Sentencing) Act 2005* (ACT) ss 33(1)(k), 35A.

²³⁰ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22A(1).

²³¹ Dawkins, for example, argues that such a ‘discount’ translates into ‘reverse sanctions in all but name’ for a non-compliant accused. See Dawkins, above n 50, 39. See also Richard Refshauge, ‘Sentencing and the Prosecution’ (Paper Presented at the 4th National Symposium on Crime in Australia, ‘New Crime or New Responses’, Canberra, 21 June 2001) 1–9.

²³² See, eg, *R v Place* (2002) 81 SASR 395, 412–3; *R v Thomson* (2000) 49 NSWLR 383, 411–2; *R v Cameron* (2002) 209 CLR 339, 350–1; *R v Ceruto* [2014] SASCFC 5 (30 January 2014) [22]; *R v Nguyen* [2015] SASCFC 40 (2 April 2015) [16]–[19].

²³³ See, eg, *Criminal Case Conferencing Trial Act 2008* (NSW); *Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012* (SA). See further South Australia, *Parliamentary Debates*, House of Assembly, 11 July 2012, 2427 (John Rau).

²³⁴ The rationale of such a proposition is that an accused is not punished for exercising his or her right to plead not guilty (which is impermissible; see *R v Shannon* (1979) 21 SASR 442, 445; *Siganto v The Queen* (1998) 194 CLR 656, 663), but rather that an accused who pleads guilty is receiving a ‘reward’ or ‘discount’ from what otherwise have been the appropriate sentence that they would not be entitled to had they pleaded not guilty. This distinction ‘is not without its subtleties but it is, nevertheless, a real distinction’ (*R v Cameron* (2002) 209 CLR 339, 343).

²³⁵ *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(h).

²³⁶ Griffith, above n 3, 34.

VIII CONCLUSION

Though any suggestion of pre-trial defence disclosure is invariably contentious, there have been many calls in both Australia and elsewhere for increased pre-trial defence disclosure. Such calls are, within certain limits, justified. The traditional arguments against defence disclosure do not withstand close scrutiny. It is time for a realistic, workable and enforceable defence disclosure regime to be adopted in South Australia. The current limited statutory defence disclosure requirements should be amended. When contested indictable cases are to be heard before a superior court, and after the prosecution has satisfied its duties of disclosure, the requirements should compel the defence to respond by identifying: any positive defence it intends to raise; the issues of fact or law which it intends to dispute at trial; and the basis on which these intend to be disputed. This will enable the court and parties to know what the real issues in dispute are and allow the trial to ‘proceed as smoothly as possible’.²³⁷

Two fundamental flaws with the various current schemes for comprehensive defence disclosure is their absence of enforceability and workability. The focus should be on motivating the defence through incentives to comply with statutory requirements, rather than purely relying on sanctions. Whilst sanctions for blatant noncompliance have their place, sanctions alone are a blunt instrument. They are an ineffective solution given their potential to be unjust and proven ineptitude in encouraging adherence with disclosure obligations. The current statutory scheme in South Australia (and elsewhere) needs to be improved by robust enforcement by the judiciary and a cultural change amongst the legal profession.

While the defence should disclose what is ‘necessary to allow the prosecution to avoid addressing areas not disputed by the defence’,²³⁸ one must remember that the adversarial system remains one of *justice*. Any system must operate fairly and thoroughly, rather than fostering a culture of speed and efficiency above all else. The defence should not have to disclose their case to the same level of detail as the prosecution. This is not to say that reform is inappropriate. Rather, a workable and balanced approach consistent with that outlined in this article should be implemented.

²³⁷ Rozenes, ‘The Right to Silence’, above n 2, 6.

²³⁸ Justice Jeremy Badgery-Parker, ‘The Criminal Process in Transition: Balancing Principle and Pragmatism — Part II’ (1995) 4 *Journal of Judicial Administration* 193, 204.