SUBMISSION BY THE CRIMINAL LAWYERS ASSOCIATION OF THE NORTHERN TERRITORY INC. ("CLANT") ON THE PROPOSED REFORMS TO THE LAW IN RESPONSE TO THE HIGH COURT DECISION IN CROFTS.

CLANT is a representative organization whose membership is made up of criminal lawyers practising in the Northern Territory and elsewhere. CLANT is grateful for the opportunity to make submissions upon the *Consultation Paper: Response to the High Court Decision in Crofts* distributed by the Director of Legal Policy.

The overriding duty of any trial judge or judicial officer is to ensure that an accused person receives a fair trial. This is a duty entrusted to the trial judge, who is expected to fulfil that duty regularly, and consistently, in accordance with well-known legal principles. Those legal principles are found in common law and statute, and regulate not only the evidence that can be received in a court but also any comment or direction made upon it.

Crofts v The Queen(1996) 186 CLR 427 was a case concerning the operation of Section 61 of the *Crimes Act 1958* (Vic), which, for these purposes, is in *parimateria* with sub-section 4(5) of the *Sexual Offences (Evidence and Procedure) Act* (NT).*Crofts* is concerned with the ability of a judge to give a direction that provides balance, where necessary, to ensure a fair trial. It is worth noting the judgment of the majority (Toohey, Gaudron, Gummow and Kirby JJ) that, in general terms:

"*The enactment of specific provisions altering the general rules of practice as to the directions given to a jury concerning the reliability of the evidence of the alleged victims of sexual* offences *did not affect the requirement to give specific and particular warnings where they were necessary to avoid a perceptible risk of a miscarriage of justice arising from the circumstances of the case.*"[1]

And later:

"*Section 61 of the Act does not stand in isolation. It takes effect in the context of the conduct of criminal trials…..It presupposes the overriding duty of the judge to instruct the jury accurately on relevant principles of law, to remind them of the pertinent facts and to make such comments on the evidence, for their consideration, as the interests of justice require*."[2]

The manner of the exercise of that duty by a judge is transparent, is subject to the provision of reasons, and those reasons, comments and directions can be tested by either the Crown or the accused upon appeal. Most importantly, the accused is aware of the manner in which the jury is directed as to how to deal with evidence relating to a delayed complaint.

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[1] *Crofts v The Queen* (1996) 186 CLR 427, at 446

[2] *ibid*

Proposal (a) seeks to relieve the trial judge of this duty when there is, in a trial of a sexual offence, a delay in making a complaint, and to leave the determination of how to deal with the delay entirely to the jury. CLANT opposes this proposal in the strongest terms. It would take the conduct of the trial, in relation to evidence that is often critical to the outcome of the trial, away from the presiding judge. The jury would be bound to follow the directions of the presiding judge on all other matters, but left to deal with delay in complaint by themselves.

If enacted the proposal would also mean that an accused person would not know upon which basis the jury approached the evidence of delay in complaint. The principle of open justice would be severely compromised.

If enacted the proposal would also create a great danger that the jury could embark upon an unguided, improper reasoning process, subject to bias, prejudice or simple confusion. Without judicial guidance, juries would more than ever be subject to exercising their decision-making powers on whim, particularly in unpopular cases, such as those involving alleged sexual offences against children.

There has not been advancedany cogent reason or evidence, empirical or otherwise, to justify such a fundamental, radical and dangerous change to trial procedure.

Proposal (b) is poorly worded and inconsistent with the proposed response to *Crofts*, which has co-existed with the relevant statutory provisions since 1996. Proposal (b) allows for a credibility direction at the discretion of the trial judge, which appears at first glance to be inconsistent with Proposal (a), which prevents such a direction.

CLANT takes the view that any prohibition on fair comment or direction concerningdelay in making a complaint, where as a matter of commonsense and logic such delay may properly be seen to affect the credibility of a complainant, is contrary to the principle of a fair trial, as well as being offensive to common sense. The proposed prohibitions might lead to the most spurious of allegations escaping judicial direction, but generally tilting the balance in favour of the complainant. As the majority noted in *Crofts*:

"*Delay in complaining may not necessarily indicate that an allegation is false. But in the particular circumstances of a case, the delay may be so long, so inexplicable, or so unexplained, that the jury could properly take it into account in concluding that, in the particular case, the allegation was false.*"[3]

Proposal (c) is similar to the currently existing legislation contained in Sub-section 4(5)(b) of the *Sexual Offences (Evidence and Procedure) Act* (NT).

Evidence of complaint was traditionally admitted as evidence going to the credit of the complainant. Since the *Evidence (National Uniform Legislation)*

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[3] *op cit,* 448

Act commenced on 1 January 2013, evidence of complaint is now adduced to prove the fact in issue vide section 66. Consequently, evidence of delay in making a complaint is relevant not only to the credit of the witness, but also to whether the sexual offence actually occurred. It is therefore vitally important that the trial judge is able to instruct the jury as to the dual purpose of the evidence, and how it can be used for each purpose, in every trial of a sexual offence in which there has been a delay in making a complaint.

The decision in *Crofts* was handed down in 1996. It has lost none of it's value in ensuring that trial judges, the juries and the public at large understand that there may be good reasons for delay in making a complaint, but there may not be either. There is no reason for reform of this area of the law of evidence.

Yours faithfully

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