Criminal Lawyers Association of the Northern Territory (CLANT)

Patron: The Hon Justice Dean Mildren • GPO Box 1064 DARWIN NT 0801 • ABN: 64 391 168 310•

Dear Eilish,

Re. Potential reforms to criminal appeals

We refer to the letter of 5 August 2021 under the hand of Jenni Daniel-Yee. We appreciate, as always, the opportunity to provide submissions in relation to potential legislative changes.

We understand there are three areas of possible change under review:

1) Double Jeopardy Law Reform
2) Interlocutory appeals
3) Second and subsequent appeals against conviction

We will also address a fourth area that requires urgent review and amendment, namely the filing of Notices of Appeal from a determination of the Local Court.

Should the Legal Policy unit decide to consider prosecution appeals against acquittals which we understand is not currently being contemplated,[1] we would be pleased if we could be notified and we will address that area at the relevant time.

We have had the benefit of considering draft submissions prepared on behalf of the Northern Territory Legal Aid Commission on these issues prior to preparing our submissions.

Any reform around appeals must recognize the current unique circumstances of our jurisdiction, in particular our unjust mandatory sentencing and bail laws. Unlike in many other jurisdictions, most if not all matters in which either the Crown or an appellant is seeking to appeal either an interlocutory or final determination, the defendant will be in custody. Unfortunately our prison population is over represented by Aboriginal or Torres Strait Islander persons who make up in excess of 80 % of our adult population and at times 100% of our youth population. Any reform that creates delays in the resolution of matters, in effect, has the real potential to result in further unjust incarceration.

Therefore before any of the current reforms under consideration are acted upon, it is incumbent on the AGD to adopt the recommendations of the NTLRC reports with respect to *Mandatory Sentencing and Community Based Sentencing Options* (Report

[1] Attachment A-Potential Legislation Reforms to Criminal Areas.

47; March 2021) and *Recognition of Local Aboriginal Law in Sentencing and Bail* (Report 46; November 2020).

1) Double Jeopardy Law Reform-Second and subsequent appeals against conviction

In relation to reform of the substantive rule against double jeopardy in the Northern Territory, where there is no provision for trial by judge alone of matters charged on indictment, an acquittal should constitute a permanent bar to further prosecution for the same offence. In the event that the legislature determines to proceed to amend the rule then proper safeguards to protect individuals against abuse of power are paramount.

Preserving the integrity and finality of criminal proceedings is in the interests of all parties. The costs required to all parties in additional trials is a further consideration particularly in a jurisdiction where a majority of matters before the Court are publicly funded on both sides of the bar table. All publicly funded legal service providers in the Northern Territory both prosecution and defence are currently significantly under resourced.

Fresh and compelling evidence

In relation to the fresh evidence exception, the proposed "exercise of reasonable diligence" test for the admission of fresh evidence is too low. Application of this test would appear to allow for fresh evidence to be adduced in a retrial following an acquittal in circumstances where the police investigators assigned in the first instance acted with reasonable diligence, but were not provided with sufficient training, equipment, resources, time and/or supportive supervision to effectively and competently complete the investigation. Such circumstances cannot adequately be reconciled with having '*acted with due diligence'* and has the potential to embarrass the jurisdiction. It is proposed that the test should be that '*the evidence could not have been adduced in the first trial with the exercise of reasonable diligence by reasonably competent, resourced, trained, equipped and supervised investigators, utilising their skills and abilities at a high standard*'.

There should be express exclusion of fresh evidence in the form of statements by civilian witnesses who had previously elected not to co-operate with police and make themselves available to give evidence at the first trial. There should also be express exclusion of the evidence of civilian witnesses who ought reasonably have been known or identified, and with appropriate searches located at the time of the first trial.

The proposed 'compelling' ground is appropriate.

A tainted acquittal

In relation to the proposed tainted acquittal exception, an "administration of justice offence" should be defined to include only an offence for which the accused has been convicted. It would be fundamentally unfair to expose an acquitted accused to liability for retrial and conviction in circumstances where the acquittal was purportedly tainted not by the conduct of the accused, but only by the conduct of another person. If an

'administration of justice offence' occurs without the intention, knowledge, awareness or beyond the power of the accused it would be unjust to effectively punish the acquitted person by putting them through the stress and expense of an additional trial. It is the person responsible for the 'administration of justice offence' who ought properly be punished.

If the double jeopardy rule were abrogated, CLANT would support the proposed safeguards identified at numbered paragraphs 10 to 26 of the COAG agreed model set out at Attachment B to Ms Daniel-Yee's letter to Mr Aust dated 5 August 2021 (**Ms Daniel-Yee's letter**). Further, if the rule against double jeopardy were to be abrogated there ought to be an amendment to the *Bail Act* to create a presumption in favour of bail for any accused person who has stood trial and been acquitted and against whom the Crown proceed against a second time. The general considerations at section 24 of the Bail Act would then be applied by the Court to determine the issue of bail in a manner that is just in all of the circumstances known to the Court.

