Agreement in Principle

Mr BARRY COLLIER (Miranda—Parliamentary Secretary) [10.33 a.m.]: I move:

That this bill be now agreed to in principle.

The Keneally Government is committed to the principles of open justice and to improving the ability of the public to understand what takes place in New South Wales courtrooms. The Court Information Bill 2010 is a testament to that commitment. The bill is designed to promote the principle of open justice and to overhaul the existing complex system governing the release of court information. It does this by creating a statutory framework to govern access to documents and other court information held by New South Wales courts in connection with criminal and civil proceedings. Access to information held in court records is an essential feature of an open justice system. It allows the public to be informed about what takes place in the courtroom and to understand the basis on which judicial officers make their decisions.

Procedural reforms designed to improve the efficiency of courts have meant that information that used to be provided to the court orally is now often tendered to the court in the form of documentary evidence. Therefore, the ability of the media to accurately report, and of the public in general to understand, what takes place in the courtroom increasingly depends on access to court records. However, the means by which this information is available to the public has, until now, been complex and unclear. There are various statutory provisions and rules of court that govern access to court information in the different courts of New South Wales, most of which give judicial officers and registrars significant discretion when considering whether to grant a non-party to the proceedings access to relevant court records.

The Court Information Bill 2010 has its origins in the New South Wales Law Reform Commission's 2003 review of the "Law of Contempt by Publication", and is the result of an 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 right to access court information. The report suggested that rights to access court information should be clarified and made several recommendations in that regard. 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, including, first, debate about the extent to which privacy principles are relevant when dealing with court records; secondly, differing approaches by individual New South Wales courts; thirdly, divergent views on the extent to which exhibits should be available to the public and to media representatives; and, fourthly, processes to review decisions about access for third parties.

Following this early consultation process the New South Wales Supreme Court referred the issue to the then Attorney General's Department for development of an appropriate policy on access to court information. In June 2006 the department released a discussion paper entitled "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 informed the department's consideration of a new framework for managing access to court information. The resulting report by the Attorney General's Department entitled "Report on Access to Court Information" was publicly released in July 2008. On 9 October 2009 the Attorney General released a consultation draft of the Court Information Bill, based on the recommendations contained in the report, to targeted stakeholders, including the media, the courts and the legal profession.

This additional consultation was undertaken in recognition of the complexities inherent in establishing a uniform process for accessing court information in civil and criminal proceedings across all New South Wales courts. Each of the targeted stakeholders provided comments on the consultation draft of the proposed statutory framework. These comments have been carefully considered and have informed the Court Information Bill 2010, which is before the House today. 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 that it has got the balance right in this bill.

The Government takes this opportunity to thank all those who contributed to the development of the Court Information Bill 2010 by participating in the various consultations. In particular, we thank the Chief Justice of New South Wales, the Chief Judge of the New South Wales District Court, the Chief Magistrate, the Law Society of New South Wales, the New South Wales Bar Association and media organisations such as Australia's Right to Know Coalition and the Australian Press Council. Their comments have all been particularly helpful and have been taken into account in this bill. The Court Information Bill 2010 is 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.

In this first stage the bill simplifies access to court information by creating just two categories of information:

"open access" or "restricted access". It then sets out the framework by which these two categories of court information can be accessed by the public, including victims of crime and others who are directly affected by criminal and civil proceedings, as well as the media. In the second stage additional provisions will be added that will clarify and consolidate into the one statute the law relating to the making of non-publication and suppression orders by the courts.

This aspect of access to court information will be informed by work currently being undertaken by the Standing Committee of Attorneys-General, which is considering the development of harmonised suppression and non-publication orders across all Australian jurisdictions. The second stage of the access to the court information process will also consolidate into the one statute all statutory non-publication or suppression provisions that are currently spread amongst a large number of other statutes. It must be remembered that until the second stage of the access to court information process is completed the framework set out in the bill for access to court information is not an exhaustive one.

