Second Reading

The Hon. MICHAEL VEITCH (Parliamentary Secretary) [8.07 p.m.], on behalf of the Hon. John Hatzistergos: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

The Keneally Government is committed to the principles of open justice and to improving the ability of the public to access appropriate court information, in order to better understand what takes place in New South Wales court rooms.

The Court Suppression and Non-publication Orders Bill 2010 is another reflection of that commitment.

The bill follows the passage through this House earlier this year of the Court Information Act 2010, which set a clear statutory framework for access to documents and other court information held by New South Wales courts in connection with criminal and civil proceedings.

At the time of the introduction of the Court Information Act 2010, the Government indicated that it was the first stage in a two-stage process that will see all statutory provisions relating to access to court information eventually contained in a single statute.

The Court Suppression and Non-publication Orders Bill 2010 is the second stage of that process, providing in one consolidated statute the law relating to the making of non-publication and suppression orders by the courts.

Like the Court Information Act, this bill also has origins in the New South Wales Law Reform Commission's 2003 Review of the Law of Contempt by Publication and is the result of a very extensive and comprehensive consultation process.

In its report, the Law Reform Commission recognised that the law of contempt by publication is intrinsically linked to the rights to access court information. The report suggested that rights to access court information should be clarified and made several recommendations that have greatly informed the development of this legislation.

In 2004, the New South Wales Supreme Court conducted community consultation on the issue of access to court records. This consultation raised issues about the existing framework for accessing court information and resulted in the referral of the issue to the then Attorney General's Department for development of an appropriate policy.

In June 2006, the department released a discussion paper "Review of the Policy on Access to Court Information" for public consultation. A range of individuals and agencies made submissions to the department's review. These submissions further informed the department's consideration of a new framework for managing access to court information, of which the Court Suppression and Non-publication Orders Bill 2010 is an intrinsic part.

The resulting report by the Attorney General's Department, "Report on Access to Court Information," was publicly released in July 2008. This report made a series of recommendations in relation to suppression and non-publication orders that have again been critical in framing the provisions of this bill.

Around the same time, in March 2008, the Standing Committee of Attorneys-General asked officers to look at the current use of suppression and non-publication orders, including exploring the possibility of harmonisation across jurisdictions. The Government recognised that there needed to be greater uniformity in the system of suppression and non-publication orders across Australia, in order to give the public, and particularly the media, greater certainty and clarity about what they can and cannot know and report.

At the July 2008 meeting of the Standing Committee of Attorneys-General, Ministers requested that officers develop proposals on potential areas of harmonisation of suppression and non-publication orders, and a working group was formed.

That working group found that there were many differences across jurisdictions in relation to the law on suppression and non-publication orders that needed to be addressed in the development of model provisions, ranging from use of different terminology to varied powers to make orders, grounds for making orders, issues of standing, duration of orders, review and appeal of orders, and the consequences for breaching orders.

The working group agreed that clarity about these aspects would better inform courts to make an order, including any decision in relation to the terms of any order and the extent of any restriction imposed.

Since that time, model provisions have continued to be developed by the working party. Earlier this year, I released draft model provisions to targeted stakeholders, including the media, the courts and the legal profession.

In the main, stakeholders gave their express support for the draft provisions, including the Victims Advisory Board, the Law Society of New South Wales and Legal Aid New South Wales. The New South Wales Director of Public Prosecutions was also strongly supportive, stating:

"I indicate that I strongly support the introduction of this legislation that confers power on NSW courts to regulate and restrict persons who are not parties to proceedings in the publication of evidence in and information arising out of criminal proceedings. The bill appears to me to strike an appropriate balance between the interests of open justice, the proper administration of justice and the human rights of all concerned."

The feedback obtained from this consultation process, in addition to the feedback on each of the reports and reviews which I outlined earlier as laying the foundations for these reforms, have been carefully considered and have greatly informed the model provisions on which the Court Suppression and Non-publication Orders Bill 2010 is based.

The Government would like to take this opportunity to thank all of those who contributed to the development of this bill, including the courts of New South Wales, State Coroner, Law Society of New South Wales, Legal Aid New South Wales, Victims Advisory Board, New South Wales Ombudsman, New South Wales Bar Association, New South Wales Director of Public Prosecutions, New South Wales Police and New South Wales Department of Human Services, as well as peak media organisations, such as Australia's Right to Know Coalition and the Australian Press Council.

A further debt of gratitude is also owed to the Chief Justice of New South Wales, the Chief Judge of the New South Wales District Court, the Chief Judge of the New South Wales Land and Environment Court, the Chief Magistrate, the President of the New South Wales Children's Court, and the President of the New South Wales Industrial Relations Commission, all of whom also took time to consider the draft Court Suppression and Non-publication Orders Bill 2010.

