Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, Minister for Citizenship, Minister for Regulatory Reform, and Vice-President of the Executive Council) [9.06 p.m.]: I move:

That this bill be now read a second time.

The purpose of the Courts and Crimes Legislation Further Amendment Bill 2010 is to make miscellaneous amendments to a range of courts and tribunals, and crime-related legislation of New South Wales. The bill is part of the Government's regular legislative review and monitoring program and will amend a number of Acts to improve the efficiency and operation of our justice system. I shall now outline each amendment in turn. Schedule 1 to the bill makes two amendments to the Administrative Decisions Tribunal Act 1997. Firstly, it amends section 55 to allow the Administrative Decisions Tribunal to deal with an application to review the reviewable decision where the applicant has applied for an internal review of that decision and the review is not finalised. The tribunal can deal only with the application in such circumstances where it is satisfied that it is necessary in order to protect the applicant's interests.

Secondly, schedule 1 to the bill amends section 71 to provide legislative immunity to Guardians ad Litem panel members who act in good faith in proceedings in the tribunal. Guardians ad Litem panel members are appointed by the Director General of the Department of Justice and Attorney General for a period of three years. Although some protection is provided at common law for Guardians ad Litem, currently Guardians ad Litem panel members acting in good faith are required to cover the costs of their own defence, should legal proceedings be commenced against them. The amendment is also replicated in this bill under schedule 2 to the Adoption Act 2000, schedule 5 to the Children and Young Persons (Care and Protection) Act 1998, schedule 7 to the Community Services (Complaints, Reviews and Monitoring) Act 1993 and schedule 8 to the Consumer, Trader and Tenancy Tribunal Act 2001. Following commencement of these amendments it is intended that the Crown Solicitor will act on behalf of a Guardians ad Litem panel member in the event that legal proceedings are commenced against them.

Schedule 3 to the bill amends the Children's Court Act 1987 to increase the maximum appointment period for a Children's Magistrate from three to five years in accordance with a proposal from the Wood report into Child Protection Services in New South Wales.

Schedule 4 to the bill amends the Youth Conduct Order scheme, which is established by part 4A of the Children (Criminal Proceedings) Act 1987. This schedule also amends the Children (Criminal Proceedings) Regulation 2005. Members of the House would know that the Government has been piloting the youth conduct order scheme since 1 July 2009. The pilot currently is being independently evaluated by the Nous group, which has prepared an interim evaluation report that is now available publicly. This report noted several areas of improvement to the youth conduct order scheme as well as making recommendations about the scheme's expansion. The bill implements many of the suggestions. I shall deal first with the main amendments to the Children (Criminal Proceedings) Act 1987 made by schedule 4.1. Item [3] replaces the current definition of "relevant offence" with a new definition. This new definition significantly expands the category of offence that can be dealt with under the scheme. A relevant offence is any offence that the Children's Court has jurisdiction to hear and determine, other than the following offences: a prescribed sexual offence within the meaning of the Criminal Procedure Act 1986, any other serious children's indictable offence, and a traffic offence.

Allowing people who are charged with or who have pleaded guilty or who have been convicted of more serious offences to participate in the scheme recognises that a youth conduct order is not a soft option. Rather, through the intensive inter-agency case management offered through the scheme, a youth conduct order has the potential to directly address the underlying causes of a young person's offending behaviour.

Item [7] introduces new factors that the court must consider before it makes a suitability assessment order in relation to a young person. When the legislation is enacted, it must be satisfied that it is appropriate for a child to be dealt with under the scheme having regard to the seriousness of the relevant offence, the degree of violence if any that is involved in the offence, any harm caused to any victim, and the number and nature of any previous offences committed by the child.

Item [8] precludes the Children's Court from making a suitability assessment in relation to a child before a relevant offence if, having regard to the above matters, the court considers that the appropriate penalty for the relevant offence would be a control order under section 33 (1) (g) of the Act. To put that another way, if the court is of the view that, despite a young person substantially complying with a youth conduct order, a control order still would be the appropriate penalty, the Children's Court should not refer the young person for a suitability assessment order.

Item [11] clarifies that section 48Q, which deals with the consequence of the revocation of a youth conduct order,

does not authorise the Children's Court to impose on a child for a relevant offence a penalty that is more severe than the penalty that would have been imposed on the child if he or she had not been the subject of a youth conduct order. Item [12] amends section 48R to allow the Children's Court to make an order dismissing the charge for the relevant offence whether the child did or did not plead guilty to the offence. The current section 48R empowers the Children's Court to dismiss the charge only if the young person has pleaded not guilty. Of course, the Children's Court could also deal with the child by way of a dismissal, if the child had pleaded guilty to the offence under section 33 of the Act.

Schedule 4.2 amends the Children (Criminal Proceedings) Regulation 2005. Of particular note are items [1] to [3]. Item [1] expands the number of participating local area commands to include Blacktown, St Marys, Liverpool and Macquarie Fields commands. Items [2] and [3] amend the prescribed eligibility criteria in relation to a young person's participation in the scheme. Item [2] replaces the residential requirement. Now, among other matters, a young person is eligible to participate in the scheme if the young person has an appropriate connection with a participating local area command. An appropriate connection can be either or both of the following conditions: firstly, the person concerned permanently or temporarily resides in, or is an habitual visitor to, the area of the command; or, secondly, the relevant offence—or, in a case in which more than one relevant offence is sought to be dealt with, at least one of the offences—was committed, or was alleged to have been committed, in the area of the command.

The Government has consulted closely with its youth conduct orders advisory committee and has been greatly assisted by those discussions. Membership of this committee includes representatives from the Aboriginal Legal Service, the Law Society of New South Wales, Legal Aid, the Council of Social Service of New South Wales [NCOSS], the Youth Action and Policy Association, the Victims Advisory Board, the National Children's and Youth Law Centre, the Regional Communities Consultative Council, the Intellectual Disability Rights Service and the Youth Justice Coalition.

In relation to the Civil Procedure Act 2005, schedule 6.1 to the bill amends the Civil Procedure Act 2005 to insert a new part 10 to provide for a comprehensive representative proceedings regime in the New South Wales Supreme Court. The new regime is substantially modelled on part IVA of the Commonwealth's Federal Court of Australia Act 1976, plus the inclusion of two new procedural rules to clarify the existing Federal regime.

