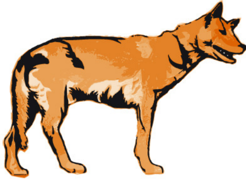

Criminal Lawyers Association of the Northern Territory (CLANT)

Patron: The Hon Justice Virginia Bell • President: Russell Goldflam (telephone: 040 1119020) •
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Jenni Daniel-Yee
Acting Director, Legal Policy
Department of the Attorney-General and Justice
Level 7 Old Admiralty Towers
68 the Esplanade
DARWIN NT O8O1

16 May 2014

Dear Ms Daniel-Yee

RE: JUSTICE AND OTHER LEGISLATION AMENDMENT (SUMMARY PROCEDURE) BILL 2014

Thank you for inviting the Criminal Lawyers Association of the Northern Territory (CLANT) to make a submission in relation to the above Bill.

Introduction

CLANT supports the key aim of reforming the summary justice system to make it more efficient, in particular by having more cases settle, and at an earlier stage.

However, CLANT does not support the proposed amendments to the *Justices Act* at this time, save for the proposed s60AJ ('Sentence indication for summary matters'). CLANT support amendments to the *Sentencing Act* which would empower courts to allow a discount of up to 40% for early pleas.

Both of these reforms can only be effected by statutory reform, as they embody a substantive change to the statutory and common law powers of magistrates.

However, the remainder of the Bill deals with procedural matters which, in CLANT's submission, are best left to the court itself in accordance with s201A of the *Justices Act*, which relevantly provides:

> the Chief Magistrate… may make rules and give practice directions… regulating the practice and procedures of the Court

CLANT respectfully agrees with the Attorney-General's following statement made to the Legislative Assembly on 8 May 2014 during Question Time:

> To suggest that I, or any other member of this House, should now waltz over to the courthouse and start directing in some fashion or another how the courts should operate is a matter which would amount to a breach of the separation of powers.

Although made extemporaneously in the course of debate about a different issue, that statement is also generally applicable to the *Justice and other Legislation Amendment (Summary Procedure) Bill* 2014 ('the Bill').

Practice Direction No. 4 of 2014

CLANT participated in a Working Party convened by Chief Magistrate Lowndes earlier this year, resulting in the promulgation of Practice Direction Number 4 of 2014 on 14 March 2014 ('the PD'). The PD was settled after detailed and careful consultation by Dr Lowndes with all key stakeholders. The PD exhibits the following key features:

- It fits within the ambit of the case management reforms outlined by Government in its October 2013 Information Sessions to the profession and the general community.[1]
- It has been drafted to work in practice, having regard to the available resources of court users.
- It is consistent with fundamental features of the criminal justice system, which have recently been characterised by the High Court as "adversarial in character, accusatorial by nature".[2]
- It is supported by all major stakeholders, including magistrates, prosecutors, police and defence lawyers.
- It is being trialled in Darwin with a view to being extended to other parts of the jurisdiction with, if required, amendments to reflect regional differences and/or emerging problems.

By contrast, it is submitted that the Bill suffers from the following serious flaws:

- It will be unworkable in practice, particularly in regional areas and bush courts.
- It is inconsistent with fundamental features of the criminal justice system, particularly its accusatorial nature.
- It is not supported by stakeholders, particularly, for the purposes of this submission, CLANT members, who comprise both prosecuting and defence lawyers.
- Once enacted, it will impose a 'one size fits all' case management regime on a system which is not uniform.

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[1] See "NT Justice Criminal Law Reform – October 2013", accessed at http://www.clant.org.au/index.php/news/80-criminal-law-reform-issues-update-october-2013

[2] *Attorney-General (NT) v Emmerson* [2014] HCA 13 at [63]

To enact the Bill without providing the court and its users a reasonable opportunity to trial the PD undermines the work done to date by all concerned, and in particular by the Chief Magistrate, to address the problems which have been identified. If, as is forecast above, the enacted Bill proves to be unworkable, it will be all the more undermining in its effect.

