

Not relevant



303 AGO0228/04CS Evidence (Miscellaneous) Amendment Bill (Michael Atkinson)
APPROVED

Not relevant



To: THE HON. THE PREMIER FOR CABINET

About: EVIDENCE (VULNERABLE WITNESSES) AMENDMENT BILL

1. PROPOSAL

- 1.1 That Cabinet approve the introduction of the *Evidence (Miscellaneous) Amendment Bill*.

2. BACKGROUND

- 2.1 On 29 September, 2004 Cabinet approved the preparation of a discussion draft of a Bill to amend the *Evidence Act 1929* to improve the way evidence is taken from children and vulnerable witnesses and the issue of that draft to the Criminal Trial Reform Working Group for comment.
- 2.2 Cabinet approved amendments that would:
- 2.2.1 prevent defendants cross-examining vulnerable witnesses in person in some kinds of trial;
 - 2.2.2 oblige courts to give vulnerable witnesses (including children) a choice of special arrangements for giving their evidence;
 - 2.2.3 clarify how the courts direct juries about the corroboration of children's evidence; and
 - 2.2.4 clarify how the courts direct juries about the reliability of children's evidence.
- 2.3 Those amendments were drafted and a confidential draft widely consulted upon and finalised. During this time the Attorney-General became aware of some other matters concerning alleged victims of crime and vulnerable witnesses that need reform, and was advised that the Criminal Trial Reform Working Group was not in a position to comment on the draft.
- 2.4 The Attorney-General then sought and obtained Cabinet's approval to add further amendments and to delay the introduction of the Bill until the Australian, Victorian and New South Wales law-reform commissions had published their report on changes to uniform evidence laws in March 2006, so that consultation on the Bill could be informed by that report.
- 2.5 The further amendments approved by Cabinet in October, 2005 were to
- 2.5.1 allow the record of the evidence of a vulnerable witness in an original proceeding to be admitted as that witness's evidence in a re-trial or related proceeding without the witness having to give that evidence again;

- 2.5.2 allow a court to make unconventional arrangements for the taking of evidence from a witness who suffers from a physical or mental disability to make it easier and less distressing for her to give evidence in court;
 - 2.5.3 allow a court, if a witness suffers from a physical or mental disability that may affect the way her evidence is understood, to hear expert evidence explaining the disability and the physical or behavioural characteristics associated with it in so far as they are relevant to the way the court is to assess that evidence; and
 - 2.5.4 clarify and expand the exception to the hearsay rule about the complaints of child victims in sexual cases so that a court may
 - i. admit into evidence an out-of-court statement by a very young or cognitively-impaired witness, and
 - ii. exempt that witness from the requirement that she be called or available to be called to give evidence, subject to appropriate warnings;
 - 2.5.5 re-define the kinds of questions that a court may find improper to be asked by counsel and limit the discretion of the court to allow such questions to be asked or answered in some cases; and
 - 2.5.6 introduce comprehensive laws preventing a defendant having unsupervised access to evidence that is sensitive.
- 2.6 In December, 2005, while the draft Bill was being prepared, the Government announced a review of South Australia's rape, sexual assault and domestic violence laws. The discussion paper that was issued in March 2006, as the first stage of the review of the rape and sexual assault laws, referred to the amendments already approved by Cabinet for this Bill because many of them are relevant to that review. In drafting this Bill for consultation, the Attorney-General was mindful of a possible overlap, and waited for advice on the outcome of the review before finalising this proposal.
- 2.7 In August, 2006 the Attorney-General circulated a confidential 'draft for comment' of a Bill to the Ministers for Families and Communities, for the Status of Women, and for Police and to selected representatives of the judiciary, courts administration, the legal profession, police prosecutions, legal-aid providers, women's groups, victim groups, Aboriginal legal and domestic violence groups. The last comment was received in January, 2007.
- 2.8 The responses represented a spectrum of views. Parts of the draft Bill have been changed in response to those comments. These were the main changes:
- 2.8.1 the definition of a vulnerable witness and the entitlements of vulnerable witnesses have been restricted to acknowledge arguments that without such restriction
 - (a) the cost of equipping the courts to service such a large number of witnesses would be too high; and
 - (b) making appropriate arrangements for such a large number of witnesses would add to existing trial delays;

- 2.8.2 amendments about judicial warnings have taken into account relevant aspects of submissions to the rape and sexual assault review as well as comments on the draft of the Bill;
 - 2.8.3 provisions about restricting access to sensitive material and official audiovisual records of evidence have been reconciled with courts legislation about public access to court proceedings;
 - 2.8.4 provision has been made for legal assistance for counsel for unrepresented defendants who wish to cross-examine a victim and may not do so in person.
- 2.9 A copy of the draft Bill and a copy of the draft second reading report are in *Attachments 1 and 2*.

