EVIDENCE AMENDMENT BILL 2000

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

This Bill will return the law relating to fact finding on sentence to its state prior to the decision of the Queensland Court of Appeal in ***R v Morrison*** [1999] 1 Qd R 397.

Reasons for the objectives and how they will be achieved

On 26 June 1998, the Court of Appeal delivered judgment in the case of ***R v Morrison*** [1999] 1 Qd R 397.

In a criminal trial, the burden of proof is on the prosecution, and before a jury can convict, they must be satisfied beyond reasonable doubt of the guilt of the accused. This standard is not set down in legislation, but is a matter of general principle applying to all criminal trials. By contrast, up until the decision in ***Morrison***, the standard of proof that applied to facts in issue at sentence was on the balance of probabilities, subject to the proviso that the degree of satisfaction required is dependant on the gravity of the fact to be proved and its potential effect on the defendant.

The decision in ***Morrison*** has altered the standard of proof that applies to fact finding on sentence. Now a sentencing judge must be satisfied beyond reasonable doubt of the existence of any disputed fact that is likely to result in a heavier sentence.

A number of difficulties have been identified with this new test, for example—

- the potential difficulties of applying the new test which does not sit well with the actual way in which information is presented at sentence;
- the effect on the use of victim impact statements, and in particular,

whether the new rule will lead to more victims who choose to provide a victim impact statement being required for cross examination at sentencing hearings;

- proving the contents of presentence reports, which are prepared independently of the prosecution and the defence;
- the effect of having a lower standard of proof applying to matters raised in mitigation (that is, those matters raised in favour of a defendant) as opposed to the standard applying to aggravating factors (that is, those matters that are adverse to a defendant);
- the effect on other sentencing principles contained in the *Penalties and Sentences Act 1992* and the *Juvenile Justice Act 1992;* and
- whether sentencing hearings will become longer and more costly, as issues which are frequently in dispute, such as victim impact statements or the value of stolen property, will no longer be able to be resolved by sentencing judges without the calling of evidence.

The objective will be achieved by inserting a new section in the *Evidence Act 1977* setting out the test to be applied to disputed facts at sentence. The test is the test that applied prior to the decision in ***Morrison***.

Administrative cost to Government of implementation

There will be no administrative cost to government.

Fundamental legislative principles

It is possible that a provision which lowers the standard of proof applying to finding facts that adversely affect an offender, might be considered to breach fundamental legislative principles, in particular that it is inconsistent with the principles of natural justice. However, the amendment will effect a return to the principles that applied to sentencing before the decision in ***Morrison***, which required a court to be satisfied to a degree commensurate with the seriousness of the fact to be proved. The Bill does not reverse the onus of proof.

The new provision applies only to sentencing proceedings and does not affect the onus or standard of proof that applies to proving the actual elements of the offence, or any circumstance of aggravation charged in the

indictment.

Consultation

In September 1998, a Discussion Paper was released which discussed the implications of the ***Morrison*** decision on sentencing hearings. The Discussion Paper was widely distributed by mailout and was published on the Internet, with the consultation period closing on 26 October 1998. Twenty-nine submissions were received.

While there was no general agreement on the necessity or appropriateness of overturning the ***Morrison*** decision, the majority of submissions favoured returning the law to its previous state.

A draft of the Bill was distributed for consultation on 7 July 1999. The Bill was sent to the Chief Justice of the Supreme Court, the President of the Court of Appeal, the Chief Judge of the District Court, the Chief Stipendiary Magistrate, the Queensland Police Service, the Bar Association of Queensland, the Queensland Law Society, the Director of Public Prosecutions, Legal Aid Queensland, the Criminal Law Association, the Youth Justice Program of Families Youth and Community Care Queensland, community legal centres, and all individuals and organisations who sent in a submission in response to the Discussion Paper.

As a result of comments received, further drafts of the Bill were sent to the Chief Justice of the Supreme Court, the President of the Court of Appeal, the Chief Stipendiary Magistrate, the Deputy Director of Public Prosecutions and the Youth Justice Program of Families Youth and Community Care Queensland.

NOTES ON PROVISIONS

Short Title Evidence Amendment Act 2000

Clause 1 sets out the Act's short title.

Clause 2 provides that the Act commences on a day to be fixed by proclamation.

Clause 3 provides that this Act amends the *Evidence Act 1977*.

Clause 4 inserts a new section 132C (Fact finding on sentencing) in Part 8 (Miscellaneous).

Section 132C(1) states that the section applies to any sentencing procedure in a criminal proceeding. The section does not apply to the process of proving facts during a trial.

Section 132C(2) states that the sentencing judge or magistrate may act on an allegation of fact that is admitted or not challenged.

Section 132C(3) sets out the test that must be applied if an allegation of fact is disputed or challenged. The sentencing judge or magistrate may only act on the allegation if the judge or magistrate is satisfied on the balance of probabilities that the allegation is true. The legislation does not alter the way in which judges and magistrates receive information at sentence, nor does it imply that evidence will be required in every case of dispute. The question of whether evidence needs to be called in any particular case will be determined by the sentencing judge or magistrate.

Section 132C(4) states that the degree of satisfaction required for subsection (3) varies according to the consequences, adverse to the person being sentenced, of finding the allegation to be true. This restores the test that applied before the decision in *R v Morrison*. If the potential consequences to the offender of the allegation being accepted are more serious (usually because a heavier sentence will be imposed) than if the allegation were not accepted, the allegation must be proved to a higher standard.

Section 132C(5) states that "allegation of fact" includes information under section 15 of the *Penalties and Sentences Act 1992*, information under section 109(3) of the *Juvenile Justice Act 1992* or in a presentence report under section 110 of that Act, information under section 14 of the *Criminal Offence Victims Act 1995* and any other information or evidence.

Clause 5 inserts a new Part 9 (Transitional Provision) and a new section 136 (Transitional—Evidence Amendment Act 2000). This provision states that section 132C will apply to a sentencing procedure irrespective of when the offence was committed or the conviction for the offence giving rise to the sentencing procedure occurred. The section also defines "sentencing procedure" to mean a sentencing procedure started after the commencement

of the section. This means that the new section will not apply to "part heard" sentences, that is, sentencing proceedings started before the commencement of the section. "Conviction" is defined consistently with the definition in the *Penalties and Sentences Act 1992*.