

## EXPLANATORY STATEMENT

No 61, 1985

SUBJECT: AUSTRALIAN CAPITAL TERRITORY  
SEAT OF GOVERNMENT (ADMINISTRATION) ACT 1910  
EVIDENCE (AMENDMENT) ORDINANCE (No 2) 1985

Sub-section 12 (1) of the Seat of Government (Administration) Act 1910 provides that the Governor-General may make Ordinances for the peace, order and good government of the Australian Capital Territory.

This Ordinance, together with the cognate Crimes (Amendment) Ordinance (No.5) 1985 is designed to reform the substantive and evidentiary laws relating to sexual offences. The purpose of this Ordinance is to create a climate more conducive to the reporting of sexual assaults by victims. The provisions have a two-fold aim, namely the securing of a fair trial for an accused person and, simultaneously, the minimising of both the reality and the perception of unfairness to the victim under the existing laws. The reality of the unfairness arises from the fact that in sexual offence proceedings the character of the victim, unlike in other criminal cases, can be blackened without penalty to the accused. The perception of unfairness arises from evidentiary provisions which are unique to sexual offence trials and which lead the victim to believe that it is he or she, not the accused, who is on trial.

Sections 1, 2 and 3 are the Short Title and formal provisions.

Section 4 affects the substantive reforms and inserts a new Part XA into the Evidence Ordinance. The amendments made by Section 4 will be dealt with later.

Sections 5, 6 and 7 updates for economic reasons, the penalties which may be imposed for offences against sections 84, 85 and 97 of the Evidence Ordinance. Those offences respectively are the publication of evidence after the court has made an order prohibiting such publication; the publication of questions and the answers thereto without the leave of the court in cases where the court has disallowed those questions and the failure of a witness to attend court when required to do so by subpoena or recognizance. For each of these offences the penalty has been increased from \$200 to \$1000.

### THE AMENDMENTS MADE BY SECTION 4

Section 4 inserts a new Part XA into the Evidence Ordinance. The new Part has operation only in relation to sexual offence proceedings. The new sections in Part XA are as follows:

Section 76A identifies the proceedings to which the Part applies.

Section 76B is the interpretation provision for this Part. "Prescribed sexual offence" is defined to include not only those offences contained in the proposed Part IIIA of the Crimes Act, 1900 but also other offences contained in that Act elements of which include an intention to commit an offence which is a sexual offence. For example, an accused could be charged with the offence of breaking and entering with intent to engage in sexual intercourse contrary to section 113 of the Crimes Act. In such a case the offence is categorised as a sexual offence and the provisions of this Part apply.

Section 76C abolishes the rule, unique to sexual offence cases, permitting a complainant to give evidence both of the fact that after the alleged offence she made a complaint to any person as well as the terms of the complaint. According to text writers the rule had its origin in the middle ages when it was essential that a victim should have raised the hue and cry if an appeal of rape were to succeed. The evidence was admissible to demonstrate consistency with the evidence of the complainant but as a matter of law it was not capable of corroborating that evidence. It was also considered relevant to the question of consent. In Kilby v. R. 129 C.L.R. 460 it was held that failure to complain at the earliest opportunity does not constitute evidence of consent to intercourse. Nonetheless the failure to complain at an early point of time is frequently exploited by the defence. In New South Wales this problem was addressed by requiring the Judge to, inter alia, instruct a jury that there may be good reasons why a victim might hesitate in making or may refrain from making a complaint. The difficulty with this approach is that it could place speculative material before the jury. The jury may, of course, only reach its decision on the basis of the admissible evidence before it.

The fact is that there may be a variety of complex social and psychological reasons why a victim may not immediately complain. Those reasons are such as to make it unfair to permit an accused to exploit them but, on the other hand, the lack of a recent complaint should not be turned into a virtue as some persons have suggested results from the New South Wales provision requiring a judge to instruct the jury that there may be good reasons why no complaint was made. Some reasons for not complaining are set out in the publication "Sexual Assault Law Reform in New South Wales" where Dr Woods, Q.C., states the following:

"Depression and guilt, sometimes but not always alternating with anger, are common psychological after effects of rape. The victim will probably, unless guided by careful counselling, feel self-doubt and uncertainty concerning the experience. Did she somehow provoke it, even unconsciously? Was the violence directed against her personally, or was it merely random? Will people regard her as unclean or damaged?"