3. DISCUSSION

- 3.1 The Bill will improve the way witnesses, especially vulnerable witnesses and alleged victims of sexual crime and crimes of violence, are treated in court. It deals with several recommendations of the Child Protection Review (the Layton Report) about children and the courts. By doing so the Bill should remove some impediments to the reporting and prosecution of serious crime.
- 3.2 In brief, the Bill will amend the *Evidence Act 1929* and make consequential amendments to the *Summary Procedure Act 1921*, the *Criminal Law (Legal Representation Act 2001)*, the *Supreme Court Act 1935*, the *District Court Act 1991* and the *Magistrates Court Act 1991* to:
 - 3.2.1 expand the category of witnesses who are to be treated as vulnerable;
 - 3.2.2 increase the protection that a court may afford to a vulnerable witness, by
 - (a) preventing a defendant from cross-examining a vulnerable witness in person in some kinds of trial, allowing cross-examination through counsel only and offering legal assistance to an otherwise self-representing defendant who wishes to do so;
 - (b) allowing a court to make an audiovisual record of a vulnerable witness's evidence;
 - (c) allowing a court in later proceedings to admit as that witness's evidence in those later proceedings the official record of evidence given in a criminal trial by a vulnerable witness, and, in appropriate cases, to relieve the witness of the obligation to give oral evidence to the court; and
 - (d) requiring a court in a criminal proceeding to order that a vulnerable witness's evidence be taken using special arrangements, unless it dispenses with the arrangements on statutory grounds, or unless the effect of making these arrangement would prejudice a party to the proceedings or prevent the judge, defendant and jury seeing and hearing the witness give evidence directly or indirectly by audiovisual means;

- 3.2.3 add these examples to the non-exhaustive list of special arrangements for the taking of evidence:
 - (a) the recording by the court of a witness's evidence out of the courtroom and its replay during the trial; and
 - (b) allowing disabled witnesses to give evidence by unconventional means if that would facilitate the taking of that evidence or minimise the witness's embarrassment or distress;
 - 3.2.4 require a criminal court to conduct a hearing in closed court to determine what special arrangements should be made to take the evidence of a vulnerable witness in a trial;
 - 3.2.5 allow a court, if it needs to do so, to be in a better position to assess the witness's evidence, to hear expert evidence explaining a vulnerable witness's disability and its physical or behavioural characteristics or, if the native language of the witness is not English and the witness is not reasonably fluent in English, to explain any difficulty that may be caused by the witness giving evidence through an interpreter;
 - 3.2.6 clarify how the courts should direct juries about the corroboration and reliability of children's evidence;
 - 3.2.7 clarify and expand rules about improper questioning of witnesses;
 - 3.2.8 clarify and expand the exception to the hearsay rule about the complaints of alleged child victims in sexual cases so that a court may admit evidence of an out-of-court statement by a very young child or a mentally-disabled witness, and may exempt that witness from the requirement that he or she be called or be available to be called to give evidence about it; and
 - 3.2.9 restrict access to sensitive material that is in the possession of a prosecuting authority or in the custody of a court.
- 3.3 The Bill will also amend the Act to effect reforms approved as part of the Government's review of the rape and sexual assault laws to
- 3.3.1 require the evidence of children who are the alleged victims of sexual offences to be recorded audio visually whether this is done by way of pre-recording by the court or by contemporaneous recording during the trial proper, so that an audiovisual record of that evidence is available for a retrial or other related proceeding and the child may be exempted from giving the same evidence again;
 - 3.3.2 modify the common-law test for the admission of evidence of other sexual offending by the accused;
 - 3.3.3 modify the laws governing the way courts treat and warn about evidence of complaint in sexual-offence cases; and
 - 3.3.4 modify the common law on the way courts should treat long delays between offending and trial.

3.4 Other implications and effects

3.4.1 Economic, Financial and Budget Implications

There are potential budget implications for the Justice Portfolio. It is difficult to predict the precise cost of these proposals. Initial start-up capital funding may be required for some aspects of the proposal, but operating costs should be absorbed within existing budgets.

