Criminal Procedure Amendment (Sexual Offence Evidence) Bill.

Second Reading

Mr DEBUS (Blue Mountains—Attorney General, and Minister for the Environment) [3.37 p.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Criminal Procedure Amendment (Sexual Offence Evidence) Bill, which amends the Criminal Procedure Act 1986 to protect a claimant in sexual offence proceedings from being questioned directly by an unrepresented accused person. Sexual assault has a devastating effect on its victims. While sexual violence only occasionally results in physical injury, the emotional impact can be significant and long lasting. Sexual assault is also notoriously underreported. There are many social, cultural and personal reasons why victims of sexual assault do not report the crime to police. One factor may be the victim's expectations of how he or she will be treated by the criminal justice system. This bill is aimed at alleviating some of those fears.

On 27 March 2002 I referred the issue of unrepresented accused persons cross-examining complainants in sexual assault trials to the New South Wales Law Reform Commission. The Law Reform Commission published an issues paper on this topic in August 2002, inviting submissions from members of the public. The final report, titled "Questioning of complainants by unrepresented accused in sexual offence trials", was released in July, and I have tabled that report today. The report forms the basis of the Government's legislation. There is already legislation in New South Wales limiting the right of an accused person to cross-examine a child witness in certain proceedings. Pursuant to the Evidence (Children) Act 1997, unless the interests of justice demand otherwise, a child witness must be questioned by a person appointed by the court, rather than by an unrepresented accused, in any criminal proceedings or in a civil proceedings arising from the commission of a personal assault offence.

However, this Act applies only to evidence given by a child under the age of 16 years at the time the evidence is given. Complainants over the age of 16 years at the time the evidence is given are not protected. Although it is rare for a person accused of a sexual offence to be unrepresented at trial, the process of being questioned personally by the accused is extremely distressing for complainants, even if the questions are not offensive or otherwise objectionable. The DPP submission to the Law Reform Commission cites one example of an unrepresented accused cross-examining his daughter, the complainant, for approximately 10 days. A 1996 report by the New South Wales Bureau of Crime Statistics and Research found that the vast majority of complainants nominated seeing the accused as the worst feature of having to attend court. Being cross-examined by the accused is even more distressing and traumatic for a complainant, particularly if the questions being asked are of an intimate nature, which is invariably the case in sexual offence proceedings.

Minimising the trauma for complainants in sexual offence proceedings is not only a worthwhile pursuit in itself, but will undoubtedly promote the accuracy and coherency of the complainant's evidence. It is also hoped that the legislation will encourage complainants to report sexual offences to the authorities, with a view to ensuring that offenders are brought to justice. Under proposed subsection (2) of section 294A a complainant in sexual offence proceedings cannot be questioned by an unrepresented accused person but may be so questioned by a person appointed by the court. The court does not have a discretion to decline to appoint such a person. Under proposed subsections (3) and (4) of section 294A, the court-appointed intermediary is to ask the complainant only the questions that the accused asks to be put to the complainant, and must not give the accused any legal or other advice. The court-appointed intermediary need not be a legal practitioner. This is consistent with the provisions that apply to child witnesses under the Evidence (Children) Act 1997.

The role of the court-appointed intermediary is simply to repeat the questions sought to be put by the accused to the complainant. The intermediary is not to give the accused any legal or other advice. No specific benefit would therefore be achieved by requiring the intermediary to be a legal practitioner. The court-appointed person is required only for the questioning of the complainant by the accused, not for the entire proceedings. It is not desirable to inject a legal practitioner into a portion of proceedings and impose on that legal practitioner the professional duties and authority involved in a client-lawyer relationship. Legal practitioners may well be reluctant to become involved in proceedings that could make them vulnerable to complaints if the accused person alleges that the legal practitioner has failed to adequately cross-examine the complainant. The position contained in the bill was supported by some notable submissions to the Law Reform Commission, including submissions from the Director of Public Prosecutions, the Department for Women and the Violence Against Women Specialist Unit. In its submission to the Law Reform Commission, the DPP noted:

It is not necessary that the third person be a legal practitioner. The appointed person should not have any influence on cross-examination. In addition, a friend or relative of the accused should not be enlisted as a third party, as there may

have existed a domestic or known relationship between the victim or the vulnerable witness and the relative or friend and this may add to any intimidation or humiliation that the complainant may feel. Suggestions for a third party could include the judicial officer's assistant or associate, a court officer or a person employed by the Attorney General's Department.