Representative proceedings, which are also known as class actions, are proceedings brought by one person on behalf of a group of people with the aim of resolving common issues and factual disputes among that group. In New South Wales, rules 7.4 and 7.5 of the Uniform Civil Procedure Rules 2005 make some provision for representative proceedings. However, these rules lack procedural clarity. The regime that is proposed by these amendments will provide a greater level of certainty for both litigants and the court, and will enhance the community's access to justice.

Extensive consultation has been undertaken on the introduction of a comprehensive representative proceedings regime in New South Wales. A consultation draft of the proposed amendments and a discussion paper recently were publicly released for comment. Nineteen submissions were received and all submissions were generally supportive of the proposed regime. The bill's comprehensive set of rules for representative proceedings in New South Wales is modelled substantially on the Federal and Victorian regimes and includes provisions dealing with standing requirements, the nature of the group, substituting the representative party, settlement of proceedings, costs, and appeals.

Two additional procedural rules also have been included. The first additional rule clarifies that representative proceedings may be taken against several defendants, even if not all group members have a claim against all defendants. The provision overcomes the contrary view of the Commonwealth expressed in relation to the operation of part IVA of the Federal Court of Australia Act 1976 in *Philip Morris (Australia) Ltd v Nixon* [2000] 170 ALR 487. The second rule clarifies that it is not inappropriate for representative proceedings to be brought on behalf of a limited group of identified individuals. This is consistent with the view taken by the Full Court of the Federal Court in relation to the operation of the Federal part IVA in *Multiplex Funds Management Limited v Dawson Nominees Pty Limited* [2007] 244 ALR 600.

The Government has taken the opportunity to prescribe this view in legislation to avoid unnecessary interlocutory battles and appeals on this point. Both of these new procedural rules arose out of the 2009 Commonwealth Attorney-General's Department's report on access to justice and the Victorian Law Reform Commission's report, "Civil Justice Review", in 2008. The new regime established by these amendments will give the New South Wales Supreme Court an efficient and effective procedure to deal with representative proceedings. The broad consistency between this bill and the existing Federal and Victorian regimes also will provide New South Wales litigants with a greater degree of certainty and clarity.

Schedule 6.2 to the bill amends the Civil Procedure Act 2005 to encourage people to resolve their disputes outside the court system whenever possible without limiting access to, or the independent discretion of, our courts. In doing so, these reforms extend the overriding purpose in section 56 of the Civil Procedure Act, which is the "just, quick and cheap resolution of the real issues" to civil disputes before they are commenced in court. We know that most civil disputes never get to court in the first place. They are resolved either informally or

through the growing number of alternative dispute resolution [ADR] avenues that are available. In fact, of those disputes filed in court, up to 97 per cent are resolved before the final hearing. The reforms will require parties to identify the issues, exchange relevant information and, most importantly, to start talking to one another before they set foot in the courthouse. That not only will increase the chances of early settlement but also should assist the parties to keep the costs of resolution proportionate to the subject matter of the dispute.

Specifically, parties will be required to take reasonable steps, when appropriate, to resolve or at least to narrow the issues in their civil dispute before commencing court proceedings, including consideration of the use of alternative dispute resolution. Reasonable steps may include notifying the other person of the issues and offering to discuss them with a view to resolving the dispute; responding to any such notification; exchanging information and documents relevant to the dispute; considering and when appropriate proposing options for resolving the dispute, including engaging in genuine and reasonable negotiations and/or alternative dispute resolution processes; and taking part in alternative dispute resolution processes.

The amendments also expressly recognise that the meaning of "reasonable steps" must be understood by having regard to a person's situation as well as the nature of the dispute, including the value and/or complexity of the claim. This makes it clear that parties are not required to take pre-litigation steps that are unreasonable or disproportionate in terms of costs or time. It also stipulates that a person's situation, which may include, for example, social or economic disadvantage, language or literacy problems, a relevant disability, health issue or other factors, can be considered when determining what is reasonable.

As well as introducing a general requirement to take reasonable pre-litigation steps, an important feature of the bill is to set up a framework for the courts to develop appropriate tailored pre-action protocols in specific matter types. When a bespoke pre-action protocol has been developed, compliance with it will meet the pre-litigation requirements in this bill to take reasonable steps. The bill also appropriately sets out exemptions to the pre-litigation requirements, including appeals, ex parte proceedings, proceedings in which parties already have been subject to separate pre-litigation processes, disputes involving vexatious litigants and civil penalty provisions.

The bill also gives the courts power to make rules excluding different classes of matter from the requirements when appropriate. For example, proposed section 18B (3), in schedule 6 to the bill excludes from the proposed requirements "any civil proceeding in relation to the payment of workers compensation". This includes claims for statutory damages and for work injury damages as defined by the New South Wales Workplace Injury Management and Workers Compensation Act 1998. Those proceedings are excluded because they are covered by their own pre-action processes.

Parties who are subject to the pre-litigation requirements will be required to attach a dispute resolution statement to the first substantive document they file in court that certifies, if they are the plaintiff, the steps that have been taken to try to resolve or narrow the issues in dispute or, if no such steps were taken, the reasons why and, if they are the defendant, whether they agree with the plaintiff's statement; if not, what other reasonable steps they believe could usefully be undertaken to resolve the dispute.

It is important to note that a person will not be prevented from starting or responding to a case because he or she has not complied by taking reasonable steps or filing the statement. Generally, each party is to bear his or her own costs of complying with pre-litigation requirements. However, the court will have the discretion to take pre-litigation conduct into account when making costs orders either with respect to pre-filing costs or costs of the proceedings as a whole. In doing so the court may have regard to any relevant matters, including any reasons given for failure to comply with the reasonable steps requirements and whether or not a person was legally represented.

