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CRIMINAL LAWYERS' ASSOCIATION OF WESTERN AUSTRALIA

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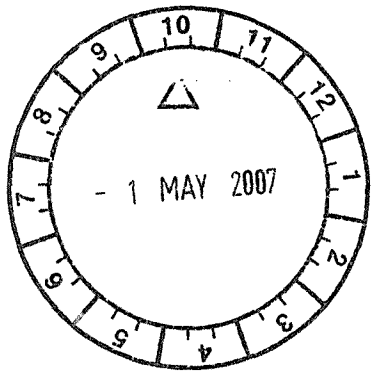

1 May 2007

Mr David Driscoll
Senior Committee Clerk
Standing Committee on Legislation
Parliament House
PERTH WA 6000

BY EMAIL: ddriscoll@parliament.wa.gov.au

Dear Sir

INQUIRY INTO CRIMINAL LAW AND EVIDENCE AMENDMENT BILL 2006

The Criminal Lawyers' Association of Western Australia, a voluntary association of lawyers engaged in both prosecution and defence in criminal matters, has considered the *Criminal Law and Evidence Amendment Bill 2006 (CLEAB)* and would like to offer the following comments for the Committee's consideration.

We are grateful for the opportunity to comment, especially in light the limited time frame.

These submissions mirror those proactively sent to the Attorney General last year.

PROPOSED AMENDMENTS TO CRIMINAL CODE (Code)

Section 5 CLEAB: Amendments to Code Section 297

No submissions.

Sections 7 & 8 CLEAB: Code Sections 317 & 317A

The Criminal Lawyers' Association is concerned that Racial Vilification laws may not be operating as they were intended and lack clarity. This is highlighted by a case in the Kalgoorlie Children's Court where an aboriginal juvenile girl was charged with an offence for calling someone a "white slut". The girl was acquitted (See decision of the *Police v A Child*, a decision of Magistrate Auty on 14 September 2006) but the fact that the police sought to charge her may mean that there is need for clarification as to what is meant by "racial aggravation". It is our suggestion that this aspect of the law be reviewed before any amendments to this section are contemplated.

Section 9 CLEAB: Amendments to Section 318

No submissions

Section 10 CLEAB: Amendments to Section 321A – Relationship Evidence

The Association does not object to the removal of the term "relationship" and replacing it with a suitable alternative.

However, the Association is strongly opposed to any changes to the law which would reduce the State's obligation to provide particulars to an accused.

It is difficult enough as it is for a person charged with a sexual assault to properly defend a charge under this section as the State is not presently required to specify actual dates and times.

Even where some particulars are provided, it is not uncommon in such cases for accused persons to have to try to account for their movements over weeks, months and often years.

Where there has been a substantial delay in complaint, (which is often the case) this works greater unfairness as the Accused has often lost the opportunity to provide alibi or other exculpatory evidence in the form of documentation or oral testimony.

The seriously offensive aspect of the new provisions is found in sub-section (8) which provides that *"a court cannot order the prosecutor to give a person charged with an offence.....particulars of the sexual acts alleged to constitute the offence"*. This is contrary to any notion of a fair trial and the right for an accused to know what he is charged with so as to mount an effective defence.

In every other criminal proceeding other than an offence under this section a person is entitled to know precisely what he is alleged to have done. There is no sound reason to place an offence under s321A in a special category of offences where the possibility of a fair trial is dispensed with. It is (and has always been) a fundamental principle of fairness in any trial that an accused person knows with some particularity the allegation he or she is facing.

The prohibition against the provision of particulars means that a person **must** go to trial not knowing precisely what he has been charged with and, consequently that he or she may not be able to prepare an adequate defence.

Obviously, in some cases which come to court many years after the alleged commission of the offence, it is not possible to specify the date on which the offence is said to have occurred. In this sort of case, the prosecution is at liberty to charge the offence as having occurred "on a date unknown between (for example) 1996 and 2001". Indictments regularly take this form especially in cases involving child complaints.

Section 321A requires proof of three different acts on three different days. The current s321A (5) already provides that is not necessary to specify the dates or particularise the circumstances.

It seems the proposed amendment proposes to dispense with any requirement to specify the individual acts charged at all – a situation which is bound, in many cases, to work manifest injustice.

Further, the proposed s321A (3) purports to deal with conduct outside the State of Western Australia. We are uncertain whether such a provision would be constitutionally valid given that the Parliament has limited power to deal with offences occurring outside Western Australia.