Of course, access to court information is a complex area of law requiring a balance between the competing considerations of open justice and individual privacy. Consequently, it has not always been possible to accommodate the concerns and views of every stakeholder in every instance—particularly where stakeholders have conflicting interests. However, the Government is confident we have got the balance right in this legislation.

At the May 2010 Standing Committee of Attorneys-General meeting, Ministers endorsed the model provisions that were settled following this extensive consultation process, and agreed to consider their implementation in their jurisdictions.

I am pleased to inform the House that New South Wales will be the first jurisdiction to adopt the model provisions in the form of the Court Suppression and Non-publication Orders Bill 2010.

The House may also wish to note that, in addition to this legislative aspect of the Standing Committee of Attorneys-General project, the working party is also considering a related proposal for a national register of suppression and non-publication orders, which it is hoped will further assist to bring clarity and certainty to this area across the nation.

I turn now to the specific provisions of the Court Suppression and Non-publication Orders Bill 2010.

Clause 3 of the bill sets out a number of definitions relevant to the operation of the bill. The definition of "news media organisation" is consistent with the definition in the Court Information Act 2010. The definition of "court" includes the Supreme Court, Land and Environment Court, Industrial Court, District Court, Local Court or Children's Court, which is also consistent with the definition in the Court Information Act 2010. The bill also allows any other court or tribunal, or a person or body having power to act judicially, to be prescribed as a court by regulations for the purposes of this Act.

Both "suppression order" and "non-publication order" are also defined. For the benefit of the House, a suppression order is a broader term referring to the prohibition or restriction on access to, or disclosure of something, such as certain documents. A non-publication order is more specific, prohibiting or restricting publication only, thereby allowing the media and general public to access information, but not publish it. This could include, for an example, the name and address of a party or witness.

The term "publish" is also defined in clause 3. Publication can, of course, take many forms and it must be acknowledged that it has not been easy to capture all forms of publication in a climate of such technological development.

Clauses 4 and 5 of the bill provide that the provisions are not intended to limit or otherwise affect any inherent jurisdiction or powers of a court, nor are they intended to limit or otherwise affect the operation of any provision made by or under any other Act that appropriately prohibits or restricts publication or disclosure of information in connection with proceedings.

This provision recognises that suppression and non-publication orders made by our courts are only one of three ways that publication of material in relation to court proceedings can be prescribed. The others are under the common law of sub judice and by express statutory authority. This bill is not intended to affect the operation of the common law or these specific legislative protections in any way and the Government has been very careful not to dilute any current protections afforded to vulnerable persons in particular.

Clause 6 of the bill states the clear intention of this legislation, namely that in deciding whether to make a suppression or non-publication order, a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

The Government's clear policy intention, not only in this bill, but also in the Court Information Act 2010, has been to promote access to court information to the public, including the media. Our intention is to promote transparency and a greater understanding of the justice system. However, at the same time, we must ensure that the fair conduct of court proceedings, the administration of justice, and the privacy and safety of participants in court proceedings is not unduly compromised.

Clause 7 of the bill sets out the power to make orders, providing that a court may prohibit or restrict the publication or other disclosure of information where it may tend to reveal the identity of or otherwise concerning any party to or witness in court proceedings, or any person who is related to or otherwise associated with any party or witness, or where it may comprise evidence, or information about evidence, given in the court proceedings.

This power is the legislative sanction that is required to bind all members of the public, not just those who are present at proceedings, an issue that was specifically identified by the New South Wales Law Reform Commission in their Review of the Law of Contempt by Publication.

Clause 8 of the bill sets out the grounds on which a court may make an order, which are as follows:

1. where the order is necessary to prevent prejudice to the proper administration of justice

2. where the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security

3. where the order is necessary to protect the safety of any person

4. where the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature including an act of indecency, or

5. where it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

Our courts must maintain their discretionary power to weigh relevant interests in the particular case before them, but these grounds will greatly assist our courts in balancing this often-difficult determination.

The administration of justice ground was specifically recommended by the New South Wales Law Reform Commission in their Review of the Law of Contempt by Publication, whilst the security ground is common in relevant Commonwealth legislation.

The public interest ground is intended to cover those situations that do not fit easily within the other specified grounds. I emphasise that it is intended that these other reasons should only outweigh the public interest in open justice where it does so "significantly".

Clause 9 of the bill relates to standing. This power is important because it allows a court to make such a suppression or non-publication order on its own motion, or on the application of a party, or any other person considered by the court to have sufficient interest in the making of an order.