There may be many reasons for not taking pre-filing steps that a court may take into account, for example, where one of the parties is terminally ill, if the safety of a person is threatened, where a limitation period is about to expire or if the litigation concerns matters of public interest. The amendments also explicitly protect the integrity and confidentiality of mediation conducted in accordance with pre-litigation requirements. Evidence of discussions, admissions and documents produced for the purposes of the mediation will not be admissible before a court except in certain circumstances. Furthermore, it is not intended that the parties be disadvantaged by disclosing relevant information and documents in accordance with the pre-litigation requirements. To this end, these reforms extend the existing protection for documents exchanged in the course of litigation to those disclosed in the pre-litigation process. These measures will ensure that parties to a dispute can engage in frank and constructive negotiations that maximise the likelihood of settlement.

These reforms follow extensive consultation on the Government’s ADR Blueprint released in 2009. Extensive stakeholder submissions were received; a consultative committee, consisting of senior representatives of the Supreme Court, the District Court, the Local Court, the New South Wales Bar Association, the Law Society of New South Wales and Legal Aid New South Wales, and various industry and community groups, provided advice; and we considered the experience of other jurisdictions. The Government thanks all those who took time to contribute to these reforms. Schedule 6.3 to the bill amends section 25 of the Civil Procedure Act 2005 and schedule 17 amends the Supreme Court Act 1970 to provide that the Supreme Court may refer a question of foreign law to a foreign court and respond to a question from a foreign court concerning Australian law. These

amendments support recent changes to the Uniform Civil Procedure Rules and provide a more cost-effective and efficient process for dealing with foreign law matters in Supreme Court proceedings.

Schedule 9 to the bill amends section 44 of the Crimes Act 1900, which as presently drafted is limited in its application and would benefit from the introduction of modernised language that is gender neutral. The amendment updates the language used in the section and covers a range of modern relationships between adults where one party has a legal duty to provide basic necessities for the other. The recent joint report of the Australian Law Reform Commission and the New South Wales Law Reform Commission on family violence also recommended that section 44 be amended to ensure that its underlying philosophy and language are appropriate in a modern context. The reference to legal duty in section 44 (1) (a) encompasses both statutory and common law duties. The common law duty is set out in the negligent manslaughter matter, *R v Taktak* (1988) 14 NSWLR 226, where one of the key issues involved consideration of the circumstances in which a person is under a duty which obliges them to care for another, gross breach of which, resulting in death, may render him or her guilty of manslaughter.

Where the Crown relies on criminal negligence by omission, it must establish the existence of a legal duty and not merely a moral obligation. There must be a personal legal duty of such a nature that the natural and ordinary consequences of a breach of that duty is a danger to life. Examples of a relationship that may give rise to such a duty include where an accused has assumed a contractual duty of care, for instance, in a paid care arrangement where the accused has agreed to provide necessities of life; or where an accused has voluntarily assumed the care of the victim who is unable to help themselves and the accused has so secluded the victim as to prevent others from rendering aid. This latter situation was considered in the Taktak decision to which I referred. This provision will ensure the protection for some of the most vulnerable in our community, being those who are dependent on others for the basic necessities of life.

Schedule 10 to the bill amends section 39 of the Crimes (Criminal Organisations Control) Act 2009. The first application under the Act is still before the courts. Therefore it is proposed that section 39 be amended to extend the review period from two years to four years to ensure that the Ombudsman is reviewing substantive action under the Act. Schedules 11 and 12.1 to the bill make important reforms to the provision of evidence in sexual assault matters, most significantly to the Sexual Assault Communications Privilege contained in part 5 division 2 of the Criminal Procedure Act 1986. I shall deal with the amendments made to the Criminal Appeal Act 1912 which, as members of the House will see, are closely related to the amendments to the Criminal Procedure Act 1986 made by schedule 12.1.

Schedule 11 amends the Criminal Appeal Act 1912. Item [1] gives standing to the subpoenaed person and the protected confider to appeal a ruling made under chapter 6 of part 5, division 2 of the Criminal Procedure Act 1986. This includes a decision by the court to grant leave, as well as a determination by the court that a document or evidence does not contain a protected confidence within the meaning of the division. Item [2] is a transitional provision that specifies that the amendments to the Criminal Appeal Act 1912 extend to proceedings commenced but completed before the commencement of those subsections. The importance of these reforms will become clearer once I have dealt with the amendments made to the Criminal Procedure Act 1986 by schedule 12.1. The New South Wales Government first introduced legislation to protect the confidentiality of a sexual assault victim's counselling records in the Evidence Amendment (Confidential Communications) Act 1997.

The Act protected confidential communications such as counselling notes, and emphasised the public interest in ensuring the confidentiality of counselling relationships. The then Attorney General, the Hon. Jeff W. Shaw, in the second reading speech on the Evidence Amendment (Confidential Communications) Bill in May 1997, gave several reasons why the Government considered that it was necessary to provide a specialised privilege for sexual assault counselling communications. These reasons are still significant 13 years later. In 1997 New South Wales was the first Australian State to introduce a specialised sexual assault counselling communications privilege. Today all but one of the Australian States and Territories have introduced similar protections. The national importance of this issue is highlighted by the fact that at the May 2010 meeting of the Standing Committee of Attorneys-General [SCAG] in Melbourne Ministers agreed on seven principles to be applied as the minimum standard for protection of sexual assault counselling communications in Australia where jurisdictions decide to provide such a protection.

It is pleasing that the current New South Wales provisions comply with each of the Standing Committee of Attorneys-General principles. However, that is not to say that the Government should rest on its laurels. In recent years concerns have been expressed by numerous stakeholders that the current privilege is not operating as effectively as it was intended. As such, the Government has taken the opportunity to review the division. To this end, it has been assisted by submissions made by the Women's Legal Service New South Wales and the law firms Blake Dawson, Clayton Utz and Freehills, which, together with the Office of the Director of Public Prosecutions and the New South Wales Bar Association, operated a Sexual Assault Communications Privilege Pro Bono Referral Pilot at the Sydney Downing Centre Local Court and District Court from February 2009 to February 2010.