Sub-section (6) would allow the prosecution to prefer an additional charge during the period of the persistent sexual conduct in question. In our view there is some danger that a specific charge as well as the persistent sexual conduct charge might both be declared bad for duplicity, given that there is no necessity to nominate or particularise the offences giving rise to a charge under sub-section (4).

Sub-section (11) is another offensive aspect of the proposed amendment. It proposes that jury members need not all be satisfied as to the occurrence of each of the sexual acts. The inherent unfairness in this and the dangers of this type of approach were pointed out by the unanimous decision of the in High Court *KBT v The Queen* (1997) 72 ALJR 116.

We note from the briefing notes to the Bill that this amendment is designed to "overcome the decision in KBT". In our view, there is nothing in that decision which needs to be overcome. It is a decision of the High Court which ensures substantial fairness for accused persons in ensuring that a jury is genuinely agreed on all of the relevant elements of the offence required to be proven before convicting.

It is submitted that any attempt to "overcome" the effect of that case is manifestly undesirable. The dangers in allowing cases to go to a jury without sufficient particulars is set out by their Honours at page 124 of that decision where the Court held

> *"...there is a special danger of unfairness where as here, a crime which permits imprecise and general evidence to be proved is coupled in the indictment with other sexual offences specified with particularity. This Court has noted the special risks of unfairness where a number of sexual offences are charged together.....the dangers inherent in the possibility that a jury may infer guilt of several offences from the proof of guilt of one or some requires care in the joinder of counts...."*

The inherent unfairness of a provision such s321A (11) is pointed out with precision in the joint judgment of Brennan CJ, Toohey, Gaudron and Gummow JJ at 119.

It is submitted that the proposed amendment would legalise and formalise the precise unfairness and prejudice that the High Court has warned against in KBT. We note that the briefing note to this Bill is silent as to whether or not there have been any problems with the legislation in tis current form i.e. is it commonplace that offenders are acquitted because of the shortcomings of the section in question? In our experience this cannot be said, and the writers cannot recall a single instance where the legislation in its present form has worked an injustice.

The proposed sub-section (12) is also offensive. It provides for an alternative verdict or verdicts where the "persistent sexual conduct" on three or more occasions is not proven. For instance, where a jury finds that only one or two of the instances have been made out by the prosecution they could bring in guilty verdicts on those individual counts.

In normal circumstances there would be nothing objectionable in this. However, as the section does not require dates, particulars of the circumstances or particulars of the sexual acts to be specified and given to the accused, the provision can only serve to work manifest injustice in every case where it is likely to arise. This section, like the proposed sub-section (8) puts a person in jeopardy of a criminal conviction for a very serious charge of which he has been given no particulars whatever in relation to which he could answer the charge or mount a defence.

Sections 11, 12, 13 CLEAB: Amendments to Sections 338C, 338, 570

No submissions.

AMENDMENTS TO CRIMINAL PROCEDURE ACT 2004

Sections 14 - 27 CLEAB: Amendments to Sections 14, 20, 50, 55, 62, 69, 77, 84, 86A, 98, 111, 129, 133

No submissions.

Section 28 CLEAB: Amendments to Section 143 Defence Addresses

The Association would object to the amendment of this section.

It is not an invariable practice that the prosecution or indeed the Judge will remind the jury of the onus and standard of proof at the commencement of a trial. Consequently, in order to inject some balance in to proceedings at an early stage, it is appropriate and desirable that the defence have an opportunity to do this. Indeed, it is often an Accused's defence that the factual elements sought to be proved by the State cannot be proven beyond reasonable doubt. In that sense, the onus and standard of proof cannot be separated from "the essence" of the defence case.

Given the adversarial nature of the proceedings, we would submit that is not appropriate for Courts to prescribe what can and cannot be said by an advocate for either side. If an advocate were to make some false or misleading representation or to otherwise act inappropriately, it would be within the power of the Judge to correct that situation by making an appropriate comment.

Section 148

No submissions

Section 30 CLEAB: Repeal of and insertion of new section 169

No submissions

Section 33 - 41 CLEAB: CRIMINAL APPEALS ACT AMENDMENTS

The Criminal Lawyers' Association is opposed to any broadening of the scope of prosecution appeals.

The Association is not aware of any jury trial where a Judge has made an error of law from which it could be said that an Accused's acquittal has resulted, as a result of that mistake alone. In any given case there are many reasons why a person might be acquitted, so it would be impossible to show that a Judge's error alone would inevitably have led to an acquittal, absent an ability to eavesdrop on jury deliberations.

The issue of double jeopardy has been well-ventilated in a number of forums and the overwhelming majority of the legal profession would object to any diminution of the principle.

