



NSW Legislative Assembly Hansard

Criminal Procedure Further Amendment (Evidence) Bill

Extract from NSW Legislative Assembly Hansard and Papers Wednesday 23 March 2005.

Second Reading

Mr BOB DEBUS (Blue Mountains—Attorney General, and Minister for the Environment) [8.58 p.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Criminal Procedure Further Amendment (Evidence) Bill. The bill amends the Criminal Procedure Act 1986 to expand the protections that the Act provides to sexual assault complainants, thereby ensuring that complainants are accorded a measure of privacy and respect and are able to give the best evidence they can, and that the court process does not revictimise these courageous people. The bill is part of the Government's ongoing process of legal reform in sexual assault prosecutions. The Government made a number of election commitments in relation to sexual assaults and has fulfilled those commitments—and more—by the introduction of the bill. This will not, though, be the end of reforms in this area because the Government is committed to improving the criminal justice system's response to sexual assault crimes, and is committed to doing this without sacrificing any of the principles, such as the right to a fair trial, that we as a society hold dear. And with this package of reforms, the Government, after wide consultation, has improved the system for sexual assault victims and at the same time has upheld those cornerstone legal principles.

There can be no doubt that the prosecution of sexual assault is one of the most difficult areas of the law. Sexual assault is a difficult event to come to terms with, to report, to investigate and to judge. And by its very nature, giving evidence of a sexual assault is like no other evidence. Sexual assault complainant evidence must include precise and explicit details of sexual acts and of intimate sexual violence. Evidence may include swear words, slang usage for body parts, name calling, derogatory terms or remarks of a personal nature. It is embarrassing and humiliating evidence to give. It can come as no surprise that many victims feel reluctant to come forward and report sexual assaults and, of those who do, their efforts to have their day in court are nothing short of heroic. There are many reasons for the low rate of reporting by sexual assault victims: a fear of reprisals; a wish to protect the offender; to keep the family together; shame; embarrassment; and, in some cases, fear or suspicion of the criminal justice system.

By making it easier for complainants to give evidence, which is what this bill does, these reforms will encourage reporting and encourage those victims who do choose to report to see the legal process through. The bill amends the Criminal Procedure Act 1986 as follows: it imposes a duty on a court hearing any criminal proceeding to disallow improper questions that are put to witnesses in cross-examination; it prevents the circulation and unauthorised copying of sensitive evidence; it requires any part of proceedings for a sexual offence in which evidence is given by the complainant to be held in camera; it confers an entitlement on a complainant in such a case to have one or more support persons present near the complainant when giving evidence; it simplifies and standardises the coverage of various provisions of the Act that relate to the protection of a complainant in sexual offence proceedings; and it makes it clear that a complainant in a sexual offence proceeding is entitled to give evidence utilising alternate arrangements such as screens instead of by the use of closed-circuit television, whether or not closed-circuit television facilities are available in the proceedings.

The bill amends the Children (Criminal Proceedings) Act 1987, the Crimes Act 1900, the Evidence Act 1995 and the Evidence (Children) Act 1997 consequentially. It provides for savings and transitional matters, and makes minor amendments by way of statute law revision. I now turn to the detail of the bill. New section 275A of the Criminal Procedure Act deals with improper questions. At present, section 41 of the Evidence Act gives the court the power to disallow a question put to a witness in cross-examination, or to inform the witness that the question need not be answered, if the question is misleading or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. The application of section 41 is inconsistent. Some counsel are reluctant to object each time they think a question is improper because they believe it may place them at a forensic disadvantage, such as appearing to be trying to hide something; and although judicial officers have the power to intervene, some judges are reluctant to take this up.

The amendment in relation to improper questions sets a new standard for the cross-examination of witnesses in criminal proceedings, including by referring, for the first time, to the manner or tone in which a question is asked. It is an important amendment because improper questions asked of them in cross-examination are one of the most distressing aspects of the court process for sexual assault complainants. This amendment will also apply to our most vulnerable witnesses—child complainants. Under the amendments, a court must disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question, firstly, is misleading or confusing; secondly, is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; thirdly, is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or, fourthly, has no basis other than a sexist, racial, cultural or ethnic stereotype.