I support that submission. In addition, the Northern Territory and Western Australian jurisdictions have similar provisions that do not require the court to appoint a legal practitioner. Even though the accused may ask a particular question to be put to a complainant, the court will allow the question to be put only if it is in admissible form and does not otherwise breach the provisions of the Evidence Act. For example, a judge should not allow a question to be put to a complainant if the question is unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. These are qualities mentioned in section 41 of the Evidence Act. At this point I would like to make it clear to honourable members that the intermediary is appointed by the court and not by the accused person. The accused cannot insist on a particular person being appointed. It is up to the court to appoint a suitable person, and it is expected that in the normal course of events this will be a court officer or a judge's associate, although the provision deliberately allows some flexibility in this respect. Judges may even appoint themselves to ask the questions. I do not anticipate that the practical implementation of these provisions will be problematic.

I would expect that the accused would convey his or her questions to the court-appointed intermediary in much the same way that they would if, for example, an interpreter was being utilised. The intermediary may then, subject to any ruling on the admissibility of the question by the court, repeat that question to the complainant. A sexual offence is defined broadly in proposed subsection 294A (9) to include all sexual assault offences, sexual offences against children and sexual servitude offences. This is to ensure that all complainants in sexual offence proceedings are afforded the protection provided in the legislation. It will apply to hearings before magistrates, committal proceedings, judge alone and jury trials. Proposed subsection 294A (5) makes it clear that the prohibition applies to child witnesses who are complainants in sexual offence proceedings, despite the provisions of the Evidence (Children) Act 1997.

This bill goes further than that Act in that the bill does not give the court a discretion to decline to appoint an intermediary. By contrast, the Evidence (Children) Act 1997 gives the court a discretion to appoint an intermediary but that Act applies to a broad range of child witnesses, not just complainants, in all criminal proceedings and in certain civil proceedings. To demonstrate the inter-relationship between the bill and the Evidence (Children) Act 1997, if a complainant is giving evidence in sexual offence proceedings, whether an adult or a child, the complainant will be covered by proposed section 294A. If a child witness under the age of 16 years is giving evidence other than as the complainant in a sexual offence proceeding—for example, the child is the alleged victim of a non-sexual offence—the provisions of the Evidence (Children) Act 1997 will apply.

All honourable members are aware that the introduction of this bill has been expedited to ensure its timely commencement. Therefore, it is not possible to put the bill before the Legislation Review Committee. The bill is to commence on assent. It should be noted that this bill does not seek to remove the accused person's right to represent themselves, nor does it seek to remove the accused person's right that the complainant be cross-examined. It simply prohibits the accused from conducting such cross-examination in person, providing what the Victorian Law Reform Commission has described as a "protective filter between the accused and the complainant". The possibility of prejudice to the accused is reduced by providing that the court is required to warn the members of the jury that they must not draw any adverse inference or give the evidence any greater or lesser weight based on the appointment of an intermediary. This requirement is found in proposed subsection 294A (7).

It was not considered necessary to implement the recommendation made by the Law Reform Commission that the court warn an unrepresented accused about the rule in *Browne v Dunn*. This direction—that is, the provision contained in the so-called rule in *Browne v Dunn*—is already adequately covered in the bench books maintained by the Judicial Commission of New South Wales. This warning is one of general application, to be given to an unrepresented accused person in any trial, not limited to sexual offence proceedings. Therefore, it is unnecessary to introduce a specific requirement for sexual offence proceedings. The Law Reform Commission's recommendation regarding alternative arrangements is presently being explored by my department, with a view to the Government introducing legislation during this session of Parliament. This bill achieves the necessary balance of reducing the trauma experienced by complainants in sexual offence proceedings without denying the accused a fair trial. I commend the bill to the House.