NSW Legislative Assembly Hansard

Criminal Procedure Amendment (Sexual and Other Offences) Bill

Extract from NSW Legislative Assembly Hansard and Papers Wednesday 18 October 2006.

Second Reading

Mr GRANT McBRIDE (The Entrance—Minister for Gaming and Racing, and Minister for the Central Coast) [10.05 p.m.], on behalf of Mr Bob Debus: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Criminal Procedure Amendment (Sexual and Other Offences) Bill, which proposes amendments to the Criminal Procedure Act 1986 and the Crimes Act 1900 to extend the existing protections provided to complainants in sexual assault proceedings, and to provide protection for other vulnerable persons in criminal proceedings. It is part of the Government's continuing commitment to ensure that the harm suffered by sexual assault victims is not compounded by the processes of our legal system. The amendments ensure that complainants are afforded greater measures of privacy and respect in court proceedings in order to minimise the trauma and potential re-victimisation these courageous people experience in their interaction with the criminal justice system.

The bill is part of the Government's ongoing legal reforms in the area of sexual assault prosecution, and arises out of the recommendations of the Criminal Justice Sexual Offences Task Force, which was established in December 2004. The task force report, published in April 2006, contains 70 recommendations and represents the most comprehensive review of the law in this area in the past 20 years. The task force was made up of representatives from a number of Government and non-government agencies and involved wide consultation with various stakeholders. I take this opportunity to thank each one for their hard work and efforts in this very important endeavour on behalf of the Government. In particular, the Government thanks Lloyd Babb, chair of the task force, who was able to achieve consensus in a committee with very disparate views, and Sally Traynor of the Office of the Director of Public Prosecutions for her hard work in putting the report together.

The task force recommendations not only highlight the need to change laws and procedures affecting the prosecution of sexual assault matters, but are aimed at bringing about a cultural shift in the way sexual offences are investigated and prosecuted and the attitudes of key participants within the criminal justice system. It is hoped that addressing these issues will help alleviate the high rates of attrition in sexual offences. The bill concentrates on the legislative recommendations in the task force report, and is part of the Government's commitment to improving the response of the criminal justice system to sexual assault crimes, while at the same time upholding the cornerstone legal principles that are valued by our community, such as the right of the accused to a fair trial.

The bill represents the first stage of the Government's package to reform sexual assault laws. The Attorney General expects to introduce a further bill shortly that will focus on greater protection for children, intellectually impaired persons and other vulnerable witnesses in the criminal justice system. These amendments are currently being finalised. In addition, the Attorney General expects to be consulting very soon on a bill that will contain a definition of consent, expansion of the circumstances that vitiate consent, and the introduction of an objective fault test. These recommendations require further consultation and advice from legal professionals and community stakeholders. The bill amends the Criminal Procedure Act 1986 in respect of committal processes, non-publication orders, jury directions, communication devices for vulnerable witnesses, use of a complainant's previous evidence to be used in a new trial where the earlier proceedings were adjourned, aborted, or resulted in a hung jury, and the unrepresented accused provisions.

I now turn to the detail of the bill. First I deal with committal proceedings. Items [1] to [3] of schedule 1 relate to committal proceedings. It is a general rule that complainants are not called to give oral evidence in committal proceedings. The courts rely mostly on their written statements in deciding whether or not there is a case to answer. In sexual offence proceedings in particular, it can be particularly traumatic to repeat evidence already provided several times to police, at committal and at trial. While it may be appropriate for a sexual assault complainant to be called to give evidence at committal in some cases, the bill seeks to tighten the procedures surrounding the process so that this is the exception rather than the rule.

The bill amends section 91 to provide that the written statement of a witness, who is directed to attend committal proceedings to give oral evidence, may be admissible as evidence in the proceedings in certain circumstances, namely where the parties consent, and the magistrate is satisfied that there are substantial reasons why, in the interests of justice, the statement should be admitted. At present, the written statement of such a witness is not admissible under the Act. The purpose of this amendment is to provide extra protections to the complainant by enabling the magistrate to admit his or her statement as evidence-in-chief, and to codify a practice that is

routinely adopted in court but at present has no legislative backing.