For this reason, cross-examination in a rape trial as to the reason for late complaint or absence of complaint after the event is often met by a non-response of anguished silence or by the unhelpful answer 'I don't know'. The victim usually cannot articulate that subtle psychological process which may cause a delay in complaint. 'I wanted time to think about it', is a response occasionally made: but rarely will the victim clearly say something like 'I feel unclean because 20 years of social conditioning led me to think that if I made a complaint I might not be believed. I was so shocked that at first I wasn't even sure of what my own behaviour had been. I felt unclean and wanted to cleanse myself, to escape from the whole experience'".

Bearing in mind the potential harm to both the victim and the accused, the approach adopted has been to abrogate the rule permitting the evidence of complaint in its totality thus bringing a sexual offence trial into line with trials for other criminal offences.

Sub-section (2) however provides that where the terms of a complaint or the fact of making a complaint would be admissible under another general criminal law rule then it would remain admissible. Examples of such situations include an accusation made to the accused in his presence under circumstances where he would be expected to make some reply or where the complaint forms part of a *res gestae* of the offence.

Section 76D recognises the right of the public to know what occurs in its courts but permits the judge, if in his view the interests of justice so require, to direct that the evidence of a complainant be given in camera. Where the judge so orders, the complainant is entitled to have a person of her choosing present in court. It is envisaged that a victim may select a social worker, parent or close friend for moral support.

Section 76E prohibits the publication of the identity of a complainant in a sexual offence proceeding without the consent of that complainant. The fact of publication is stated by rape crisis centre workers to be one of the major considerations inhibiting the reporting of sexual offences. The penalty for a breach of the prohibition is a fine of \$1000 or imprisonment for 6 months or both.

Section 76F repeals the present law requiring a judge to warn the jury against the danger of acting upon the victim's uncorroborated evidence. The requirement of corroboration is regarded as offensive and discriminatory. The proposition that victims of sexual offences, as a class, are more prone to falsehood and so should be treated automatically with undue suspicion is doubted by the Tasmanian Law Reform Commission. Matters in support of the abolition of this rule include:

- (1) The degree of resentment leading a victim to the belief that he or she, rather than the accused, is on trial.
- (2) Complexity of the rule and practices relating to corroboration which some authors argue are capable of misleading jurors.
- (3) The rights of the accused are not prejudiced in that the accused is protected by the requirement of proof beyond reasonable doubt, appellate review and the right of counsel and the judge to comment on witnesses in the prosecution case.
- (4) It abrogates the jury's fact-finding role. It is for the jury to determine the credibility of witnesses and the weight of their evidence.

Sub-section (2) expressly reserves the right of the trial judge to comment on any evidence that may be unreliable but precludes him from doing so purely on the basis that the evidence is uncorroborated. Sub-section (3) ensures that this provision will relate only to conduct committed after the commencement of this provision and preserves the rule that a judge must warn a jury that it is unsafe to convict a person on the uncorroborated evidence of a child.

Section 76G deals with the admissibility of evidence relating to the sexual reputation or experience of the complainant. Sub-section (1) precludes any evidence relating to the sexual reputation of the complainant. The effect of this provision is to prevent an accused from asserting that he had an honest belief that the victim had consented to sexual intercourse based on the fact that other persons had told him that the victim was of loose morals. Sub-section (2) prohibits evidence in relation to the sexual experience of the victim with a person other than the accused unless the court directs to the contrary. Sub-section (3) sets out the grounds on which the court can grant leave to give such evidence. The effect is that an accused person may give evidence of his own sexual experience with the victim but he is prohibited from giving evidence, unless the court directs otherwise, of the sexual experience of the victims with other persons. This approach is supported by the Tasmanian Law Reform Commission.

Section 76H prohibits an accused from adverting to the sexual reputation of the victim in an unsworn statement from the dock. It also precludes him from raising in a dock statement the sexual experience of the complainant with persons other than himself except where the court has previously given leave to the admission of such evidence. Finally he may not in a dock statement for the first time raise an allegation as to prior sexual experience of the complainant with himself. Either this must have been put to the complainant during the prosecution case or he must allege this by way of sworn evidence upon which he may be cross-examined.

The section also requires a judge to warn an accused of the matters to which he may not refer in a dock statement prior to the making of the dock statement. Should an accused breach these requirements the judge may, in an exceptional case, discharge the jury but in other cases he must direct the jury to disregard those matters.

Ord. 24/84

Authorised by the  
Attorney-General