This amendment places a positive duty on judges to act to prevent improper questions, thereby ensuring that witnesses are able to give their evidence free from intimidation and fear. It also allows a party to the proceedings to raise an objection if they so wish. The factors that may be taken into account by the court in determining whether a question should be disallowed have been extended to include the ethnic and cultural background of the witness, their language background and skills, and their level of maturity and understanding. The amendment provides that a question is not a disallowable question merely because it challenges the truthfulness of the witness or the accuracy of their recollection, or because it

requires a witness to discuss a subject that could be considered distasteful or private.

The amendment also allows a question to be asked if there is some basis for asking it—such as the fact that the issue was raised in evidence-in-chief—other than to reinforce a sexist, racial, cultural or ethnic stereotype. These are sensible safeguards that will ensure that every witness's evidence can be fairly tested. A failure by the court to exercise the duty placed on them will not affect the admissibility of any evidence given in response to a question. This amendment therefore does not open a new stream of appeal points for defendants. Section 41 of the Evidence Act 1995 will no longer apply to the cross-examination of witnesses in criminal proceedings but will continue to apply to civil proceedings.

Item [5] of schedule 1 to the bill creates new sections 281A to 281F, which deal with sensitive evidence. As I have already mentioned, one reason the Government is undertaking this on-going process of reform to sexual assault laws is to ensure that the court process does not re-victimise the victims. The possession and dissemination of sensitive material by an accused—sometimes as a form of "gaol porn"—is another cause of distress and humiliation for sexual assault complainants and another reason for them to fear the court process. As such, the Government has introduced new part 2A of chapter 6 which contains provisions preventing the circulation and unauthorised copying of sensitive evidence. This amendment takes the protection of sexual assault complainants in New South Wales to a new level.

Under new section 281B, a thing that contains or displays an image of a person—referred to as the protected person—is sensitive evidence, first, if the image is obscene or indecent; secondly, if providing a copy of the image to another person without the protected person's consent would interfere with the protected person's privacy; or, thirdly, if the image was taken after the death of the protected person. Under new section 281B (3), the fact that the thing, such as a photograph of injuries suffered by a complainant, was only created to provide evidence is to be disregarded when determining whether the thing is sensitive evidence. Even if created by the police or the Coroner, it may still be sensitive evidence and must be treated as such.

With this amendment, the Government is concerned not only to prevent the re-victimisation of sexual assault complainants and to prevent them from feeling further embarrassment and shame but also to protect the privacy and dignity of all other victims, including those who have tragically lost their lives. The amendments will prevent the unauthorised circulation or reproduction of sensitive evidence. The prosecuting authority is not required to provide the accused person, which includes his or her representative, with a copy of any sensitive evidence under section 281C. However, new section 281D sets out the procedures which will provide an alternative means for the accused person to be given access to view but not copy the sensitive evidence. This will ensure that an accused person is able to access all the relevant evidence the prosecution has compiled and, therefore, be fully informed of the case against them.

New section 281E allows the prosecuting authority to retain or regain possession of sensitive evidence, or copies of sensitive evidence, tendered in criminal proceedings. New section 281F creates offences for the unauthorised or improper copying or circulation of sensitive evidence. Item [7] of schedule 1 amends section 291 of the Criminal Procedure Act 1986. At present, section 291 of the Act gives a court the power to close the court when a sexual assault complainant gives evidence. However, not all complainants receive the benefit of being able to give their evidence in camera. This provision will ensure that when complainants give their evidence it will be free from the stress, trauma, embarrassment and humiliation of having to recite the minute details of their sexual assault before a court full of strangers, the accused's family and friends or teenage boys on school excursions.

In assisting to reduce the stress and humiliation complainants face when giving evidence, closed courts also assist complainants to give best evidence; that is, accurate, reliable, coherent and complete evidence. Assisting complainants to do this also serves the interests of justice. The amendments replace the existing section 291 and will ensure that courts are closed as a matter of course. They will give greater certainty and privacy to sexual assault complainants and, as mentioned, assist in the giving of best evidence. The new provisions require that any part of proceedings in respect of a prescribed sexual offence in which evidence is given by a complainant are to be held in camera; that is, in a closed court, unless the court otherwise directs. This applies even if the complainant gives evidence by means of closed-circuit television or other technology, or under any alternative arrangements available to the complainant.

This is important, because the embarrassment and humiliation associated with giving evidence arises from the presence of the listening public—whether or not the complainant can actually see them. Also, complainants using closed-circuit television can still hear and often see the public. New subsection 291 (3) provides that a court may direct the evidence to be given in open court only if a party to the proceedings requests it and the court is satisfied that:

- (a) special reasons in the interests of justice require the part of the proceedings to be held in open court, or
- (b) the complainant consents to giving his or her evidence in open court.