This issue was again considered by the New South Wales Law Reform Commission in its Review of the Law of Contempt by Publication, recommending that any person who can satisfy the court that he or she has a sufficient interest in the matter should be able to apply for an order, a concept that is well established in the rules of administrative law that govern standing to sue.

Clause 9 also sets out those persons who are entitled to appear or be heard by the court on an application for a suppression or non-publication order. This is a broader range of persons and includes a party to the proceedings, the Government, the media, and any other person who, in the court's opinion, has a sufficient interest in the question of whether an order should be made. The first three categories of persons would have an automatic right to make a written submission, including the media. The latter category of persons would need to make an application to the court for permission to do so. This formulation is based on similar provisions in the South Australian Evidence Act.

Clause 10 of the Court Suppression and Non-publication Orders Bill 2010 relates to interim orders. The Standing Committee of Attorneys-General working party considered that the power to make interim orders was a practical necessity to ensure that the regime worked effectively, and that any such application should be determined by a court expeditiously.

Clause 11 of the bill provides that a suppression or non-publication order applies to the place specified in the order, and may also apply outside of New South Wales to anywhere in the Commonwealth if the court is satisfied that this broader application is necessary for achieving the purpose of the order.

Providing for a broader application of suppression and non-publication orders, is necessary especially in an age of Internet news, where a restriction imposed in one jurisdiction only will not prevent that information from being disseminated via a news publication across the worldwide web from a source located outside that jurisdiction.

Clause 12 of the bill provides for the duration of orders, specifically that, in deciding the period for which an order is to operate, the court is to ensure that it operates for no longer than is reasonably necessary to achieve the purpose for which it is made, and that this period may be referenced to a fixed or ascertainable period or by reference to the occurrence of a specified future event.

The Attorneys-General working group was of the view that such a provision was necessary for the purposes of certainty and compliance.

The New South Wales Report on Access to Court Information recommended that restrictions imposed by any order should cease to have effect after 75 years in relation to criminal, adoption and care proceedings, and after 30 years in relation to civil proceedings.

Feedback obtained from the extensive consultation undertaken in relation to the model provisions highlighted that, whilst orders should not be open-ended, fixed duration periods may not fit the circumstances of each case, or be consistent with similar legislation. The more flexible formulation outlined in clause 12 of the bill was therefore adopted.

Clause 13 of the bill provides for the review of orders. Specifically, it provides that the court that made the suppression or non-publication order may review the order on its own initiative, or on the application of a person who is entitled to apply for the review. The same range of persons outlined in clause 9 in relation to standing are again entitled to apply for and to appear and be heard by the court on the review of an order. The court is able to confirm, vary or revoke the order, or make any other order that it can under this bill.

Clause 14 sets out the provisions for appeals and confirms the power of the appellate court to confirm, vary or revoke an order or decision of the original court, or to make any other order that could have been made under the bill in the first instance.

Clause15 of the bill provides a specific exception for court officials, stating that a suppression order does not prevent a person from disclosing information, as long as that disclosure is not by publication and is in the course of performing functions or duties or exercising powers in a public official capacity.

Clause 16 of the bill then sets out relevant offence provisions. A person who contravenes a suppression or non-publication order, and is reckless as to whether their conduct contravened that order, is liable to a maximum penalty of 1,000 penalty units or imprisonment for 12 months, or both, for an individual, or 5,000 penalty units for a body corporate. At the same time, that conduct may also be punished as a contempt of court, although an offender is not liable to be punished twice.

Under clause 17, proceedings for offences are to be dealt with summarily before the Local Court or summarily before the Supreme Court in its summary jurisdiction.

Clause 18 of the bill allows for Regulations to be made, whilst schedule 1 deals with savings, transitional and other provisions.

Schedule 2 of the bill omits the sections of three Acts that are considered to be superseded by the provisions of the bill. As I outlined earlier, the Government has been particularly careful not to dilute any protections currently afforded by other legislation, particularly as they relate to children, complainants and witnesses in sexual assault proceedings, and some witnesses in broader proceedings.

The Government has undertaken extensive consultation at every stage of the development of the Court Suppression and Non-publication Orders Bill, including in the development of the early reports on access to court information and through the Standing Committee of Attorneys-General process.

As the first jurisdiction to adopt this legislation, the Court Suppression and Non-publication Orders Bill is another example of the New South Wales Government leading the way in relation to court information.

To paraphrase the New South Wales Director of Public Prosecutions, the Government is confident that this bill achieves the right balance between the interests of open justice, the proper administration of justice, and the human rights of all concerned.

I commend the bill to the House.