Section 93 of the Criminal Procedure Act 1986 currently provides that in any committal hearing in which the accused is charged with an offence involving violence, the magistrate may not direct an alleged victim of the offence who has made a written statement to give oral evidence at the hearing, unless the magistrate is of the opinion that there are special reasons in the interests of justice why the alleged victim should attend the hearing. Where the parties agree to the alleged victim being called, the magistrate must then direct the attendance of the victim. This position has been confirmed in obiter remarks in the judgment of Justice Johnson in the recent Supreme Court decision of *Director of Public Prosecutions (NSW) v O'Conner* [2006] New South Wales SC 458.

This bill amends section 93 to provide that such a direction should not be given unless the magistrate has satisfied himself or herself that such special reasons in the interests of justice exist, even where there is agreement between the parties. This will place a positive duty on the court to ensure that the interests of the complainant are protected. Section 93 is also amended to confirm the prohibition on calling child complainants in certain sexual offence proceedings to give oral evidence at committal hearings.

Item [4] of schedule 1 inserts a new section 275B into the Criminal Procedure Act 1986 to deal with vulnerable witnesses. This is only one of many recommendations made by the task force in relation to vulnerable people. As I foreshadowed earlier, further amendments will be made in a forthcoming separate bill. The rationale behind the introduction of special arrangements for vulnerable witnesses is that it facilitates witnesses giving their best evidence. Where a person relies upon an aid to communicate in their day-to-day living, that aid should also be available for their use in giving evidence before a court.

This new section provides that in any criminal proceedings, a witness who has difficulty communicating is entitled to use a communication aid, or a person in the role of an intermediary, to assist the witness in giving his or her evidence, but only if the witness ordinarily uses such assistance on a daily basis. Any intermediary acting under this section will be subject to the provisions governing interpreters in the Evidence Act 1995. This section will supplement existing provisions in the Evidence Act 1995 that enable a court to make any orders it considers just in relation to the way witnesses are questioned, and its inherent power to control proceedings.

I turn to non-publication orders. It is a fundamental principle of the common law that the administration of justice must take place in open court. The law, however, also makes exceptions to the rule, particularly where children and sexual assault complainants are concerned. Section 292 of the Criminal Procedure Act 1986 prohibits publication of evidence in sexual assault proceedings. Similarly, section 578A of the Crimes Act 1900 makes it an offence to publish any matter which identifies or leads to the identification of a complainant in certain sexual offence proceedings. The task force examined whether the current provisions relating to non-publication orders in section 578A and section 292 are adequate protection for victims in sexual assault trials. It made a series of recommendations in the report—recommendations 17 to 21—to enhance the existing provisions in recognition of the fact that publication of the identity of complainants in a sexual assault trial may cause secondary trauma to those complainants, increase the stigma attached to the offence and in some cases, jeopardise the safety of complainants.

Item [5] of schedule 1 amends section 292 to clarify that publication of evidence, or any report or account of that evidence, includes dissemination via the Internet or any other electronic means. It also provides, consistent with section 578A, that the court must consult with the complainant before determining whether to make such an order. Of course, in practice this consultation may occur either directly with the complainant or via the prosecutor. The task force also agreed that there are occasions where non-publication orders should continue after the verdict has been delivered for a period of time where there is the possibility of creating adverse publicity for an accused facing a back-to-back trial or the trial of the co-accused.

It will be remembered that the Court of Criminal Appeal overturned a conviction for gang rape on the basis of adverse publicity—see *R v S* (2004) 144 A Crim R 124. Accordingly, section 292 (7) provides that any non-publication order can continue to have effect after the proceedings have been finally disposed of. The court may, however, on application from any person, vary or revoke the order at any time. Schedule 2 to the bill amends section 578A of the Crimes Act in similar terms to section 292 of the Criminal Procedure Act 1986 to clarify that publication includes dissemination via the Internet and other electronic means.

I turn to jury directions. Perhaps the most significant amendments in this bill are those relating to jury directions concerning warnings to the jury in sexual assault proceedings. These directions have been roundly criticised by members of the judiciary, legal practitioners and academics as being, variously, too confusing, inconsistent, having no rational basis, reinstating false stereotypes about women, and giving rise to a high number of appeals of a very technical nature.

There has also been a practice developing of judges giving a warning even where it is not necessary in order to "appeal-proof" their decisions. This apparent compulsion to give the warning has of itself given rise to mistakes occurring in the way in which the direction is given to the jury. For example, figures supplied by the Judicial Commission of New South Wales to the task force show that for sexual assault cases heard on appeal from

2001 to 2004, the most common basis for a successful appeal based on a misdirection was that there was a deficiency in the Longman direction resulting in an error of law in 22 of the 37 cases. Of the 22 cases where a Longman misdirection gave rise to an appeal, a retrial was ordered in 14 of those cases, and in eight cases an acquittal was entered by the court.