The reforms that this bill introduces are informed by the findings of the pro bono referral pilot, as well as the

Standing Committee of Attorneys-General principles, and, together with the recently announced establishment of a specialist government unit, which will provide free legal representation to victims who have had their counselling records subpoenaed, will ensure that the sexual assault communications privilege is strengthened. I turn now to the detail of schedule 12.1, which amends the Criminal Procedure Act 1986. Item [1] amends the definition of "sexual offence witness" contained in section 294D of the Act. Currently, a sexual offence witness is defined as a witness, other than the complainant, against whom it is alleged that the accused has committed a sexual offence not being the sexual offence that is the subject of the proceedings. A sexual offence witness is entitled to the same protections when giving their evidence as the complainant in the proceedings, including giving evidence by closed-circuit television, being entitled to a support person and allowing the court to make an order directing that the identity of a sexual offence witness will not be publicly disclosed.

However, currently the definition of "sexual offence witness" does not extend to witnesses who were the subject of sexual misconduct that did not fall within the provisions of the Crimes Act 1900 as enacted at the time that the conduct occurred, but which conduct would now be an offence. An example of such conduct is grooming by adult offenders of children in order to commit unlawful sexual activity, which was first introduced into the Crimes Act 1900 in 2007. The current definition of "sexual offence witness" also does not apply to witnesses who were the subject of sexual misconduct that is alleged to have occurred in interstate or overseas jurisdictions. Item [1] rectifies these anomalies by extending the definition of "sexual offence witness" to include those two classes of witnesses.

A sexual offence witness will now be defined as any witness in the proceedings, other than the complainant, who is alleged to have been the victim of a prescribed sexual offence committed by the accused person, or acts of the accused person that would constitute a prescribed sexual offence were those acts to occur in this State at the time of the proceedings.

Item [3] clarifies that criminal proceedings as defined under the division include pre-trial and interlocutory proceedings. Item [4] amends the definition of sexual assault offence. This amendment extends the privilege to witnesses who were the subject of sexual misconduct that did not fall within provisions of the Crimes Act 1900 as enacted at the time that the conduct occurred, but would now be an offence; witnesses who were the subject of sexual misconduct that is alleged to have occurred in interstate or overseas jurisdictions; and witnesses who fall into both of the above categories.

Item [4] repeals sections 297 to 299D and replaces them with new provisions that are clearer, more prescriptive and offer better protection to sexual assault victims who have their counselling records subpoenaed by the defence. It is important to note that the common law is not ousted by the privilege in this area; that is to say, the requirement for a subpoena to have a legitimate forensic purpose still exists. In addition to this requirement, however, any party seeking to compel a person to produce a document recording a protected confidence must also comply with this section and obtain leave from the court.

The sexual assault communications privilege is designed to limit the disclosure of protected confidences at the earliest point possible: for a complainant who has gone to a counsellor to discuss the sexual assault, it is little comfort to him or her if the documents are not to be adduced in evidence at the trial if they have already unnecessarily been disclosed to the defence by an order of the court. The privilege is not just designed to prevent the unnecessary adduction of evidence of protected confidences before a jury, but is designed to prevent the inappropriate subpoena of such confidences in the first place, and then the inappropriate granting of access to them.

New section 297 retains the current absolute privilege in relation to preliminary criminal proceedings. That is, protected confidences continue to be inadmissible in relation to preliminary criminal proceedings which are defined as committal proceedings or proceedings relating to bail. The court does not have the power to grant leave in those proceedings. New section 298 clarifies that a protected confidence can be produced or adduced in evidence in criminal proceedings only if the court gives leave. Under subsection (1) a new requirement is introduced to obtain leave from the court before seeking to compel a person to produce a document recording a protected confidence in, or in connection with, any criminal proceedings.

Under subsection (2) leave of the court must also be obtained before a document recording a protected confidence can be produced in, or in connection with, any criminal proceedings. Under subsection (3) leave must also be obtained before evidence can be adduced in any criminal proceedings if it would disclose a protected confidence or the contents of a document recording a protected confidence. The defence must have some legitimate forensic purpose for seeking the issue of a subpoena for records in the first place, or the subpoena is merely fishing and can be set aside as abusive without resort to these provisions.

New section 299 replaces the old section 303 and states that the court must satisfy itself that a witness, party or protected confider, which includes the victim or other person who made the protected confidence, who may have grounds for an application for leave, objection to the production of a document, or the adducing of evidence, is aware of the effect of the division, and has been given a reasonable opportunity to seek legal advice. The importance of this section is highlighted by its new location at the beginning of the division. That is, the question of whether the protected confider is aware of the protections offered by the division should not be an

afterthought, given its importance in ensuring that the division offers effective protection. The new requirement for the victim to be given a reasonable opportunity to seek legal advice strengthens the earlier protection and, together with government-funded representation for victims in applications under this division, will ensure that the confidentiality of counselling records of sexual assault victims are better protected.

New section 299A gives a protected confider who is not a party standing to appear in criminal proceedings or preliminary criminal proceedings, if a document is sought to be produced or evidence is sought to be adduced that may disclose a protected confidence made by, to or about the protected confider. Previously, the protected confider had to seek leave to appear in criminal proceedings under section 298 (7), and had no statutory right of appearance in preliminary criminal proceedings. This section gives the protected confider automatic standing by right, and not by leave, and is an important new protection to assist sexual assault victims to successfully object to applications made under the division.

It is necessary for standing to apply to preliminary criminal proceedings, even though the privilege is absolute in these proceedings, due to the fact that, on occasion, protected confidences may inadvertently be returned in relation to a defence subpoena without the defence requesting them. For instance, the defence may subpoena a victim's school records as part of their preparation of the accused's case in preliminary proceedings, not intending that protected confidences will be produced amongst the records, and therefore not being restricted by section 297. If, when the documents are produced to the court by the record holder, they also include protected confidences such as school counselling records, the protected confider needs standing at this stage to ensure that he or she can object to the production of, or the granting of access to, the documents to the defence. New section 299B describes the process the court may undertake if a question arises under this division relating to whether a document or evidence contains a protected confidence.

The court may make any orders it thinks fit to facilitate its consideration of a document or evidence under this section, however, it must be considered in the absence of the jury. Subsection (3) specifies that the court must not make available or disclose to a party, other than a protected confider, any document or evidence to which the section applies, or the content of any such document, unless under subsection (a) the court determines that the document does not record a protected confidence or that the evidence would not disclose a protected confidence, in which case clearly the privilege does not apply; or, under subsection (b), a party has been given leave under this division in relation to the document or evidence and the making available or disclosing the document or evidence is consistent with that leave; that is, in accordance with the court's determination under section 299D.

