Agreement in Principle

Mr BARRY COLLIER (Miranda—Parliamentary Secretary) [10.38 a.m.]: I move:

That this bill be now agreed to in principle.

The amendments proposed by the Evidence Amendment Bill 2010 arise out of recommendations made in the 2005 Uniform Evidence Law report, a joint report of the Australian, New South Wales and Victorian law commissions—hereafter referred to as the commissions—following a review of the New South Wales and Commonwealth Evidence Act after 10 years of operation. The joint report represented the culmination of an 18-month inquiry and an extensive public consultation process. During the inquiry the commissions released two community consultation documents, held targeted consultations in every State and Territory, and received 130 written submissions from a wide range of individuals and organisations.

Many of the commissions' recommendations were incorporated in the Model Uniform Evidence Bill, which was endorsed by the Standing Committee of Attorneys-General in July 2007 and subsequently incorporated in the New South Wales Evidence Act 1995 by the Evidence Amendment Bill 2007. On 7 May 2010 the Standing Committee of Attorneys-General approved a number of further amendments to the Model Uniform Evidence Bill. Two of those amendments are now to be incorporated in the New South Wales Evidence Act 1995 by the present bill.

The first of the amendments relates to the mutual recognition amongst the uniform evidence law jurisdictions of certificates given by courts to provide witnesses with protection from self-incrimination. The uniform evidence law jurisdictions are: New South Wales, the Commonwealth, the Australian Capital Territory, Victoria and Tasmania. Currently sections 128 and 128A of the New South Wales Evidence Act 1995 provide that where a person objects on reasonable grounds to giving evidence or disclosing certain information that may be self-incriminating and the witness nevertheless gives the evidence or discloses the information, either willingly or because required by the court, the court must give the witness a certificate. Where a certificate has been given the evidence given or information disclosed cannot be used against the person in a proceeding before a New South Wales court or by any person or body authorised to hear and examine evidence. However, a certificate given in a New South Wales court under section 128 or 128A does not protect a person from having the relevant self-incriminating evidence or information used against them in proceedings in another State or Territory. Nor is a person who has been given a certificate in another State or Territory protected from having the relevant self-incriminating evidence or information used against them in a New South Wales court.

The Evidence Amendment Bill 2010 will assist in removing this gap in the protections provided by such certificates in the uniform evidence law jurisdictions. The Evidence Amendment Bill 2010 amends the New South Wales Evidence Act 1995 to require that New South Wales courts treat certificates given under prescribed State or Territory provisions in the same way as certificates given by a New South Wales court under sections 128 and 128A and provides for the "prescribed State or Territory provisions" to be declared by regulation, where appropriate. It is expected that the other uniform evidence law jurisdictions will adopt these amendments in their Evidence Acts and prescribe the New South Wales provisions in their regulations so as to extend mutual recognition of such certificates in these jurisdictions. The intention of the existing sections 128 and 128A of the Evidence Act 1995 is to facilitate obtaining evidence or information from persons who may otherwise be reluctant for fear of incriminating themselves. The extension of these protections to evidence given or information disclosed in other States and Territories will greatly reinforce the value of the protection afforded by these sections.

The second amendment contained in the bill relates to the circumstances in which a person is taken not to be available to give evidence about a fact. The question of a witness's availability to give evidence is important because it is relevant to the application of what is known as the hearsay rule. If a witness is available then hearsay evidence will not be admissible and the witness will need to attend court to give evidence. If a witness is unavailable then hearsay evidence may be admissible in limited circumstances. Currently, as set out in clause 4 of part 2 of the Dictionary to the Evidence Act:

(1) a person is taken not to be available to give evidence about a fact if:

(a) the person is dead, or

(b) the person is … not competent to give the evidence about the fact, or

(c) it would be unlawful for the person to give evidence about the fact, or

(d) a provision of this Act prohibits the evidence being given, or

(e) all reasonable steps have been taken, by the party seeking to prove the person is not available, to find the person or to secure his or her attendance, but without success, or

(f) all reasonable steps have been taken, by the party seeking to prove the person is not available, to compel the

person to give the evidence, but without success.

(2) In all other cases the person is taken to be available to give evidence about the fact.

The bill inserts a further subsection such that a person will be taken to be unavailable if the person is mentally or physically unable to give the evidence and it is not reasonably practicable to overcome that inability. The new subsection is intended to apply to situations where a person is not available to give evidence by reason of his or her bodily, mental or psychological condition. In contrast to section 13 of the Evidence Act 1995, which deals with the competence of a witness to give evidence for reasons which may include "mental, intellectual or physical disability", the new subsection is intended to apply where a person is unable to give the evidence, not because the evidence is likely to be unreliable but because giving the evidence would cause harm to the person—for example, where the person is unable due to major trauma or fear to give the evidence and/or where giving the evidence would have a significant adverse effect on the person's physical or mental health.

However, it is not intended that the amendment should lower the standard of unavailability generally. For instance, it is not intended that any person should be considered unavailable to give evidence simply because he or she produces a medical certificate which asserts the existence of a mental or physical inability to give the evidence. A real mental or physical inability to testify must be shown. In addition, it must be shown that it is not reasonably practicable to overcome that inability. It also is not intended that the subsection apply to persons who are willing and otherwise competent and available to give the evidence.

The amendment proposed by the bill is consistent with recommendation 8-2 of the Australian, New South Wales and Victorian Law Reform Commissions in their 2005 collaborative report on the Uniform Evidence Acts. The Department of Justice and Attorney General consulted with key stakeholders on the draft provision, which is supported by the Director of Public Prosecutions, the Law Society of New South Wales, the New South Wales Bar Association and the New South Wales Police.

The New South Wales Government has played a key role in the reform of evidence law in this country and the move toward uniform rules in Australia's three largest jurisdictions. The Evidence Amendment Bill 2010 is yet another example of this Government's determination to stay at the front of the pack when it comes to improving court processes and procedures for the benefit of the community. I commend the bill to the House.