Although the Court Information Bill 2010 sets out the statutory framework for obtaining access to most court information, the courts will retain their power to make suppression and non-publication orders in particular cases. Nor does the bill enable a person to access or to publish court information if another law prevents access to or publication of that information. For example, the identities of children involved in care and protection proceedings or criminal matters, of parties to adoption proceedings, of victims of sexual assault, and of persons involved in mental health or public health inquiries will continue to be protected by the relevant statutes. The objectives of this legislation are enshrined in clause 3 of the bill as follows:

(a) to promote consistency in the provision of access to court information across New South Wales courts;

(b) to provide for open access to the public to certain court information to promote transparency and a greater understanding of the justice system;

(c) to provide for additional access to the media to certain court information to facilitate fair and accurate reporting of proceedings; and

(d) to ensure that access to court information does not compromise the fair conduct of court proceedings, the administration of justice, or the privacy and safety of participants in court proceedings, by restricting access to certain court information.

I turn now to the details of the statutory framework for access to court information established by the provisions of the bill. As recommended in the Report on Access to Court Information, the Court Information Bill 2010 defines all information held in court records in connection with civil or criminal proceedings as either "open access information" or "restricted access information". "Courts" are defined in clause 4 of the bill in such a way as to include all courts in New South Wales. This definition encompasses any sub-jurisdiction within New South Wales courts such as the Drug Court, which is a part of the District Court, the Coroners Court, which sits within the Local Court, and the Youth Drug and Alcohol Court, which is a part of the Children's Court.

Civil and criminal proceedings are also defined in such a way as to encompass all the kinds of proceedings that may be heard by a court. "Criminal proceedings" is defined in clause 4 of the bill to include committal proceedings, proceedings related to bail, proceedings related to sentence, and proceedings on appeal against conviction or sentence. "Civil proceedings" are broadly defined in clause 4 as any proceedings other than criminal proceedings. Clause 5 of the bill gives any member of the public, including victims of crime and the media, an entitlement to access all court information that is classified as open access information. Courts will no longer be able to refuse access to open access information on the grounds that the person seeking access does not have a sufficient or proper interest in the case.

Clause 5 of the bill sets out the information and/or court records that are classified as open access information. This clause will give the public an entitlement, subject only to the payment of any relevant fees, to access the following information in both civil and criminal proceedings: firstly, documentation which commences proceedings; secondly, written submissions made by a party to proceedings; thirdly, statements and affidavits admitted into evidence, including experts reports; fourthly, judgements, directions and orders given or made in the proceedings, including a record of conviction in criminal proceedings; and, fifthly, the date on which a matter has been or is to be heard by the court and the name of the judge, magistrate, registrar or other court officer who heard or is officially listed to hear the proceedings.

Further, for criminal proceedings open access information will also include the indictment, court attendance notice or other document commencing proceedings. The police fact sheet, statement of facts or similar summary of the prosecution's case will also be open access information for criminal proceedings. However, in jury trials that information will only be open access information before the proceedings are set down for trial by a jury and after the conclusion of the proceedings. This will protect against trials having to be aborted due to jurors being adversely influenced by publication of unsworn and untested allegations. These changes will mean, for example, that a person who is a victim of a crime will now have an entitlement to access transcripts of the criminal court proceedings against the offender, as well as the court attendance notice or indictment, any police fact sheets

and other statements and affidavits that are admitted into evidence in the proceedings and the orders made by the judge or magistrate.

In civil cases the originating process and pleadings in a civil case will also be open access information, although only after the stage in proceedings where the court has an opportunity to consider the originating process or pleadings, including any cross-claim, or the conclusion of the proceedings, whichever comes first. This will ensure that defendants to civil proceedings are not prejudiced by having documents about them made public before they are served with the pleadings, or before they have had a chance to object to proceedings that may be vexatious, scandalous or otherwise an abuse of the court's process, or before they have had an opportunity to consider making a cross-claim.

It should be noted that it will be possible to add to the list of information that is classified as "open access information" by regulations made under the bill. The ability to add additional categories of open access information in regulations made under the bill gives the statutory framework an essential flexibility to quickly react to evolving technology and court procedures. Placing this flexibility into the regulations rather than into the rules of court also ensures that when consideration is being given to including new categories of open access information there is ongoing consultation with affected stakeholders and the process is subject to parliamentary control. It also ensures that the categories of open access information created under the bill will remain consistent across all courts in New South Wales.