This allows the court independently to inspect or consider the documents in order to determine whether they contain a protected confidence. It also allows the court to grant first access to a protected confider. However, this section does not allow the court to adduce evidence from the protected confider about the substance of the protected confidence; any disclosure or adduction of evidence relating to the content of the protected confidence must be done in accordance with section 299D. To do otherwise would subvert the privilege and render it useless. Thus, this section assists the court in considering whether or not there may be a protected confidence, but does not regulate the production or adduction of a protected confidence, which is provided for in section 299D.

New section 299C deals with the notice requirements for an application for leave. It provides that the applicant for notice must, as soon as is reasonably practicable, give notice in writing of the application to each party and each relevant protected confider. If the protected confider is not a party to the proceedings the notice can instead be given to the prosecutor or, if another person or body is specified by the regulations, that person or body. The prosecutor must then ensure that a copy of the notice is given to the protected confider within a reasonable time after its receipt. Subsection (4) introduces a new requirement that prohibits the court from granting an application for leave under the division until at least 14 days, or such shorter period as may be fixed by the court, after the relevant notices have been given under subsections (1) and (2).

Subsection (4) specifies three circumstances in which the court may waive the requirements to give notice. They are if notice has already been given in respect of an application under this division, being an application that relates to the same protected confidence and the same criminal proceedings, the principal protected confider has consented in writing to the notice being waived, or the court is satisfied that there are exceptional circumstances that require notice to be waived. The first two categories are self-explanatory. However, some elucidation of what are "exceptional circumstances" is required. The fact that the trial is due to commence either the day of the application for leave, or perhaps in a number of days, will not of itself amount to exceptional circumstances. The statutory notice period is now specified as 14 days under subsection (4), and this is the time frame that should be complied with by the applicant in all but a small number of cases.

New section 299D prescribes six factors that the court must take into account when determining whether to grant leave under the division. These six factors provide clear guidance to the court of what it must consider when it embarks on its weighing exercise under subsection (1) (c). However, this list is not exhaustive, and the court is not limited when it determines the public interest in preserving the confidentiality of protected confidences and protecting the principal protected confider from harm. The court is required to take judicial notice of all these factors and there is no obligation on the protected confider to adduce evidence, although there is no prohibition

on the protected confider from doing so if he or she wants.

To that end, subsection (3) introduces a provision that allows the court to receive a confidential statement, by way of affidavit made by or on behalf of the principal protected confider, specifying the harm the confider is likely to suffer if the application for leave is granted. Under subsection (4), the court must not disclose or make available to a party, other than the principal protected confider, any confidential statement made to the court under this section by or on behalf of the principal protected confider.

This addresses the difficulty that some protected confiders face in describing to the court the harm they might suffer if the protected confidence is disclosed, without describing the substance of the protected confidence. Subsection (5) provides that the court must state its reasons for granting or refusing to grant an application for leave under this division. Subsection (6) ensures that, if there is a jury, any application for leave is to be heard and determined in its absence.

Item [8] is a new regulation-making power that allows regulations to make provision for, or with respect to, the issue and service of subpoenas in or in connection with any criminal proceedings or preliminary criminal proceedings involving a prescribed sexual offence. Item [9] is a transitional provision. Items [1] to [3] of schedule 12.1 relate to procedural matters and, under subclause (1), extend to proceedings commenced but not completed before the commencement of those amendments. Subclause (2) clarifies that the admissibility of any evidence given in proceedings before the commencement of the amendments in subclause (1) does not affect the validity of anything done, or omitted to be done, before that commencement. Items [4] to [6] relate to evidentiary matters. Because they may affect the availability of certain pieces of evidence, they do not extend to proceedings in a court if the proceedings have commenced in that court before the commencement of those amendments. Thus, if preliminary criminal proceedings in a matter are still taking place in the Local Court, these amendments do not apply. However, once the proceedings are no longer preliminary and become criminal proceedings in the District Court, the new provisions will apply.

Schedule 12.2 to the bill makes a further three amendments to the Criminal Procedure Act 1986. First, schedule 12.2 amends section 56 (1) of the Criminal Procedure Act 1986 to allow certain aspects of committal proceedings to be conducted by online court proceedings. It is proposed that there initially be a 12-month trial of the online court at the Downing Centre Local Court. The aim of the online trial is to make better use of the court's resources by minimising the number of in-person court appearances required during the early stages of criminal proceedings, many of which are administrative and non-contentious. The amendment specifically provides that aspects of committal proceedings may be conducted in the absence of the public only for the purpose of the online court, and only with the parties consent; and after the first appearance of the accused person in committal proceedings; and if the matter is of a procedural nature that does not require the resolution of a disputed issue or a person giving oral evidence.

It is proposed that the trial will commence in early 2011 and that, in the first three months, only the Director of Public Prosecutions and Legal Aid NSW or the Aboriginal Legal Service will be referred to the online court. Upon evaluation at that stage, and if the Chief Magistrate considers it appropriate, private practitioners may then be offered the opportunity to register and participate in the online court. It is proposed that if a member of the public is interested in a matter in the online court list they will be able to request a printout of the online court proceedings from the registry once the proceedings are completed. Currently, a fee is charged for copies of court documents; however, it is proposed that this fee be waived in these circumstances. No objections were raised by stakeholders on the proposed trial. I understand that the Local Court will consult further with relevant stakeholders prior to its commencement. A full evaluation of the trial is planned.

Schedule 12.2 to the bill amends schedule 1 of the Criminal Procedure Act 1986 to increase the maximum property value for break and enter offences under section 109 (1) of the Crimes Act 1900 dealt with summarily by the Local Court under chapter 5 from $15,000 to $60,000. The bill further amends the Criminal Procedure Act 1986 to implement a new system for determining when a trial should proceed before a judge sitting alone without a jury. Section 132 of the Criminal Procedure Act 1986 allows the accused person in criminal proceedings to be tried by a judge alone if the judge is satisfied that the accused has sought legal advice in relation to the election and the Director of Public Prosecutions consents to the making of the election. The Chief Judge of the District Court proposed in late 2009 that the Director of Public Prosecution's veto power be removed from section 132 by allowing a court to settle the dispute if the prosecution and defence cannot agree on the issue of trial by a judge alone. Judge-alone trials are appropriate in a limited number of circumstances. For example, they may be appropriate where there are concerns that cannot be overcome regarding pre-trial publicity, or where the evidence of the trial is likely to be highly technical.