Section 294 of the Criminal Procedure Act 1986 currently provides that in circumstances where there is evidence given or a question asked of a witness in certain sexual offence proceedings that tends to suggest a delay in, or absence of, complaint about the alleged offence, the judge is to warn the jury that this absence or delay does not necessarily indicate that the allegation is false, and that there may be good reasons why such a victim may hesitate in, or refrain from, making a complaint.

In *Crofts v The Queen* (1996) 186 CLR 427 the High Court has stated that if a warning is given in accordance with section 294, then the jury should also be informed that the delay, or absence of complaint may be taken into account in evaluating the complainant's evidence, and determining whether to believe him or her. Item [6] of the bill therefore extends section 294 to ensure that a judge does not also warn the jury that such a delay or absence of complaint is relevant to the victim's credibility, unless there is sufficient evidence to justify such a warning.

The next amendments relate to the Longman warning in *Longman v The Queen* (1989) 168 CLR 79, which is given to the jury where the court considers that because of the passage of so many years between the offence and the complaint it would be dangerous to convict on the complainant's evidence alone, unless the jury is satisfied of its truth and accuracy having scrutinised the complainant's evidence with much care. The rationale for the Longman warning is that the effect of significant delay on the accused's ability to test the complainant's allegations may not be readily apparent to a jury. There have been a number of criticisms of aspects of the Longman warning from the judiciary, practitioners and academics.

They are that decisions of the High Court had created an irrebuttable presumption that the accused had been disadvantaged requiring a direction to be given in every case involving delay, irrespective of whether there was any evidence that the delay had in fact denied the accused a proper opportunity to meet the charge; the unequivocal nature of the warning; the use of the words "dangerous to convict" in the warning risks being perceived by the jury as not too subtle encouragement by the trial judge to acquit; uncertainty is created about what period of time or delay would generally not require a warning; the directions take an inordinate length of time and the language used by judges to explain legal concepts in this area was often repetitive, convoluted and confusing; and it appears to recreate sexual assault complainants as an inherently unreliable class of witness.

A Longman-style warning, if given correctly, with some flexibility and in the appropriate circumstances, retains a legitimate place in the criminal law. Most commentators and judges appear to be of the view that the decision in Longman is correct. Longman itself was an unusual case where the delay in complaint was 25 years. The Longman warning, however, is being given in cases where the period of delay does not warrant it. For example, in the recent case of *DRE v Regina* (2006) NSWCCA 280, where the delay in complaint was five years, the Chief Justice said, "This is at best a borderline case for a Longman warning". Quite apart from the overuse of the Longman warning, it was also extended by the High Court in Doggett's case to include cases even where the complainant's evidence is corroborated. It is this extension of Longman, that is, the unequivocal assumption in the warning, that is most problematic and criticised.

It must be acknowledged that in some cases a delay in complaint may prejudice an accused person by denying the accused the ability to marshal witnesses who may have died or may no longer be able to be located. Prejudice may also be occasioned due to a loss of evidence, for example, the destruction of school records, medical records, employment records or photographs which may have otherwise been able to cast doubt on the evidence of the complainant. These issues may not necessarily be apparent to the jury, which is not entitled to speculate on evidence that is not before it. Other Australian States have also identified problems with the Longman direction and suggested a number of options for reform. Most importantly, the Australian Law Reform Commission [ALRC] has also examined this issue and recommends that the uniform Evidence Act be amended.

Accordingly, item [7] of schedule 1 further amends section 294 to provide that where the delay is significant and the accused can show he or she suffered a significant forensic disadvantage as a result of the delay, the judge may warn the jury of the nature of the disadvantage and the need for caution in determining whether to accept or give any weight to the relevant evidence, but only where a party requests the warning. The amendment is designed to ensure in the first instance that a Longman warning should not be given unless it is established factually that there has been a significant delay. The word "significant" has been purposely used to ensure that the warning is given in cases where the delay is warranted, and conversely not given where the delay is not significant.