Under clause 6 of the bill any court information that is not defined either in the bill or in the regulations as open access information is classified as restricted access information. The bill also recognises that there is some court information that would normally fall into the category of open access information but that, due to the nature of the information contained in the record, should be restricted access information. This includes information of a personal, highly sensitive or confidential nature, such that its release could adversely impact the privacy or safety of any participants in court proceedings, such as by causing identity theft or further traumatising victims of crime, or compromise the fair conduct of the court proceedings or the administration of justice.

Clause 6 of the bill therefore classifies the following type of information as restricted access information: firstly, personal identification information, such as tax file numbers, social security numbers, Medicare numbers, financial account numbers, passport numbers, personal telephone numbers, dates of birth and home addresses; secondly, information contained in an affidavit, pleading or statement that has been rejected, struck out or otherwise not admitted into evidence; and, thirdly, information contained in a person's criminal record, or in a statement that comprises a medical, psychiatric, psychological or pre-sentence report, or in a victim impact statement, unless that information is summarised in a judgement given or orders made in proceedings. This does not mean that the public will not be able to have access to this court information. A member of the public who is not a party to criminal or civil proceedings can still make an application to the court for access to restricted access information contained in the court records of the proceedings. The court may still grant an application for access to this information taking into account specific factors set out in clause 9 of the bill, which I will outline in detail shortly.

Whilst the framework established by the bill presumes automatic access by the public to open access information, the bill also recognises that there may be particular cases where this court information ought not be accessed. Therefore in clause 8 the bill provides for the court to order that non-parties should not have or should have limited access to open access information that is contained in that proceeding's court records. In relation to both open access and restricted access information, clauses 8 and 9 of the bill provide that, in a particular case, the court can also place conditions on the way that access is to be provided or that restrict the disclosure or use of the information. Coupled with clause 21, which provides for an offence to breach any condition of access granted to court information, these provisions will ensure information is used for the purpose for which access was granted, and not for an improper commercial or other unlawful purpose.

At this point, I must reiterate that the objects of the bill require the court to start from the presumption that open access should be granted to court information, rather than the current situation where the onus is on non-parties to convince a court to allow them access to the information sought. Clause 9 of the bill also sets out the specific issues that the court may consider when such an application is made. The test that will be applied by courts when considering applications for access to restricted access information will now require a balancing of the various interests involved in granting access to that information, including the public interest, any adverse effect on the principle of open justice, the extent of any compromise to an individual's privacy or safety, any adverse impact on the administration of justice, the extent of the applicant's interest or involvement in the proceedings or other matter to which the information relates and the reasons for which access is sought.

In addition, clause 9 of the bill provides that access to restricted access information can also be provided by the regulations. This will give the framework a degree of flexibility to provide access to certain kinds of restricted access information to members of the public, or specific categories of the public, without the need for an application to the court. For example, the bill does not give government departments or agencies any special right to access restricted court information, yet regular access by some agencies to certain kinds of court information may be necessary to assist in the administration of justice. For example, research organisations, such as the Bureau of Crime Statistics and Research require access to restricted information to be able to

collate statistical information about the justice system.

The regulations will be able to provide that certain government agencies that support the justice system or specific research organisations, such as the Bureau of Crime Statistics and Research, can have access to specific kinds of restricted access information for specific purposes. The regulations will, of course, be subject to parliamentary oversight. This is in addition to clause 12 of the bill, which provides that the bill is not intended to prevent or otherwise interfere with the giving of access to court information as is required or permitted under any other Act or law. The bill recognises the special role of the media in informing the public about civil and criminal proceedings. When the media is able to give a fair and accurate account of what has happened in a particular case, and to report the information on which any decisions were based, this not only expands the community's knowledge of matters of which it should be aware, but enhances the public's understanding of the justice system as a whole.

In clause 10 of the bill, news media organisations are granted additional access to information contained in court records even though the information is otherwise classified as restricted access information. For example, media representatives will now be able to automatically access information contained in a transcript of proceedings held in closed court, information contained in a court record that is only classified as restricted access information because it contains personal identification information, information contained in the brief of evidence admitted in criminal proceedings and information contained in a record admitted into evidence that is a document in written form, or that can readily be reproduced as a document in written form, such as sound or video recordings.