The Standing Committee on Law and Justice endorsed the model referred to it by the Government with minor amendments and the provisions of the bill reflect the result of the committee's consideration. The purpose of the new model is to allow both the prosecution and defence to apply for a judge-alone trial and uses the court to determine the appropriate trial method where there is a dispute. This will bring New South Wales into line with other jurisdictions and represents a fair and transparent way to determine whether a trial should proceed without a jury.

It is not intended that these amendments will significantly increase the number of judge-alone trials. The jury remains the most appropriate fact finder for serious criminal trials and these provisions do not seek to change that; they merely seek to provide a clear set of rules for the determination by an independent arbiter—the court—as to when a matter should proceed before a judge alone. The accused's right to trial by jury continues to be a central tenet of the New South Wales criminal justice system. Item [2] of schedule 12.2 replaces the existing provision for judge-alone trials and inserts a new provision adopting the model considered and approved by the Standing Committee on Law and Justice. Either party may apply for a judge-alone trial. Where the parties agree, the trial is to proceed before a judge sitting alone. Where the accused does not agree, the matter must proceed before a jury, thus preserving this important right.

The only circumstances where an accused's right to a trial by jury will be overborne is detailed in section 132 (7). Notwithstanding the view of the accused, a judge may make a trial by judge order where there is a substantial risk that jury tampering is likely to occur and that risk cannot be mitigated by other means. This provision differs from that originally proposed as a result of the standing committee's concerns that the original model had too low a threshold in this regard. If an accused applies for a judge-alone trial and the prosecution does not agree, the issue is to be determined by a court applying the interests of justice test. This allows a broad discretion for the court to determine the issue, although the provisions provide that the court may refuse to make a trial by judge order where the trial will involve factual issues that are appropriately determined by juries—for example, community standards or reasonableness, negligence, indecency, obscenity or dangerousness. As recommended by the standing committee, this is not an exhaustive list of criteria to be taken into account by the court in determining whether to make a trial by judge order, merely an indicative list of factors that a court may find relevant in considering an application.

Consistent with recommendation No. 2 of the standing committee, the provisions also require that an accused must receive legal advice before giving consent to a trial by judge order. The new section 132A sets out procedural matters regarding trial by judge orders, including that applications are to be made no less than 28 days before the trial date, except by leave of the court. This is designed to minimise the risk of a party applying for a judge-alone trial on the basis of knowing the identity of the trial judge. The provisions also note that joint trials should not proceed without a jury except where all accused have consented, and the consent relates to all relevant charges, and that a party may apply to the court for a trial by jury after a trial by judge order has been made and before the trial has commenced.

The standing committee recommended that consideration be given to preventing interlocutory appeals from a court's decision in relation to an application for a judge-only trial. The Government has given serious consideration to this issue but has decided not to implement a bar on appeals from such decisions. Given the serious issues at stake, it is appropriate that they be determined according to the ordinary appeal provisions that otherwise apply to interlocutory orders in criminal matters. It is noted that, while no direct appeal provisions are provided in Queensland and Western Australia, parties that dispute an order in relation to a judge-alone trial can object via other means; for example, via a stay of proceedings or as a ground of appeal against conviction or sentence.

The committee was concerned as to the delays that a right to appeal might create. However, the Government is confident that, should the Court of Criminal Appeal determine that a trial by judge order is appellable under the Criminal Appeal Act 1912, the court has the capacity to deliver a swift hearing and verdict prior to a trial taking place. Given the relatively limited circumstances where a judge would make an order that might be the subject of appeal, there is unlikely to be a significant impact on the criminal justice system by implementing the provisions in their current form. Moreover, in the long term, the decisions of the Court of Criminal Appeal would provide useful guidance to both practitioners and judges about which matters are suitable to be heard before a judge sitting alone, ensuring that the system operates efficiently and fairly.

Schedule 13 amends the Graffiti Control Act 2008 and Graffiti Control Regulation 2009 to provide a definition of "fine" that accords with the Fines Act 1996. Amendments to the Graffiti Control Act, which commenced in May 2010, introduced community clean-up orders, which allow a court that imposes a fine on an offender to make an order that the person satisfy the amount of the fine by performing community clean-up work. For clarity, this amendment inserts a definition into section 9A of that Act, clarifying that the term "fine" has the same meaning as under the Fines Act 1996. This amendment renders clause 12 of the Graffiti Control Regulation superfluous, and that clause will be omitted.

Schedule 14 to the bill amends the Industrial Relations Act 1996 to provide that legally qualified commissioners are exercising the jurisdiction of the Industrial Court of New South Wales when dealing with small claims matters under section 548 of the Commonwealth's Fair Work Act 2009. Currently under section 548 of the Fair Work Act, the small claims jurisdiction is only conferred on State Magistrates Courts, which is defined as a court constituted by a police, stipendiary or special magistrate, or by an industrial magistrate. The Commonwealth has indicated that once New South Wales has made the current amendment to our Industrial Relations Act proposed in this bill, it will take steps to amend the Fair Work Act to enable the Industrial Court of New South Wales to hear small claims matters. Once the Commonwealth has made the necessary corresponding amendments, it is then proposed that the Industrial Amendment (Jurisdiction of the Industrial Relations Commission) Act 2009 and the Industrial Relations Further Amendment (Jurisdiction of the Industrial Relations Commission) Act 2009 will be

proclaimed. The effect of this will be that the New South Wales industrial relations jurisdiction will be consolidated in the Industrial Court of New South Wales.