2) Interlocutory appeals

CLANT resists the introduction of interlocutory appeals.

Whilst there is no provision for interlocutory appeals in this jurisdiction, when important contentious issues of law arise during a trial, the section 408 procedure adverted to above can be deployed to mitigate the risk of the trial becoming infected by legal error. As has been recently demonstrated in *R v Rolfe*, to mitigate against the risk of a wrongful acquittal a trial can be stayed in an exceptional case to enable important contentious questions of law to be agitated, considered and authoritatively determined.

CLANT opposes the adoption of CJ 79 of the RCIRCSA recommendations. Firstly (as is acknowledged by AGD), there is no reason in principle why the procedure for cases involving child sexual abuse offences should be different from the procedure for other serious criminal matters. Secondly, the recommendation applies only to Crown appeals: it would be unfair to provide an avenue of appeal to only one party, and particularly when that party is the accusing party in accusatorial proceedings. Thirdly, since the making of these recommendations in 2017, there has been substantial reform in relation to the admissibility of tendency and coincidence law both by way of statutory amendment in the NT (and other Australian jurisdictions) including this year to tendency and coincidence evidence[2] significantly lowering the bar for the admission of that evidence. In consequence, there has been a significant broadening of the scope of admissible evidence of uncharged conduct by an accused with the practical effect of these reforms being to obviate the purported need to allow for interlocutory Crown appeals. In the experience of our members in child sexual cases, most contentious admissibility issues historically related to the admissibility of tendency and coincidence evidence. Those issues will be far less contentious under the new legislative regime.

[2] See s. 97 A *Evidence (National Uniform Legislation) Act* NT.

Should the legislature proceed with the proposed amendment despite our opposition we urge the legislature to consider changes to the *Bail Act* similar to those proposed at (2) above.

Recommendation CJ 80 concerns funding decisions by government, not statutory reform. The CLANT accepts that if the law were to be amended to permit interlocutory appeals, it is essential that the Court be sufficiently resourced to meet the additional demand for its services. So too would the Office of the Director of Public Prosecutions, NAAJA and the NT Legal Aid Commission.

3) Second and Subsequent Appeals

CLANT supports this reform, as outlined at Attachment A to Ms Daniel-Lee's letter. The Northern Territory has the dubious distinction of being the jurisdiction in which a miscarriage of justice occurred in what is arguably the most notorious such case in recent Australian legal history, the trial of Lindy and Michael Chamberlain. Three jurisdictions led by South Australia and Tasmania, have introduced progressive reforms allowing second or subsequent appeal against conviction, and others have processes for inquiring into convictions. The provisions have been carefully designed to provide a remedy in those rare cases in which wrongful convictions should be re-examined in the light of fresh and compelling evidence.

Currently, the only remedy available in this jurisdiction to a person wrongfully convicted who has exhausted their single opportunity to appeal, is to petition for exercise of the prerogative of mercy, and then to make a request to the Attorney-General pursuant to section 433A of the *Criminal Code.* That process is uncertain and not subject to the protections and public scrutiny that parties appearing before a judicial officer exercising judicial power are.

4) Process of filing Local Court appeals

On 21 May 2021 the Full Court of the Supreme Court arrived at a decision in *Lorenzetti v Brennan* [2021] NTSCFC 3 at [69] that the *Local Court (Criminal Procedure Act)* must be interpreted to require any appellant from a decision of the Local Court to file a separate Notice of Appeal for each decision, conviction or sentence appealed from. Practically that requires in many cases a large number of Notices to be filed without the matters in reality being separate appeals. It is perhaps easiest to illustrate by way of example; if a person is convicted and sentenced all on the same occasion to contravening a domestic violence order, trespassing on premises, behaving in a disorderly manner and aggravated assault and given a sentence that relates to all matters that they wish to appeal; instead of filing one notice of appeal the person will be required to file four notices of appeal and of course pay four filing fees (instead of $124 the total filing fee would be $496). Further if they also wished to challenge discreet orders in the alternative to convictions on the same file numbers, ie a manifestly excessive total sentence across all counts, it is arguable that a further four notices would be required to be filed, resulting in eight filing fees ($992)-such a position is costly, cumbersome, resource intensive and plainly ludicrous and unintended. There must be immediate amendment to correct this issue

Recognizing the practical difficulties the Court noted "*We recommend that Parliament give consideration to amending the Act to permit a notice of appeal per complaint and one per information to over the requirement for multiple notices of appeal which serve no practical purpose".* For legally aided appellants and the DPP multiple notices create additional work for those already overstretched organizations. For appellants of limited but nevertheless some financial means, the accumulation of filing fees may discourage an appeal where there are genuine issues of law that ought to properly be determined by the Supreme Court. Justice needs to be accessible to all without the burden of excessive financial expense that will largely be borne by the AGD. In our view, this reform is far more urgent than the issue of interlocutory appeals and second and subsequent appeals against conviction.

Marty Aust, on behalf of the CLANT committee
President
9 September 2021