



# Criminal Procedure Amendment (Vulnerable Persons) Bill 2007

## < H2>Criminal Procedure Amendment (Vulnerable Persons) Bill 2007

Extract from NSW Legislative Council Hansard and Papers Tuesday 5 June 2007.

### Second Reading

**The Hon. JOHN HATZISTERGOS** (Attorney General, and Minister for Justice)

[3.19 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.

I am pleased to introduce the *Criminal Procedure Amendment (Vulnerable Persons) Bill 2007*.

This bill proposes amendments to the *Criminal Procedure Act 1986* to amend the existing provisions that govern the giving of evidence by children in certain proceedings, and extend those provisions to cover persons with an intellectual impairment. It is proposed to repeal the Evidence (Children) Act 1997 and insert those provisions into the *Criminal Procedure Act 1986* , extending their application to intellectually impaired persons. It is considered more appropriate that these provisions are placed in the *Criminal Procedure Act 1986*.

This bill forms part of the Government's on-going legal reforms in the area of sexual assault prosecution arising out of the recommendations of the Criminal Justice Sexual Offences Taskforce, and also the Statutory Review conducted by my Department in June 2006 into the Evidence (Children) Act 1997.

The Taskforce Report contained 70 recommendations, which not only focused on laws and procedures affecting the prosecution of sexual assault matters, but also gave rise to more general concerns with respect to the protection of vulnerable witnesses within the criminal justice system.

The Taskforce recognised that people who have an intellectual disability or other cognitive impairment may be more vulnerable to sexual assault, particularly where they require assistance with their daily life activities. The Taskforce Report highlighted the need to provide greater protection to people with intellectual disabilities and other cognitive impairments, and to improve police investigations and the court process for those people.

The Taskforce also highlighted the need to provide further protections for children giving evidence in these types of situations, to prevent re-victimisation. The rationale for introducing special arrangements for vulnerable witnesses recognises that such witnesses often suffer a deficit in the ability to communicate and find it harder to adapt to new environments and situations.

I turn now to the detail of the bill.

Clauses 5 and 6 repeal both the Evidence (Children) Act 1997 and the Evidence (Children) Regulation 2004 respectively.

These provisions will be transferred to the *Criminal Procedure Act 1986*.

Item [1] of Schedule 1 replaces Section 76 of the *Criminal Procedure Act 1986*, which concerned recorded interviews with children, transcripts of such recorded interviews, and access to the recorded interview. The new Section 76 substantially re-enacts those provisions" and replaces references to a 'child' or 'children' with references to 'vulnerable persons', thereby extending its application to persons with an intellectual impairment.

The key term 'Vulnerable Person' is defined in the new Part 6 of Chapter 6 to be a child or an intellectually impaired person. For the purposes of that part, a person is intellectually impaired if the person has:

- (a) an appreciably below average general intellectual functioning; or
- (b) a cognitive impairment (including dementia or autism) arising from, or as a result of, a brain acquired injury, neurological disorder or a developmental disorder; or
- (c) any other intellectual disability.

The only change to the Section is the insertion of subsection (4), which enables the recording to be admitted in circumstances where the Notice requirements set out in the regulations have not been complied with, provided that the parties consent, or the accused person or his or her representative has been given a reasonable opportunity to listen to or view the recording, and it is in the interests of justice. This amendment was one of the Recommendations of the Criminal Justice Sexual Offences Taskforce, and was also highlighted in the Statutory Review of the Evidence (Children) Act 1997 in June 2006.

Item [2] of Schedule 1 amends Section 91 to provide that a complainant in certain sexual offence proceedings, who is intellectually impaired, will not be required to attend a committal. This amendment mirrors the protections already in place for child complainants in certain sexual offence proceedings, reducing the number of times such witnesses are subjected to cross examination over the course of a sexual assault prosecution and reducing the re-traumatisation associated with multiple court appearances. The amendment arises from the Recommendations of the Criminal Justice Sexual Offences Taskforce.

Item [3] of Schedule 1 replaces the existing Section 185, which concerns recorded interviews and transcripts of recorded interviews. The new Section 185 substantially re-enacts those provisions and extends their application to vulnerable persons, thereby including the intellectually impaired.

Item [4] of Schedule 1 adds a Note to the end of Section 274 that makes clear that these provisions extend to certain civil proceedings as well as criminal proceedings.

- Under the amendments, vulnerable complainants in prescribed sexual proceedings, being children and those who are intellectually impaired, now
- have an entitlement to the presence of a support person when giving evidence in camera (Items [6] and [7]);
- are prevented from being cross-examined directly by an unrepresented accused person (item [8]);
- may use alternative arrangements for the giving of evidence, such as closed-circuit

television, or the use of screens or planned seating arrangements in the courtroom ([Item 9]).