Schedule 15 to the bill makes two amendments to the Local Court Act 2007. Schedule 15 to the bill amends the Local Court Act 2007 to increase the civil jurisdiction of the General Division of the Local Court from $60,000 to $100,000. The Small Claims Division of the Local Court will maintain its current $10,000 limit, and claims for damages arising from personal injury or death in the General Division will also remain at $60,000. This amendment is intended to provide litigants with a quicker and more accessible forum for resolving disputes, particularly in rural and remote New South Wales, where there is greater access to the Local Court than to the District Court. However, parties will still retain their right to commence actions in the District Court for claims of less than $100,000.

Schedule 15 also amends the Local Court Act 2007 to confer power on the Minister to make determinations with respect to the extended leave entitlements of magistrates appointed before 20 September 2002, and includes a transitional provision to ensure the validity of a 2005 determination made by the then Minister. The purpose of the 2005 determination was to introduce a scheme to allow magistrates who were appointed from the public service before 20 September 2002 to make an election to waive rights to extended leave conferred by section 25 (1) of the Local Court Act 2007, and to be paid an equivalent gratuity to the rights waived. The transitional provision allows the Minister to make arrangements under which magistrates or former magistrates who have already elected to be paid a gratuity under the 2005 determination can opt to repay the gratuity, and have their pre-2002 extended leave entitlements reinstated.

Schedule 16 to the bill amends the Mining Act 1992 to allow applicants for mining leases and landowners to apply to the Land and Environment Court where there is a dispute about a claim that there is a valuable structure on the land, such as a substantial building or a dam. The Act provides that a mining lease may not be granted over land on which a significant improvement has been made. Currently, the Director General of the Department of Industry and Investment must refer disputes to an independent person for report to the Minister. These provisions have not proved practical and have not been utilised to date. The proposed new provisions will give both parties the ability to apply directly to the Land and Environment Court for a determination of the applicant’s objection.

I move now to schedules 18 and 19, which contain amendments to the Victims Support and Rehabilitation Act 1996 and the Victims Rights Act 1996 respectively. The main purpose of these schedules is to make amendments to legislation concerning victims of violent crime to facilitate the streamlining of the compensation and counselling application process, expand the offences for which victims compensation levies are payable, and implement recommendations of a review of the Charter of Victims Rights and of the Chairperson of the Victims Compensation Tribunal.

The Victims Support and Rehabilitation Act 1996 sets out the compensation and counselling entitlements of victims of crime. Compensation, legal and other victims' service-related costs are paid from the Victims Compensation Fund set up under the Act. A number of the changes proposed in schedule 18, together with changes that will be made to the Victims Support and Rehabilitation Rule 1997 and the Victims Support and Rehabilitation Regulation 2006, are required to support the streamlined administrative procedures. These changes are expected to provide savings, meaning more money is available to be paid directly to victims.

Schedule 18 implements a number of recommendations from the Chairperson of the Victims Compensation Tribunal. These include allowing a person who receives a compensable injury as a direct result of an act of violence to recover all actual expenses incurred under the Victims Assistance Scheme—currently only a limited number of prescribed expenses can be claimed, preventing family victims from lodging applications out of time other than in limited circumstances, and clarifying that the definition of "related acts" includes multiple acts that have been committed against a victim by a person over a period of time, as is the case in other jurisdictions in Australia. Schedule 19 to the bill contains amendments to the Victims Rights Act 1996, to improve the implementation of victims' rights under the Charter of Victims Rights. The proposed changes are the result of extensive consultation with the Victims Advisory Board and victims support groups.

I turn now to the most important provisions of schedule 18. Section 5 (3) defines the circumstances in which an act is to be considered related to another act for the purpose of determining whether a number of acts are to constitute a single act of violence. The Victims Compensation Tribunal Chairperson's Report 2007-08 recommended that section 5 (3) be strengthened to provide that an act is related to another act if the acts were committed against the same person by the same perpetrator or perpetrators. Since then, the District Court has examined how section 5 (3) is to be interpreted. This has resulted in applicants increasingly separating their claims into multiple claims. This has increased the pending caseload and could have serious adverse consequences for the financial state of the Victims Compensation Fund if it enables awards to be made in respect of every single act of violence occurring during a series of acts of violence.

As currently interpreted, there is concern that individual victims could receive payouts of more than $1 million. The architects of the scheme never intended that a victim should receive such a large amount, especially when $50,000 is the maximum payable in relation to the death of a victim. No other jurisdiction allows this, and it would

be financially irresponsible for New South Wales to continue to allow it. As of 10 September 2010, 30 per cent of claims lodged were multiple claims. If this trend continues, the potential impact on the Victims Compensation Fund could run to tens of millions of dollars.

With the vast majority of victims compensation payments coming from consolidated revenue, the Government has a responsibility to ensure that payments do not become an unaffordable drain on public funds. Given the financial climate, and the outstanding liability of the Victims Compensation Fund, failing to manage such multiple claims properly will eventually result in reduced compensation for other victims of crime. Therefore, item [2] provides that where there is more than one act of violence and those acts were committed against the same person over a period of time by the same perpetrator or group of perpetrators, the acts will generally be considered as related. Such related acts are treated as a single act of violence for the purposes of victims compensation under the Act. However, compensation assessors will still retain the discretion to treat multiple claims as unrelated acts, which is made clear in new section 5 (3A). The recommended amendment will make New South Wales legislation consistent with other jurisdictions, such as Queensland and Victoria.

The purpose of the Victims Assistance Scheme is to reimburse specified expenses to victims of crime who are not otherwise eligible for statutory compensation. The scheme currently covers only specified expenses. The Victims Compensation Tribunal Chairperson's Report 2007-08 recommended that the scheme be modified to make it less administratively difficult for applicants, and that the category of prescribed expenses be expanded. The amendment in item [5] will allow a person who receives a compensable injury as a direct result of an act of violence to recover all actual expenses incurred. Compensating all actual expenses will remove the confusion about what expenses are covered and make it easier for applicants to lodge a claim under the scheme.