As clause 13 of the bill provides, additional access granted to the media remains subject to any order of a court that prohibits or restricts the publication or disclosure of that information, or any provision made by or under any other Act or law prohibiting or restricting the publication or disclosure of that information. For example, the non-publication restrictions that are already in place in a raft of other pieces of legislation, such as the prohibition on the naming of children involved in criminal proceedings, will continue to apply. In addition to these existing protections, and in recognition of the additional access granted to media organisations to otherwise restricted access information, the bill puts in place additional safeguards to protect the privacy of the parties, witnesses and others involved in court proceedings.

As I mentioned earlier, the court may impose conditions on access to court information in any particular case, but only conditions that relate to the way in which access is to be provided or that restricts the disclosure or use of the information to which access is provided. Similar to the bill's provisions in respect of the court's ability to make such orders regarding other open access information, the objects of the bill require the court to start from the presumption that access should be granted to the media to the additional information contained in clause 10. Media access to certain restricted access information is also subject, in clause 10 (3), to a prohibition on the publication of any personal identification information, except with the permission of the court or of the person to whom the personal identification information relates. A penalty applies for any breach of this clause.

I will now canvass the issue of personal identification information in more detail. As I mentioned briefly earlier, were such information readily available to the public, there is a significant risk that involvement in court proceedings, even if only as a witness, could lead to the theft of a person's identity or to being targeted for commercial purposes. One barrier to the classification of court records as open access information is that this personal identification information is contained in a significant proportion of court records. The bill addresses this problem in clause 17 by requiring each court to publish on its website, or by other appropriate means, general information that promotes awareness of these dangers, and the court's practices and procedures for limiting access to personal information.

Further, clause 18 of the bill requires a court to ensure, to the maximum extent reasonably practicable, that court records that contain open access information do not contain personal identification information. To that end, clause 18 enables the courts to develop rules to ensure that it is prepared and filed by a party to proceedings and/or that access is only granted to those court records from which personal identification information is redacted from any court record that is prepared and filed by a party to proceedings and/or that access is only granted to those court records from which personal information has been redacted. Where a court record does contain personal identification information, courts may refuse the general public, but not the media, access to this court record even if the court record would otherwise be open access information.

At the same time, clause 19 of the bill requires a court to take such security safeguards as are reasonable in the circumstances to ensure that the court information contained in court records is protected against misuse and unauthorised access, use or disclosure. Further, clause 20 of the bill makes it an offence, punishable by 100 penalty units or imprisonment for two years, or both, for a court officer to disclose or use court information in contravention of the access provisions of the bill or associated regulations, or without the consent of the person from whom the information was obtained, or unless otherwise authorised or required by law. In relation to how access to court information is to be provided, clause 14 of the bill sets out the methods of providing access, including the conditions that may be imposed on access, and the grounds on which access may be refused in a particular case.
As can be seen from the above description of the statutory framework of the Court Information Bill, additional

work will be required before this bill can commence. In particular, the Government will consult on and develop transitional provisions, such as provisions to assist in dealing with court records in civil and criminal proceedings commenced prior to the commencement of the Act; regulations, such as the kinds of other court records that might be classified as open access information and access to restricted access information by way of regulation rather than court application; court rules, such as specific rules to govern how the personal identification information of participants in court proceedings will be protected by courts, how applications for access to court information should be made, and how the access will be provided pursuant to this bill, and regulations prescribing fees.

To assist in developing regulations, the Department of Justice and Attorney General is establishing an advisory group, consisting of representatives of the courts, the media and the legal profession. This advisory group will be able to provide guidance and advice on the regulations that will be required under this bill. At the same time, the courts will be able to use existing processes for the development of any court rules required pursuant to this bill. In particular, New South Wales courts have a Uniform Rules Committee established under the Civil Procedure Act 2005, in which uniform civil rules are developed to apply across all New South Wales courts.

The Attorney General has encouraged the courts to establish the members of that committee as a separate advisory committee to assist in the development of uniform rules for the purpose of this bill. The Government wants to get these reforms right the first time. Consequently, it has undertaken intensive consultation and engaged stakeholders at every stage of the process. The Court Information Bill is another example of the Government leading the way in simplifying court processes and making information more accessible. I commend the bill to the House.