3.4.2 Required Resources

- (a) The proposal will require the Justice Portfolio to continue work already in progress, under existing budgets, to make C.C.T.V. and pre-recording facilities more widely available for criminal trials involving child witnesses. Some courts will have to be fitted or their existing C.C.T.V. facilities adapted for the audiovisual recording of a vulnerable witness's evidence, and for there to be a lock-up in the courts for the secure storage and management of those records.
- (b) We propose a gradual outfitting of the major central criminal courts to meet demand, with the courts themselves managing cases involving vulnerable witnesses to maximise use of existing facilities. There will be some initial capital costs that may be outside existing budgets, for example, for installing vulnerable witness equipment such as C.C.T.V., and fitting out separate remote rooms for witnesses (about \$300,000) and installing D.V.D. recording equipment within the courts. For regional courts, it may be possible to adapt a video-link capacity for these purposes.
- (c) The proposal will require judicial education about the technological and legislative changes and the training of court staff. This should be possible within existing budgets.
- (d) The proposal will require limited legal representation (for cross-examination of the alleged victim only) for the few defendants who represent themselves in trials of sexual offences or of serious offences of violence. Although the *Criminal Law (Legal Representation) Act 2001* allows the Legal Services Commission to recover its costs of legal assistance, full recovery is not always possible because some defendants have little or no capacity to contribute to legal assistance costs. To this extent the Legal Services Commission may need extra funding for this proposal. It is impossible to calculate the amount required at this stage.

3.4.3 South Australia's Strategic Plan

- (a) The Bill will help achieve a priority action of Objective 2 of the State Strategic Plan: 'Implement the Government's response to the Layton Report into child protection' on children and the courts and, by introducing measures to make the court experience of vulnerable witnesses and victims of crime less stressful, will help remove impediments to the reporting and prosecution of crime, particularly sexual and violent crime.

- (b) It will also restrict access to sensitive images of victims of crime, to protect their privacy and personal integrity.

3.4.4 **Information and Communication Technology Requirements**

There is a material I.C.T. component to the proposal.

3.4.5 **Staffing Implications**

There are no significant staff changes associated with this proposal.

3.5 **Public and Environmental Effect**

3.5.1 The social impact of the proposal is to make it less stressful for people to come to court to give evidence, particularly if they are victims of sexual or violent crimes, children, or physically or mentally disabled. Over time, these changes should dispel unwarranted negative perceptions about giving evidence and remove some disincentives to reporting and assisting with the prosecution of crime.

3.5.2 Most victims of sexual crime are female. For females, the proposal will be positive, in making the court environment less hostile.

3.5.3 The proposal will have no effect on small business and no environmental effect.

3.5.4 The proposal has no significant regulatory impact.

3.5.5 The regional impact of the proposal is that some trials involving children or vulnerable witnesses may need to be transferred from regional courts to city courts so that the witnesses may avail themselves of the special arrangement facilities in those courts.

3.6 **Risk Management Strategy**

3.6.1 There is no significant risk with the proposal. There will be those who applaud some or all of it, those who think it goes too far, and those who think it does not go far enough.

3.6.2 The effectiveness of the proposal can be assessed by monitoring judicial interpretation of the legislation, witness use of special arrangements, and court and witness feedback on these arrangements and the changes to the rules of evidence.

3.7 **Consultation**

3.7.1 These people and agencies were consulted in the development of part of this proposal by being asked to comment on a consultation draft of a bill called the *Evidence (Vulnerable Witnesses) Amendment Bill*. That Bill included all the amendments approved by Cabinet except those approved as part of the Government's review of the rape and sexual assault laws:

The Chief Justice

The Chief Judge of the District Court

The Acting Chief Magistrate

The Director of Public Prosecutions
The Director, Justice Strategy Division, Attorney-General's Department
The State Courts Administrator
SAPOL Prosecutions Branch, through the Minister for Police
The Minister for Families and Communities
The Minister for the Status of Women
The President, Law Society of South Australia
The President, S.A. Bar Association Inc.
The Director, Legal Services Commission of S.A.
The Victims of Crime Co-ordinator
The Chief Executive Officer, Victim Support Service Inc.
The Director, Yarrow Place - Rape and Sexual Assault Service
The Chief Executive Officer, Aboriginal Legal Rights Movement Inc.
The Managing Lawyer, Children's and Youth Legal Service of S.A.
The Senior Solicitor, Women's Legal Service S.A. Inc.
The President, South East Community Legal Service Inc.
The Senior Solicitor, Riverland Community Legal Service Inc.
The Chairperson, Central Community Legal Service
The Chairperson, Northern Community Legal Service Inc.
The Managing Solicitor, Westside Community Lawyers Inc.
The Chairperson, Environmental Defenders' Office (S.A.) Inc.
The Chairperson, Southern Community Justice Centre Inc.