Items [16] to [21] make changes that streamline the approval of counselling applications. The amendments to section 21 of the Act allow the Director of Victims Services, instead of a compensation assessor, to approve applications for approved counselling services. It is considered an inefficient use of resources for compensation assessors to determine counselling applications under the approved counselling scheme given the high approval rate and the low evidential standard applied to them. Instead, trained staff will approve these applications, on delegation from the director. Currently counselling is approved by an assessor for an initial two hours, and then for further hours as requested. On average, victims of crime need six to eight hours of counselling in addition to the initial two-hour assessment, and requests for this extra time are rarely refused. The amendments will therefore replace the initial period of two hours counselling with up to 19 hours of counselling.

I refer, next, to claims that pre-date a current claim. A claim from a person who has suffered multiple acts of violence may not be properly evaluated unless considered in the context of all acts of violence and all relevant claims arising from those acts of violence. Under item [25] the intention of the amendment is to prevent applicants from drip-feeding claims over a number of years, and to ensure that applicants bring all claims at the same time. New section 23A will prevent subsequent claims being made in relation to acts of violence pre-dating a successful claim, other than in exceptional circumstances. This will encourage claimants to bring all outstanding claims. Examples of the sorts of claims that might be affected by this amendment are claims that involve a psychological injury. Multiple acts of violence over a long period may have contributed to a psychological injury. If all claims for compensation are lodged at the same time the decision-maker will be able to identify whether multiple acts of violence should be treated as a single act of violence.

Where the decision-maker determines that the act concerned consists of a single act of violence involving multiple injuries, he or she would award compensation according to clause 3 of schedule 1, which sets out how compensation should be awarded where there are multiple injuries. It is difficult for the decision-maker to apply this clause when a person does not bring all claims at the same time. The amendment would also enable a decision-maker to apply clause 4 of schedule 1, which allows for a reduction of the standard amount of compensation because of an existing condition in cases where there has been more than one act of violence and earlier acts of violence have given rise to an existing condition.

I refer, next, to the time limits for family victim claims. Currently, an application for statutory compensation must be lodged within two years of the act of violence or, in the case of family victims, within two years of the death of the primary victim. However, an application lodged out of time may be accepted with leave of the director. The Chairperson of the Victims Compensation Tribunal recommended precluding leave being granted to family victims to lodge claims outside the two-year time limit. Claims are being lodged in relation to deaths that occurred more than 40 years ago. It was not intended that the Act provide compensation in relation to such deaths. Item [26] implements this recommendation with two exceptions. First, applications by family victims who were less than 18 years old at the time of the offence may be accepted, with the leave of the director, within two years of those victims turning 18. Secondly, applications by family victims may be lodged out of time, with the leave of the director, within two years of it becoming apparent that the primary victim has died as the result of an act of violence.

I refer, next, to the maximum amount of compensation for family victim claims lodged out of time. New section 26 (2C) prevents the director from giving leave under one of the exceptions in new section 26 (2B) when the total award of $50,000 has already been made. This limitation is consistent with the principle that $50,000 is the maximum amount that the primary victim of an act of violence, and any other victims claiming through that victim,

may receive, as set out in sections 16 and 19. It is difficult to recover amounts of compensation already awarded to valid family claimants if a subsequent family claimant emerges. Once the maximum award has been made and the two-year limitation period has expired no further claims should be able to be made.

Items [30] to [32] will amend section 35 of the Act to make it clear that the awarding of legal costs is discretionary, and that compensation assessors are to form a view as to the appropriate level of costs to be awarded for each claim, depending on the amount of work involved or its complexity. The current wording of the section has created an expectation that legal costs will be paid irrespective of the outcome of an application and irrespective of the amount of work involved. The Victims Compensation Tribunal or compensation assessors will continue to be able to award costs in excess of the scale of costs if of the opinion that the special circumstances of the case justify such an award.

I refer, next, to extending the victims compensation levy to all offences. One of the objects of the Act is to impose a levy on people found guilty of crimes to provide a source of revenue for the Victims Compensation Fund. Currently, the levy is payable by people convicted of offences, punishable by imprisonment, and who are dealt with by particular courts. The levy is $148 if the first offence is an indictable offence and $64 otherwise. The victims compensation levy represented just 4 per cent of the total revenue of the fund in 2008-09. The funds main source of revenue is the Consolidated Fund. The Government is committed to reducing the contingent liability of the Victims Compensation Fund and reducing the dependence of the fund on the Consolidated Fund. Item [40] will extend the victims compensation levy to all offences dealt with by the courts listed in that clause, not only those punishable by imprisonment. Penalty notices will not be subject to the victims compensation levy. It is projected that this change will yield an additional $2.91 million per annum for the fund. I note that in all other jurisdictions where levies are imposed they are payable in respect of all summary and indictable offences. This amendment will bring New South Wales into line with those jurisdictions.

I move now to the amendments to the Victims Rights Act 1996 contained in schedule 19. The amendments arise from a review of the Charter of Victims Rights, conducted by Victims Services within the Department of Justice and Attorney General. The object of the Victims Rights Act 1996 is to recognise and promote the rights of victims of crime. The Victims Rights Act 1996 incorporates the Charter of Victims Rights, which sets out 17 rights for victims of crime and outlines how government agencies should treat and assist victims.

The following amendments are part of a package of proposals to enhance the implementation of the Charter of Victims Rights: specifying that Victims Services may publish codes and guidelines to provide practical guidance on how agencies are to implement the Charter of Victims Rights and ensure that agencies are accountable for their interactions with victims; strengthening the way in which victims' rights under the charter are expressed; providing a specific right to complain and to be informed about complaint processes; extending the application of the charter to non-government agencies, professionals and subcontractors that are funded by the State under direct contractual arrangements—the charter generally will not apply to non-government legal practitioners who provide advice on victims legal issues or private medical practitioners who may deal with a victim's injuries, even if the cost of those services are ultimately paid by the Government, unless they provide those services under contract with the Government; updating the references to the Victims of Crime Bureau to refer to Victims Services, making it clear that Victims Services is the branch of the Department of Justice and Attorney General that is responsible for victims' issues; and increasing the number of members of the Victims Advisory Board that represent the general community from four to six members.

This bill addresses a number of issues relating to the smooth and effective running of the New South Wales justice system. The amendments contained in the bill have been the subject of consultation with key stakeholders, including the judiciary, the courts and tribunals, the legal profession, relevant government agencies and community stakeholders. I commend the bill to the House.