That last subparagraph is important, because it empowers complainants by allowing them a choice in how they give their evidence. The courts will retain their current discretion to direct that other parts of the proceedings, or the entire proceedings, be held in camera, and the amendments do not affect the existing requirement that the proceedings for certain incest offences must be held entirely in camera. Item [18] of schedule 1 creates a new section 294C that improves the previous support person provisions of the Criminal Procedure Act. An important part of giving evidence for a sexual assault complainant is the right to have a support person or persons of their choice present when they give evidence. Support persons provide emotional, logistical and other support to sexual assault complainants. Such support throughout a trial can help reduce the trauma of the court experience and its intimidating and alienating effects.

The amendments confer on a complainant who gives evidence in sexual offence proceedings an entitlement to have one or more persons chosen by the complainant present near the complainant, and within the complainant's sight when the

complainant gives evidence in the proceedings. This is an improvement on the current provisions, which give the court a discretionary power—which is not universally applied—to exempt a person supporting the complainant from a closed court direction. The entitlement applies even if the complainant gives evidence by means of closed-circuit television or other technology or under any alternative arrangements available to the complainant, and even if the proceedings, or the part of the proceedings in which the complainant gives evidence, are held in camera.

The amendments limit the right of the accused person to object to the suitability of the person or persons chosen by the complainant to be with the complainant when giving evidence. This means that taking tactical objection to a complainant's choice of support person at the door of the court will no longer be allowed. But the amendments also provide a safeguard if the complainant's choice of person is likely to prejudice the accused's right to a fair trial; for example, if the person chosen is a witness or potential witness in the proceedings. Of course, the complainant's choice of a support person or persons will continue to be guided by the advice of the Director of Public Prosecutions.

The entitlement conferred by the new provision extends to a complainant of any age, and to cases heard in the Children's Court, so that all sexual assault complainants, regardless of their age and regardless of what court they appear in, receive the same rights in relation to support persons, just as these amendments mean they do in relation to giving evidence in a closed court. Item [1] of schedule 1 provides for a revised definition of prescribed sexual offence and a number of other minor amendments relate to this definitional change. At present, there is no standard definition of the types of offences to which the various legislative provisions providing sexual assault complainants with special protections, such as those provisions I have already outlined, apply.

Each of the relevant provisions contains its own definition of the types of offences to which the provision applies. As a consequence, the provisions do not apply uniformly to all complainants in all sexual offence proceedings. Therefore, the amendments address this issue by providing for a new, comprehensive definition of prescribed sexual offence. The definition is intended to cover all offences of a sexual nature, including repealed offences, under the Crimes Act and various related offences. These amendments do not affect the validity of anything already done in proceedings already instituted or part heard.

Item [15] amends existing subsection 294B (3) of the Act to improve complainants' choice in how they give evidence. This amendment will give greater choice to complainants so that they can choose to give evidence by use of alternative arrangements—such as screens that restrict contact between the complainant and the accused—whether or not the technology is available for the giving of evidence by closed-circuit television. At present, complainants can use screens only if closed-circuit technology is not available. The savings and transitional provisions make it clear that where appropriate the new requirements extend to criminal investigations already instituted and criminal proceedings already instituted or partly heard.

Schedule 2 to the bill makes consequential amendments to other Acts, including the Children (Criminal Proceedings) Act 1987 in relation to the closed court and support persons amendments. This consequential amendment makes it clear that the new provisions extend to proceedings to which a child is a party, generally heard by the Children's Court, and that the support person or persons chosen by the complainant cannot be directed to leave the court. The Evidence Act 1995 is also amended consequential on the proposal to require the court in criminal proceedings to disallow improper questions put in cross-examination of a witness. The Evidence (Children) Act 1997 is consequentially amended in relation to the support person's proposal. If the complainant is a child, the provisions of the Criminal Procedure Act 1986 apply instead of the provisions relating to support persons that might otherwise apply under the Evidence (Children) Act 1997.

The schedule 2 amendments are important in that they give all sexual assault complainants, irrespective of their age and irrespective of the court in which they give evidence, the same protections. I know that all members of the House are impressed by the courage shown by those sexual assault complainants who report horrendous crimes and who follow the court process through to its conclusion. And I know that all members wish to assist these complainants to give their evidence free from additional stress, trauma and humiliation. Therefore, I am sure that the amendments will be welcomed by all members. I commend the bill to the House.