NSW Legislative Council Hansard

Criminal Procedure Amendment (Evidence) Bill

Extract from NSW Legislative Council Hansard and Papers Tuesday 3 May 2005.

Second Reading

The Hon. JOHN HATZISTERGOS (Minister for Justice, Minister for Fair Trading, Minister Assisting the Minister for Commerce, and Minister Assisting the Premier on Citizenship) [5.11 p.m.]: I move:

That this bill be now read a second time.

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

Leave granted.

Sexual assault in New South Wales—indeed in Australia—is a grossly under-reported crime.

Victim surveys reveal that more than half the sexual assaults that occur each year are perpetrated by the partner, boyfriend or former partner of the victim, and in a further 34% of cases by a person known to the victim.

These assaults occur every day. They do not get headlines. Victims do not report their former partners, their husbands, people they thought were their friends.

The Government is determined to provide support and assistance to victims of sexual assault at every stage of the process.

As such, in recognition of the low rates of reporting and convictions, the Government has made a number of reforms designed to assist complainants in the difficult task of giving evidence, thereby encouraging them to come forward and report sexual assault crimes.

The Government is pleased to introduce the *Criminal Procedure Amendment (Evidence) Bill* 2005.

The bill amends the *Criminal Procedure Act* 1986 to permit the record of evidence given by the complainant in a sexual assault trial to be admitted as the evidence in any new trial ordered following an appeal.

This bill is part of the on-going process of reform in relation to improving the process surrounding sexual assault prosecutions for complainants. There will be more reforms in this area in the very near future.

Honourable members will be aware that on 3 February 2005, the DPP announced that the re-trial of two Accused would not proceed because the complainant was unwilling to testify again and the case was not strong enough to proceed without her evidence.

The advice of every experienced prosecutor is that it is infinitely preferable, in a jury trial, to have the direct evidence of the complainant.

No other form of evidence has the clear impact of personal testimony. But that option is no longer available. And the Government respects the decision of the young woman in that case.
In certain circumstances under the current state of our law the evidence of complainants from previous trials is admissible on subsequent re-trials.

However, unless an exception to the hearsay rule applies, the record of the original proceedings is inadmissible.

The rule against hearsay, as found at section 59 of the *Evidence Act* 1995 (NSW), currently prevents the admission of representations made by a complainant in a previous trial to prove the facts upon which the prosecution seeks to rely in a subsequent re-trial.

This rule against hearsay is subject to a number of exceptions: section 65 of the *Evidence Act* creates an exception to the hearsay rule where a witness is not available, and they have given evidence in prior proceedings and the accused cross-examined them or had a reasonable opportunity to cross-examine them.

A person is not available if they are dead or if all reasonable steps have been taken to locate them and get them to come to court, but without success. In such circumstances, a recording or transcript of their evidence may be adduced in evidence.

The *Evidence Act* does not provide for the admission of the record of the original evidence of a complainant on a re-trial ordered by an appeal court where the complainant is available but unwilling to give further evidence.

This Government considers that the record of the original evidence **should** be admitted in such circumstances and that the rule against hearsay evidence should not prevent this.

Sexual assault has a devastating effect on its victims. While sexual violence only occasionally results in physical injury, the emotional impact can be extensive. The Australian Institute of Criminology's 2001 report on Sexual Violence in Australia found that:

"Regardless of age, sex, occupation or marital status of the victim, the consequences of sexual assault can include massive and potentially long-lasting trauma, both for the victim and their immediate family or social network."

Not surprisingly, some complainants who have given evidence that resulted in a conviction, decide that they simply cannot return to give evidence again, when a new trial is ordered on appeal. Significant time will have passed and the complainant will have tried as best as possible to put the matter out of their mind.

The proposed new Division 3 of Part 5 of Chapter 6 of the *Criminal Procedure Act* permits the admission of a record of evidence given by a complainant in a prescribed sexual offence proceeding in any new trial that is ordered following an appeal.

Under the proposed s306B the record of the original evidence will be admissible only if the prosecutor gives the court and the accused notice of the prosecutor's intention to tender the record. The form of the notice is prescribed by the regulations.

Proposed subsection 306B(4) provides that the hearsay rule under the *Evidence Act* will not prevent the admission or use of the record as evidence.

Under proposed subsection 306B(5) the Court does not have discretion to decline to admit the record where proper notice has been given by the prosecution.

However, subsections 306B(6) and (7) do allow the record to be edited to remove inadmissible statements. An example of where the transcript will need to be edited is where the Appeal Court has indicated that a part of the complainant's evidence was placed before the original jury in breach of the rules of evidence or law.

That the complainant is not giving evidence orally in the new trial proceedings is not a basis for rejecting the record of evidence. The new trial court must approach issues of admissibility as if the evidence of the complainant were being given orally.

The proposed subsection 306B(7) provides that editing may also occur on the basis of agreement between the prosecution and the accused or his or her counsel.

This bill does not require the record of the original evidence to be admitted in evidence on all re-trials. Some complainants will choose to give all of their evidence again in person. It is important that complainants can choose to give evidence on a re-trial. It empowers complainants and allows them a decision-making role in the court process.

The prosecutor will no doubt advise complainants that the case will be stronger if they can manage to give all their evidence again in front of a new jury. Where the complainant does choose to give all their evidence again on a re-trial no notice need be served by the prosecution.

The complainant will have a choice about whether to give no further evidence, whether to give limited further evidence or whether to give all his or her evidence afresh.

The proposed sections 306C and 306D provide that if a record of the evidence of a complainant is admitted in the new trial proceedings, the complainant will not be compellable to provide any further evidence, but may elect to do so (with leave of the court hearing the new trial proceedings).

A complainant who chooses to give further evidence will not be exposed to further questioning "at large" on all matters.

The proposed subsection 306D(3) requires the court to ensure that only those questions which are necessary to clarify the record of the original proceedings, to canvas new material that has become available since the original proceedings, or that are necessary in the interests of justice, are asked of the complainant. Subsection 306D(4) makes a complainant who commences to give further evidence compellable to remain to

answer such limited further questions as the court allows from both the prosecution and the defence.

The proposed section 306E also makes provision for the form in which a record of the original evidence given by a complainant is to be tendered in new trial proceedings.

The best available record must be tendered. A recording will be tendered where one is available and, where a recording is not available, a transcript may be tendered.

The proposed provisions extend to new trials ordered before the commencement of these provisions. In this way, the procedure of tendering the record of the original proceedings will be available for the matter which received publicity on 3 February 2005 if the DPP choose to proceed to trial against the two Accused.

The bill also amends the *Criminal Procedure Regulation 2000* consequentially to make provision for: (a) the matters to be specified in the notice required to be given by the prosecutor before tendering a record of the original evidence of a complainant, and (b) the arrangements that are to be made for giving an accused person access to that record if it is an audio-visual recording or audio recording.

Madam President, as I foreshadowed, this is not the end of the reforms by the Government in this area. More amendments, aimed at supporting victims of sexual assault will be introduced into this House in the very near future, and I look forward to the continued support from all Honourable members of the House on these issues.

I commend the Bill to the House.