



Legislative Council

Criminal Procedure Amendment (Sexual Assault Communications Privilege) Bill Hansard - Extract

07/05/2002

Second Reading

The Hon. IAN MACDONALD (Parliamentary Secretary) [5.32 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Criminal Procedure Amendment (Sexual Assault Communications Privilege) Bill 2002 seeks to amend the Criminal Procedure Act 1986 in order to address issues arising out of the decision of the Court of Criminal Appeal in *R v Norman Lee* [2000] NSWCCA 444.

The policy behind the sexual assault communications privilege is that the benefits of counselling services provided to a sexual assault victim should not be compromised by the prospect that communications made in connection with those services may later be revealed to the accused or disclosed in court. The Government has taken the view that the public interest in preserving the confidentiality of counselling communications, including counsellors' notes, in order to protect the counselling relationship and thereby assist the victim in overcoming the trauma of the attack, often outweighs the public interest in allowing inspection of the notes by the accused or his lawyer.

The application of the privilege is discretionary, so that whether or not evidence of counselling communications may be subpoenaed or adduced is determined in accordance with a statutory balancing exercise.

Under the existing terms of the Criminal Procedure Act 1986, counselling communications may only exist, and the privilege may only apply, where there is a relationship in which one person is "counselling, giving therapy to or treating" another person for "any emotional or psychological condition".

The Court in *R v Norman Lee* interpreted this to mean there must be "some defect or illness or disease or abnormality" in the state of mind of the person receiving counselling, and that the counselling must consist of "the provision of expert advice" by "persons skilled... in the treatment of mental disease or trouble."

This was a most disturbing result. Firstly, it suggested that the sexual assault communications privilege may only protect counselled persons who suffer from a recognisable psychiatric illness. This was clearly not the intent of the legislation. Sexual assault counselling typically seeks to address feelings of shame, humiliation and fear—which are perfectly normal reactions to such an attack. Most sexual assault victims probably do not suffer from a recognised psychiatric illness.

Second, it paved the way for a later court to decide that the sexual assault communications privilege only applies to counselling provided by a psychiatrist or other specialist who is qualified in the diagnosis of mental illness. This would exclude social workers, who presently provide the great bulk of sexual assault counselling in NSW.

Third, by characterising "counselling" as the provision of expert advice, the decision misunderstood the role of a sexual assault counsellor, which is essentially to listen to the thoughts and feelings of the victim and provide verbal and other support and encouragement.

The principal purpose of this Bill is therefore to ensure that the sexual assault communications privilege is capable of protecting confidential communications made in connection with:

- counselling provided by counsellors who lack formal training or qualifications in the diagnosis of psychiatric and/or psychological conditions; and
- which takes the form of listening to the thoughts and feelings of the alleged sexual assault victim and providing verbal or other support, rather than providing expert advice.

This purpose is achieved by inserting a new definition of "counselling" into the Criminal Procedure Act 1986.

Counsellors will not need training or qualifications in the diagnosis of mental illness in order to satisfy that definition. Rather, they will need to have undertaken training or study, or have experience that is relevant to the process of counselling persons who have suffered harm. This wording is similar to section 79 of the

Evidence Act 1995, which identifies persons who are eligible to give expert opinion evidence, but broader in that it does not include the requirement of "specialised knowledge".

The new definition will also specify that "counselling" includes listening to and providing verbal or other support or encouragement to the counselled person. It may, but need not, include the provision of advice, therapy or treatment.

These amendments are designed to ensure the legislation reflects the realities of sexual assault counselling, and to prevent technical legal argument going to the mental state of the alleged victim.

It is recognised that there has been continuing opposition to this privilege in some quarters. However, the Government does not consider that it represents an unfair infringement on a defendant's right to a fair trial or to the best defence available. The sexual assault communications privilege is and always has been discretionary in its application, so that a court can still require counselling communications which include information material to the defence to be produced on subpoena or given in evidence.

This Bill will ensure the sexual assault communications privilege is capable of protecting a wide range of counselling communications, and that the Government's policy is properly implemented. It will help to minimise the prospect that communications made in connection with counselling services provided to victims of sexual assault may later be revealed to the accused or disclosed in court, and therefore to maximise the possible benefits of such counselling and further assist victims to overcome the trauma of the assault.

I commend the Bill to the House.