The direction in *Regina v Murray* (1987) 11 NSWLR 543 provides that where there is only one witness asserting the commission of the offence, the evidence of the witness is to be scrutinised with great care. The typical sexual assault offence takes place in private without any other witnesses. The members of the task force agreed that the direction was unnecessary, as existing directions as to reasonable doubt were sufficient to protect the

accused. Item [8] of the schedule therefore adds a new section 294AA which prohibits a judge from stating or suggesting to a jury that complainants in sexual offence proceedings are unreliable witnesses as a class, mirroring section 165A of the Evidence Act 1995 which relates to children. The new section also prohibits the judge from warning the jury of the danger of convicting on the uncorroborated evidence of any complainant.

In relation to unrepresented accused, section 294A currently prohibits an unrepresented accused person from cross-examining a complainant in certain sexual offence proceedings and provides for a court-appointed intermediary to ask the questions. The New South Wales Law Society has specifically advised its practitioners not to act in this regard because of professional liabilities that might arise from a qualified practitioner acting as a mouthpiece for the accused but not providing legal advice. Section 294A is therefore extended by item [9] to ensure that an Australian lawyer appointed by the court under this section is immune from his or her professional responsibility towards the accused.

As to the use of evidence in subsequent trials, in May 2005 the Criminal Procedure Act 1986 was amended to permit previously recorded evidence given by a complainant in sexual assault trials to be admitted in any retrial after appeal, including evidence-in-chief, cross-examination and any re-examination. This was designed to alleviate the trauma of having to give sensitive evidence again and again. There are other circumstances in which a complainant is forced to give evidence again through no fault of their own, including where a trial is aborted or results in a hung jury or is discontinued for other reasons, such as the sudden unavailability of the trial judge, refusal of a juror to continue or illness of one of the parties or his or her lawyers.

Item [10] of the schedule expands the existing provisions to allow for all or part of a complainant's previous evidence in criminal proceedings to be used in a subsequent trial by introducing a new division 4, special provisions relating to subsequent trials of sexual offence proceedings. These new circumstances allowing the use of evidence in hung juries and aborted trials may be distinguished from a retrial. Where a retrial as been ordered following the result of a successful appeal, the complainant's evidence is complete, including cross-examination, and the jury has convicted the accused on the basis of that evidence. Where hung juries and aborted trials have resulted in new trials the complainant may not have given all of their evidence or the jury may have been unable to reach a verdict. Accordingly, several allowances must be made in these new provisions to ensure that the accused is not being unfairly disadvantaged.

Although there is a presumption in favour of admitting the previous evidence, the court is given a discretion whether or not to admit the evidence, having regard to the completeness of the previous evidence including cross-examination; the effect of editing the evidence if necessary; the availability or willingness of the complainant to attend to give further evidence and to clarify any matters arising from the previous evidence; the interests of justice; and any other matter the court thinks relevant. Additionally, the complainant must be available to give further evidence if the court believes it is necessary to clarify matters arising from the previous evidence; to canvass information or material that has become available since the original proceedings; or if it is in the interests of justice. However, there is a presumption against calling the complainant, and the mere fact that the previous evidence is incomplete or that further material has come to light will not automatically make the complainant compellable to give evidence.

New division 4 of part 5 of chapter 6 of the Criminal Procedure Act 1986 gives effect to these provisions. New section 306H contains relevant definitions, and section 306I permits the prosecutor to tender the record of the evidence of the complainant given in the discontinued proceedings as evidence in the new trial. This includes evidence-in-chief, cross-examination and any re-examination. The record will only be admissible if the prosecutor gives the accused and the court notice of the prosecutor's intention to tender the evidence, and the hearsay provisions of the Evidence Act 1995 will not apply. The new provisions will extend to new trials listed before the commencement of the new division.

New section 306J provides that the complainant is not compellable to provide further evidence unless the court is satisfied of the matters already referred to. New section 306K enables the complainant to elect to give further evidence with the leave of the court if he or she so chooses. New section 306L applies the provisions of the current 306E to 306G to new division 4, which relate to the form in which the recording is to be tendered, as well as access to recordings and exhibits. The amendments contained in this bill will make it easier for complainants in sexual assault proceedings to give their evidence and reduce the stress that the court process entails, as well as assisting them to give the best evidence they can give and preventing their re-victimisation in the criminal justice system. It is hoped that such amendments will encourage increased reporting and the prosecution of sexual assault matters. I am sure this will be welcomed by all members. I commend the bill to the House.