Criminal Lawyers Association of the Northern Territory (CLANT)

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SUBMISSION BY THE CRIMINAL LAWYERS ASSOCIATION OF THE NT (INC) ("CLANT") ON THE PROPOSAL TO EXTEND THE OPERATION OF S.21B OF THE *EVIDENCE ACT*, TO SUMMARY JURISDICTION AND YOUTH JUSTICE COURTS.

CLANT opposes the extension of S. 21B of the *Evidence Act* (the Act) to summary proceedings.

Courts of summary jurisdiction do not deal with many sexual offences, but as a matter of practice, more often deal with serious violence offences that usually involve aggravated assaults. In the existing statutory scheme relating to vulnerable witnesses in those matters, the accused's fundamental right to test the evidence of and confront his or her accuser and other prosecution witnesses is eroded by the provisions of S.21A of the Act which are designed to minimize harm to the vulnerable witness, and to facilitate the vulnerable witness giving evidence "effectively". S.21A applies in all criminal proceedings in all courts.

S.21B of the Act currently applies only to the evidence of vulnerable witnesses who give evidence in Supreme Court jury trials of a sexual offence or a serious violence offence. S.21B of the Act further erodes an accused person's rights. Barr J dealt with the purposes and effect of the legislative scheme in S.21B (and *apropos* S. 21E) of the Act in *R v SG* (2011) 29 NTLR 157; 250 FLR 337.

CLANT recognizes that, in principle, an extension of the operation of S.21B of the Act to summary proceedings for sexual offences and serious violence offences would not be inconsistent with the purposes of Part 3 of the Act. CLANT also notes the provisions of S. 21E of the Act, which permit an audiovisual record to be made of the evidence of a vulnerable witness in any "criminal proceedings".

A Question of Balance

The current statutory scheme has tilted the balance against accused persons, compared to the pre-existing law. The measures now in place to protect vulnerable witnesses are not available to accused persons who give evidence, even if they are themselves vulnerable persons. An accused person is, as a matter of law, innocent until guilt is proven, beyond reasonable doubt. Yet accused persons do find themselves under great stress in criminal proceedings, and are afforded no protection from the harm that may be caused by the proceedings or any assistance in telling their story "effectively".

It is the regular experience of courts that lies are told and mistakes are made by complainants and other prosecution witnesses in both sexual and serious violence matters.

It is CLANT's submission that to further tilt the balance against accused persons by extending the operation of S.21B to summary proceedings would not be in the interests of justice. CLANT notes that no other Australian jurisdictions have adopted this proposed reform.

S.21B makes two principal changes to the law. Firstly, in S.21B(2)(a), it permits the prosecution to adduce the evidence-in-chief of a vulnerable witness by playing a pre-recorded statement given to police (the Child Forensic Interview (CFI)). Secondly, in S.21B(2)(b), it establishes a procedure for the conduct of 'special sittings' at which the vulnerable witness's evidence is pre-recorded before a judge, to be replayed before a jury on a subsequent occasion.

S.21B(2)(b): Special sittings

There is no good reason to adopt the special sittings procedure in summary courts, where the presiding magistrate functions as both the tribunal of fact and law. Such a procedure would cause unnecessary delay, expense and inconsistency. It would not assist vulnerable witnesses. It would serve no identifiable useful purpose.

The S.21B(2)(b) special sittings regime should not be extended to summary courts.

S.21B(2)(a): CFIs as evidence in chief

CLANT also opposes the extension of S.21B(2)(a) to summary courts. There are serious resource implications in this proposed reform. Given current equipment levels, in remote communities it may not be possible to effectively conduct video-recorded CFIs. Training would also need to be provided to local police officers in the conduct of CFIs. Alternatively, officers who have undergone the course of instruction may have to be flown to the remote community which may delay the disclosure of the allegation and adversely affect the quality of the allegation and the ability to find and retain witnesses. These problems may lead to differing standards in the administration of criminal justice throughout the NT.

Similarly, it is not only recording facilities that need to be provided, but also facilities to allow for the transcription and editing of the recorded evidence of vulnerable witnesses.

The importance of proper resources and training cannot be overstated. Considerable time is added to the length of jury trials when CFI, and pre-recorded evidence, is led by the Crown. The experience of CLANT members is that that the recordings, particularly at the CFI stage, but any recording before the trial, can be replete with leading questions, impermissible questions, irrelevant material and prejudicial material that requires editing out to comply with the laws of evidence.

The use of the CFI as evidence in chief further tilts the balance against accused persons, because it can effectively deprive the accused person of a real opportunity to challenge the evidence of a complainant. For example, a CFI may have been obtained from a child who, when sworn to give evidence in court, is non-responsive. Under the current law, neither the evidence in chief or cross-examination of such a witness in a summary hearing would be productive, and the witness's evidence would, quite properly, be accorded no or very little weight by the court. However, under the proposed reform, the prosecution would be able to rely on the CFI, but the defence would have no real opportunity to challenge the accusations contained therein, in a situation where effective cross-examination of a non-responsive witness would be futile.

Summary of Issues

a. The fundamental rights of confrontation of a witness by the accused should not be further eroded.

c. The proposal to extend the operation of S.21B has many practical difficulties, and significant resource implications.

d. Unless the police and courts of summary jurisdiction are properly trained, funded and equipped, if this proposed reform is adopted, the quality of the administration of criminal justice in the NT would, undesirably, vary from place to place according to available resources.

e. The editing process would both prolong and complicate the hearing process, putting further pressure on the court's ability to fix a timely hearing date, which is undesirable, and unjust, particularly to those defendants on remand.

In conclusion, CLANT notes that there does not appear to be an evil to be addressed by the proposal, but that inequality and injustice may be occasioned in the hearing of sexual and serious violence offence charges by implementing the proposed legislative change.

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