Mandatory Sentencing

CLANT opposes mandatory sentencing and supports the repeal of Part 3 Division 6A of the *Sentencing Act*. For the purposes of this submission, however, CLANT notes that the continued operation of Division 6A will in practice seriously subvert the intended aims of the Bill.

Without the incentive of sentencing discounts, many defendants will continue to be advised that it is not in their interest to offer to plead guilty at an early or indeed at any stage. In those matters, case conferencing, sentence indications and sentence discounting will all be rendered nugatory.

Furthermore, the co-existence of mandatory sentencing and the proposed sentencing discount scheme will create anomalies in sentencing which will bring the law into disrepute. For example, an offender convicted of an unexceptional second or subsequent offence as categorised by s78(1)(b) of the *Sentencing Act* (ie an assault with a weapon causing bodily harm) is subject to a mandatory minimum period of actual imprisonment of 12 months.[3] Pursuant to the Bill, no discount would be available to an offender in this category who enters an early plea, even if in all the circumstances of the offender and the offence, having regard to general sentencing principles, a sentence of less than 12 months would have been called for. On the other hand, a more serious offender whose offending merits more condign punishment of, say, 20 months, would be entitled after an early plea to the same sentence – 12 months – as the less culpable offender. This offends the principle of parity:

> Just as consistency in punishment - a reflection of the notion of equal justice - is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice.[4]

The remedy for this is simple: omit from proposed s107D of the *Sentencing Act* the words "so long as the reduced sentence complies with the minimum mandatory penalty."

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[3] Section 78DA, *Sentencing Act*
[4] *Lowe v The Queen* (1984) 154 CLR 606, per Mason J at 610–611

Sentencing discounts

The proposed Division 3A of the *Sentencing Act* ('Sentencing discounts') is unworkably and unnecessarily rigid. Any attempt to codify with precision the infinite variety of circumstances relevant to the calculation of the appropriate discount is destined for failure. That is why the exercise of judicial discretion is at the heart of the sentencing process. In relation to this issue, the Court of Criminal Appeal of the Northern Territory has held as follows:

> In our opinion it is desirable that a sentencing court should indicate the extent to which, and the manner in which, a plea of guilty has been given any weight as a mitigating factor, but we do not consider that it is possible to lay down any tariff. The weight to be given to the plea will vary according to the circumstances.[5]

The amendments should provide that a discount of 40% should be accorded to a person who enters a plea of guilty at the first available opportunity, and that pleas of guilty entered at a subsequent stage of the proceedings should attract discounts to a lesser degree, having regard to all of the relevant circumstances. There is ample case law which provides authority as to the nature and scope of the relevant circumstances.

Defence disclosure

The proposed sections 60AF(3)(a) and (b) and 60AH(2)(b) of the *Justices Act* are inconsistent with the accusatorial nature of the criminal justice system, with the associated right of an accused person to remain silent, and with the exercise by a defendant of legal professional privilege.

The Bill detracts from long-standing provisions available to prosecutions to serve a Notice to Admit Facts on defendants. This procedure is currently under-utilised in the context of summary proceedings, but could be usefully deployed to narrow the issues in dispute.

In the Northern Territory, the current usual practice of opposing counsel is to identify, clarify and narrow the issues in dispute. Tactical reasons will prevail in some cases, but practicality is a hallmark of Territory legal practice, particularly in magistrates courts. This has the benefit of streamlining court proceedings but also the benefit of lessening the workloads on lawyers, particularly those practising for legally aided clients in high volume environments.