- have a general entitlement to the presence of a support person as set out in Section 294C when giving evidence in such proceedings (Items [10], [11] and [12]);

Item [13] of Schedule 1 inserts a new Part 6 into Chapter 6 of the *Criminal Procedure Act 1986*, which deals with Evidentiary Matters. The proposed Sections 306M to 306ZP concern the giving of evidence by vulnerable persons, defined as children and intellectually impaired persons.

The new Part substantially re-enacts the provisions of the Evidence (Children) Act 1997, so as to enable the electronically recorded interviews made by investigating officials with a witness who is a vulnerable person, to be admitted into evidence as part of the person's evidence in chief. For children these are commonly known as JIRT [Joint investigation response team] interviews.

The new Part also confers an entitlement upon such vulnerable persons to give their evidence in criminal proceedings, and certain other proceedings, by means of closed-circuit television or other similar technology, rather than attending the proceedings to give oral evidence.

Proposed Section 306P sets out the circumstances in which the new Part 6 will apply to the evidence of vulnerable witnesses. In the case of a child, this is when the child is under the age of 16 at the time the evidence is given. This provision has not changed from the Evidence (Children) Act 1997.

In the case of intellectually impaired witnesses, the provisions will apply if the court is satisfied that the facts of the case may be better ascertained if the witness's evidence is given in such a manner. In making such a determination, the court will consider not only the quality of the evidence, but also the effect of any stress or trauma associated with the witness giving his or her evidence in the ordinary way. There are some minor modifications contained in the proposed Part 6. Proposed Section 306Q provides that the Regulations may require an investigating official to record interviews with vulnerable persons. This replaces Section 7 of the Evidence (Children) Act 1997, which requires an investigating official who questions a child in connection with the investigation of the commission or possible commission of an offence by the child or any other person to ensure that any representation made by the child in the course of the interview is recorded, if the investigating official considers it may be adduced as evidence in court.

Existing Section 7, which sets out the requirements for the recording of interviews, will be moved to the regulations, and this will allow more flexibility in police operations and the ready adoption of new technologies when they become available.

Proposed Section 306U replaces and amends Section 11 of the Evidence (Children) Act 1997, which allows the previously recorded statement of a child under the age of 16 years to be admitted in criminal proceedings as his or her evidence in chief, where he or she is over the age of 16 but less than 18 years of age. The proposed amendment expands these provisions to enable the recording to be admitted no matter what the age of the person at the time of the hearing. This proposed change is in response to a specific Recommendation of the Criminal Justice Sexual Offences Taskforce.

Subsection (4) also makes it clear that the provisions requiring the vulnerable person to be available for cross-examination and re-examination in subsection (3)

do not apply to committal proceedings.

Proposed Section 306V replaces Section 12 of the Evidence (Children) Act 1997 and concerns the admissibility of the recording of the vulnerable person's evidence. The amendment provides that despite a failure to comply with the Notice requirements in the regulations, the recorded statement should be admitted if the parties consent, or if the accused has had an opportunity to view the recording, and it would be in the interests of justice to do so.

This amendment also arises from the Recommendations of the Criminal Justice Sexual Offences Taskforce, as well as the Statutory Review of the Evidence (Children) Act 1997 conducted by my Department in June 2006.

The task force considered that the court should have a discretion whether to admit the evidence in circumstances where compliance with the notice provisions cannot be proved, provided that the accused has had an opportunity to view the recording, and it is in the interests of justice, or the parties consent. This would avoid a two-week delay, which the prosecution is obliged to seek in order to comply with the notice requirements. It would also bring these provisions in line with other judicial discretions.

Proposed Section 306ZE replaces and amends Section 21 of the Evidence (Children) Act 1997 which places a prohibition on children giving identification evidence by means of closed-circuit television or other similar technology. The child must be brought into court to give such evidence orally. Identification is often not a fact in issue in such proceedings, and the existing prohibition has been identified as unnecessarily problematic and has caused some practical difficulties, particularly where the child is giving evidence from a remote facility. The proposed amendment therefore retains the prohibition on giving identification evidence by way of closed-circuit television, but limits it to circumstances where identification is a fact in issue in the proceedings.

Schedule 2 makes consequential amendments to other Acts arising from the bill.

The amendments contained in this bill will make it easier for children and persons with an intellectual impairment to give their evidence and provide greater protections from the stresses of the court process, as well as assisting them to give the best evidence they can give. I am sure these amendments will be welcomed by all members.

I commend this bill to the House.