Put simply, the assets of the State and its capacity to bring prosecutions are enormous. In the overwhelming majority of cases, however, the capacity of a citizen to defend himself more than once is extremely limited. It is in the interests of the community at large that there be an end to litigation especially where a jury has returned a verdict of not guilty.

In our submission there is no need for any further right of appeal by the prosecution. If a judge had made an error of law, the prosecution would have had the opportunity to persuade the judge to a contrary position prior to the jury's retirement. If the perceived error were not corrected at that stage by the Judge, then the State could have the matter referred to the Court of Appeal for resolution on an Attorney-General's Reference. Whilst this will not mean that the perceived perpetrator is retried or even punished, it will mean that the mistake is never replicated or perpetuated.

Whilst there would understandably be some support (particularly from the victims' lobby groups) that in every case the perpetrator of a crime should be punished wherever possible, it is submitted that this must be balanced against protecting the rights of the vast majority of citizens who would see it as desirable that litigation should end with a jury's verdict of acquittal, and the certainty that this brings to the legal process.

An accused person gets no costs whatsoever upon acquittal in superior courts. It is inevitable that those persons will suffer some financial loss – often devastating financial loss - as a result of having to pay legal fees, and in taking time off to attend to the case. The person's reputation may be irretrievably damaged and he may also have been incarcerated whilst awaiting trial or appeal. An accused cannot ever be compensated for this.

An accused person who is acquitted gets no benefit other than the knowledge that he can get on with his life and that he cannot be retried for an offence for which he has been acquitted.

In the Associations' submission, the need for the proposed change has not been demonstrated.

Further, the Bill does not provide adequate protection in the way of compensation for accused persons who may be subject to double jeopardy in terms of appropriate compensation for legal costs thrown away.

Under current legislation (the *Suitors' Fund Act*) there are some limited circumstances where, if a trial is adjourned or aborted, an accused has an entitlement to a payment. This comes (effectively) from consolidated revenue in the form of the *Suitors Fund* but the scale of remuneration under that Act is however far below the level of funding that would actually be expended in mounting a defence to a case or arranging representation at an adjourned trial or retrial.

In our experience, the amount payable under the *Suitors' Fund Act* will usually be a fraction of the real costs expended in a modest defence. In our submission any attempt to have the costs of the respondent to a prosecution appeal under the proposed provisions paid for along the lines currently available under the *Suitors' Fund Act* should be vigorously opposed.

It is submitted that a respondent to such a prosecution appeal should be afforded *indemnity* costs, provided they are not unreasonable, for both responding to the appeal and for the conduct of any retrial. To ensure that there be no abuse of this type of provision the rate of remuneration for any retrial should be assessed taking into account the level of legal representation used by the Respondent in the original trial.

Sections 42 - 56 CLEAB: AMENDMENTS TO EVIDENCE ACT

Section 43 CLEAB: Amendments to section 36BE

The Association believes that this proposal should be approached with great caution. Before any such amendment is enacted, it is submitted that the experience of other jurisdictions with this type of provision be examined carefully. There are some provisions to this effect which operate in the Family Court jurisdiction and would be worth examining before proceeding with this type of provision.

One concern with this type of evidence is that juries may afford the evidence of experts weight which transcends that given to the evidence of other witnesses, especially when testifying to equivocal aspects of behaviour (such as being "withdrawn" or sexually precocious) which may or may not support allegations of sexual offences.

What could occur in cases such as this is that for every prosecution expert who would testify as to a certain feature of a child's behaviour being consistent with the child having been sexually abused there would be another who would testify to the contrary.

Cases could become in effect contests between experts.Trials would become significantly longer and more expensive. Legal Aid would be forced to fund experts in almost every sexual assault case involving children.

The foregoing is predicated on the basis that fairness would dictate that the defence could call rebuttal evidence to evidence called by the prosecution. The section as it currently stands however does not specifically empower the defence to call such evidence. The briefing notes to the Bill observe that the provision would allow such evidence to be admitted "*against an accused person*".

The Criminal Lawyers' Association primary position is that the provision should at this stage be rejected in its entirety, absent investigation into workings of similar provisions in other jurisdictions. In the event that it were to be passed in some form or other it should be made abundantly clear on its face that the defence would have the right to call expert evidence either in rebuttal or as a positive aspect of the defence.

Further, such an amendment is likely to add a further strain on an already under-resourced District Court.

We trust that the foregoing may be of some assistance.

Yours faithfully

Judith Fordham
President