3.7.2 Of these, responses were received from

The Chief Justice
The Chief Judge of the District Court
The Acting Chief Magistrate
The Director of Public Prosecutions
The Director, Justice Strategy Division, Attorney-General's Department
The State Courts Administrator
The Minister for Families and Communities
The Minister for Police
The President, Law Society of South Australia
The Director, Legal Services Commission of S.A.
The Victims of Crime Co-ordinator
The Chief Executive Officer, Victim Support Service Inc.
The Director, Yarrow Place - Rape and Sexual Assault Service
The Senior Solicitor, Women's Legal Service S.A. Inc.

The Chief Executive Officer, Aboriginal Legal Rights Movement Inc.

- 3.7.3 All respondents welcomed this legislation. Many expressed reservations about the cost of applying the new provisions for vulnerable witnesses and suggested that their scope be restricted. Several suggested alternative approaches. In responding to these comments the proposal aims to strike a balance between the entitlements of defendants and the need to make alleged victims or witnesses feel more comfortable coming to court and so encourage their participation in the criminal justice system.
- 3.7.4 The main criticism was of the cost of taking audiovisual records of the evidence given by vulnerable witnesses in court. The Bill now carefully circumscribes the class of vulnerable witness and its entitlements.
- 3.7.5 The Chief Justice thought judicial education about the changes was essential and suggested that the Attorney-General arrange an information program to be provided through the courts' Judicial Education Committee or the National Judicial College of Australia. That is not within the scope of this legislation. The Attorney-General intends to work with the Chief Justice on this.
- 3.7.6 There was wide public and expert consultation on the discussion paper suggesting options for reform of the rape and sexual assault laws, and details of that consultation are set out in full in paragraph 3.12 of the submission for Cabinet's approval to draft this legislation.
- 3.7.7 Ms Liesl Chapman was consulted on the parts of this draft Bill that reform the way judges direct juries in sexual cases.
- 3.7.8 The Attorney-General in consultation with the Minister for the Status of Women proposes that the Bill be introduced as soon as possible in the coming sitting of Parliament and that it should lie on the table for several weeks after the second-reading adjournment to allow the Government to consult on it and consider suggestions for amendments.
- 3.7.9 Treasury and Finance has not yet been consulted on project/implementation costs.

3.8 Fulfilment plan

- 3.8.1 Before the legislation comes into operation, the courts, the D.P.P. and the Legal Services Commission will need time to train staff and prepare any necessary changes to procedures. The Law Society will also need time to alert its members to the changes.
- 3.8.2 The only part of the legislation for which we propose a delay in operation is the part allowing a court to take an audiovisual record of a vulnerable witness's evidence for possible use in later proceedings, and requiring a court to take such a record of the evidence of the child victim of a sexual offence. Before that provision comes into effect, an adequate number of courts should be fitted with appropriate equipment or existing equipment modified.

3.9 Communication Strategy

The proposal will be communicated to the public by media release.

3.10 Executive Council

The proposal does not require the approval of Her Excellency the Governor in Executive Council after Cabinet approval.

4. RECOMMENDATION

4.1 We recommend that Cabinet approve the introduction of the Evidence (Miscellaneous) Amendment Bill.

I declare that I have no actual or potential conflict of interest about the proposals contained in this submission.

~~OR~~

~~I declare the interests set out in Appendix about this submission.~~

The Hon. Carmel Zollo M.L.C.
Acting Attorney-General

2nd February, 2007

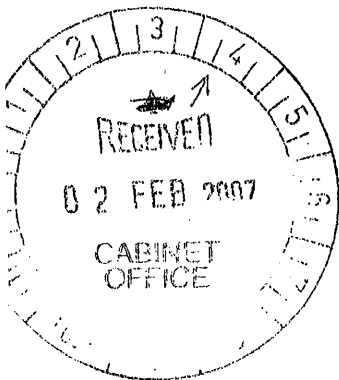
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~~OR~~

~~I declare the interests set out in Appendix about this submission.~~

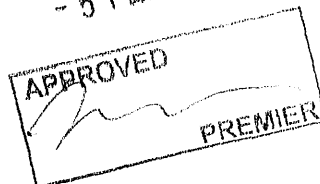
The Hon. Jennifer Rankine M.P.
Minister for the Status of Women

2nd February, 2007



In Cabinet

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Draft Bill prepared by Parliamentary Counsel

57 pages removed

Exempt clause 10(1) – legal professional privilege