[5] *Kelly v The Queen* (2000) 10 NTLR 39 at 49, [27]

The proposed amendments would serve to place the prosecution on notice of any defence that may be conducted by a defendant. This is inconsistent with a fundamental right of any person brought before a court as a necessary implication of the right to silence.[6]

The proposed disclosure requirements also raise the spectre that the right of an accused to put the prosecution to proof would be placed in jeopardy. By shifting, albeit only slightly, the compass of the summary trial from adjudication to investigation, a situation is created which could have additional evidence collected to the detriment of the accused upon serving the prosecution with the requisite notice.[7] Ultimately, it is not for the defence to present and prepare a prosecution; should the prosecution omit to include and then adduce specific evidence of facts which form elements of the offence, a defendant should not be required assist in any effort to rectify that omission.

Another concern which arises is the tension between the proposed disclosure requirements in sections 60AF(3)(a) and (b) and the exercise of legal professional privilege:

> There is no obligation imposed upon counsel, other than by compulsion of statute (eg raising an alibi defence), to disclose to the court or to the prosecution the nature of the defence case.[8]

An obligation on the defence to disclose the issues in dispute and the witnesses who will give evidence would require defence counsel to disclose confidential information, contrary to long-established and fundamental rules of practice.[9]

The provisions would require counsel to seek specific instructions to disclose these matters. If a client cannot be contacted, especially if residing in a remote community or have no accessible sources of communication, compliance with the required amendments would place lawyers on the horns of an ethical dilemma. This in turn could lead to them returning the brief and seeking leave to withdraw from the proceedings.

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[6] See *Petty v The Queen; Maiden v The Queen* (1991) 173 CLR 95 at 108 (Brennan J).

[7] *HML v The Queen* (2008) 235 CLR 334 at 353, [9] (Gleeson CJ): "It is important not to overlook the legitimate opportunism that may be involved in the conduct of a defence under the accusatorial system of trial."

[8] Riley J, 'Ethics and the Criminal Defence Lawyer' (Paper presented at the Criminal Lawyers Association of the Northern Territory Conference, Bali 2001) p.22, accessed at http://www.clant.org.au/images/images/the-bali-conference/2001/Riley_J_Ethical_obligations.pdf

[9] See Northern Territory Bar Association *Barristers' Conduct Rules*, Rule 103; Law Society of the Northern Territory, *Rules of professional Conduct and Practice*, Rule 2.

Passage of the Bill should be delayed

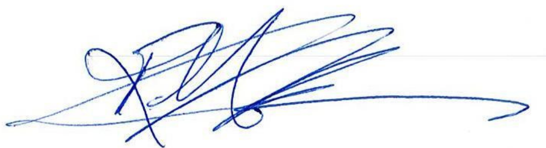
CLANT supports the underlying aims of the Bill, but strenuously argues that (with the exceptions stated at the outset of this submission), the matters the subject of the Bill should at this stage be left to the judicial arm to manage. However, if after a reasonable period of the operation of the PD, no substantial progress has been made in achieving the efficiencies sought, and it is established that this is associated with a failure by parties to comply with the PD, then further consideration should be given to enacting the Bill.

There are several other reasons to postpone the Bill:

- The preparation of preliminary briefs imposes a significant additional workload on police. That would be alleviated by the introduction of 'electronic briefs'. The Bill should not be enacted until the electronic briefs project has been rolled out.
- The Bill's case management scheme and in particular case conferencing relies to a significant extent on counsel being assigned for both the prosecution and defence at an early stage of proceedings. This is practicable with a civilianised prosecution service, as has now been instigated in Darwin. It is not practicable in the rest of the Territory, where police prosecutors continue to have conduct of summary matters right up until very shortly before (and in some cases, literally the day of) a listed hearing. The Bill should be delayed until the civilianisation program has been completed.
- Similarly, even if prosecutions is civilianised, there are currently insufficient prosecutors employed in some regional ODPP offices to enable the early assignation of files. The Bill should be delayed until this issue has been addressed.

CLANT appreciates the opportunity to be consulted in relation to these important issues, and looks forward to continuing to contribute to the dialogue between Government and the profession with a view to improving the administration of the criminal justice system of the Northern Territory.

Yours faithfully



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Criminal Lawyers Association of the Northern Territory