Agreement in Principle

Mr BARRY COLLIER (Miranda—Parliamentary Secretary) [7.31 p.m.], on behalf of Mr David Campbell: I move:

That this bill be now agreed to in principle.

The purpose of the Evidence Amendment Bill is to implement the model uniform evidence bill, which was endorsed as national model evidence legislation by the Standing Committee of Attorneys-General in July this year. The model bill is based on the recommendations of the Australian, Victorian and New South Wales Law Reform Commissions, which reviewed the New South Wales and Commonwealth Evidence Acts after 10 years of operation. The research of the commissions was wide and thorough. Consultations were held in every State and Territory, and submissions were received from 130 individuals and organisations, including the New South Wales Public Defenders Office, the New South Wales Director of Public Prosecutions and the Commonwealth Director of Public Prosecutions. The commissions reported that the uniform Acts are working well and there are no major structural problems with the Acts or their underlying policy. They made a range of recommendations to finetune the law and promote harmonisation between Australian jurisdictions.

Accordingly, the majority of the amendments that this bill proposes are for clarification and procedural improvement. Other changes are made to rectify confusing court decisions or uncertainties in the legislation. The bill proposes a number of important reforms including the expansion of certain privileges to pre-trial proceedings, and clarifications regarding the manner in which the jury is to be directed in relation to children's evidence and the effects of delay. The bill also proposes a new test of competence to be a witness, to make it easier to determine, for example, whether and how children, people with a disability and people with a cognitive impairment may give evidence. The intention is to ensure that the rules of evidence in New South Wales continue to be fair, clear, efficient and up-to-date. Before addressing some of the bill's provisions in more detail, it is fitting to provide some background to the proposed amendments.

In 1995 the Commonwealth and New South Wales adopted uniform evidence legislation. This uniform scheme was subsequently adopted in Tasmania and Norfolk Island. Around the tenth anniversary of the Commonwealth and New South Wales Acts coming into force, the Australian, New South Wales and Victorian Law Reform Commissions were given a joint reference to review the operation of the uniform evidence Acts. The model bill is based on the recommendations of these three commissions, and I am pleased to say that many of their recommendations were for New South Wales initiatives to be adopted in other jurisdictions. For example, the commissions recommended that the uniform evidence Acts incorporate the New South Wales confidential communications privilege and our prohibition on improper questioning of witnesses.

The text of the model bill has been developed by a working group of officers from around Australia, together with Parliamentary Counsel from New South Wales, the Commonwealth and Victoria. The model bill was also reviewed by an expert reference group comprising former New South Wales Supreme Court Justice the Hon. James Wood, AO, QC; the Hon. Justice Tim Smith of the Supreme Court of Victoria; Professor Les McCrimmon of the Australian Law Reform Commission; and Sydney barrister Mr Neil Williams, SC, who is also a co-author of textbooks on New South Wales evidence law. The Government is grateful to the members of the expert reference group for their generosity in agreeing to review the draft model bill and field queries from our officers.

The Government is also pleased to note that the model bill will not only be used to update the uniform evidence Acts currently in place in New South Wales, Tasmania and the Commonwealth. The Victorian Attorney General has indicated that he is interested in joining the uniform evidence scheme by implementing the model bill. Meanwhile, a number of other jurisdictions are giving serious consideration to joining the scheme. The expansion of the uniform evidence scheme will be valuable because it will allow the development of a broad, consistent body of case law on evidentiary matters. It will also assist in the development of a truly national legal profession across Australia. As I said, the majority of the proposed amendments are for clarification and procedural improvement. However, it is appropriate for me to set out in some detail the intent and operation of the key amendments that the bill proposes. I ask for the forebearance of those who do not take a keen interest in the finer details of evidence law.

First, in relation to de facto partners and compellability, the bill proposes changes to the manner in which the Evidence Act addresses de facto couples, particularly in the context of whether the de facto partner of an accused person may be compelled to give evidence. Currently, section 18 of the Evidence Act, which applies only in criminal proceedings, allows certain categories of witness to object to giving evidence against the accused. Witnesses entitled to raise the objection are the accused's spouse, de facto spouse, parent or child. The purpose of the section is to excuse these people from giving evidence against the accused if the court finds that there is a likelihood that harm might be caused to the person, or to the relationship between the person and the accused, if the person gives the evidence; and that the nature and extent of that harm outweighs the desirability of having the evidence given.

The section recognises that couples in intimate relationships should not be forced to give evidence against one another unless the interests of the community require it. The section also recognises that persons who are forced to testify are unlikely to be reliable and accurate witnesses. Therefore, the effect of the current section is not only

to protect family relationships and potential witnesses from harm, but also to ensure the accuracy and reliability of evidence that is placed before the court. Currently, the Evidence Act does not have its own definition of "de facto couples". The Evidence Act refers instead to a definition in the Property (Relationships) Act that includes same sex couples. This ensures the reliability and accuracy of evidence before the court, whether the couple is homosexual or heterosexual.

The proposed amendments regarding de facto relationships in the Evidence Act are twofold: First, references to "de facto spouse" are replaced with references to a "de facto partner". This is to ensure that the language of the Evidence Act is clearly gender neutral. Second, a definition of "de facto partner" is inserted into the dictionary, so that the Evidence Act has its own definition of de facto. Like the current New South Wales definition, the proposed new Evidence Act definition will ensure that the rules of evidence are not discriminatory and that they do not prevent the court from ensuring the quality of the evidence before it.

I am disappointed that the current Commonwealth Evidence Act does not include same-sex couples in its definition of "de facto couples". Moreover, in July the Commonwealth Attorney-General, the Hon. Philip Ruddock, MP, advised the Standing Committee of Attorneys-General that he is preparing an Evidence Act amendment bill that will not adopt the proposed model definition, and will continue to discriminate against same-sex couples. His discriminatory stance is not only contrary to the recommendations of the Australian, New South Wales and Victorian Law Reform Commissions; it is also contrary to commonsense, and to the interests of the administration of justice.

Mr Ruddock has shown that he is reluctant to grant same-sex couples certain rights. However, ensuring that same-sex couples are included in the Evidence Act definition of "de facto" does not, as Mr Ruddock's refusal to amend the Commonwealth Evidence Act seems to suggest, constitute a grant of some new or special right. Including same-sex relationships in the Evidence Act definition is merely a recognition, firstly, of the fact that couples will not always give accurate evidence against each other and, secondly, of the fact that it is not the business of the courts to alienate couples and family members from one another unless there is a compelling reason to do so.

The bill also proposes to introduce new exceptions to the hearsay rule and the opinion rule, for evidence of Aboriginal and Torres Strait Island traditional law and custom. In their report, the Law Reform Commissions found that the Evidence Act should be amended to be more responsive to Aboriginal and Torres Strait Island oral traditions. It is not appropriate for the hearsay rule—and by extension, the legal system—to treat orally transmitted evidence of traditional law and custom as prima facie inadmissible, when this is the very form by which law and custom are maintained under indigenous traditions.

Similarly, a member of an Aboriginal or Torres Strait Islander group should not have to prove that he or she has specialised knowledge based on training, study or experience before being able to give opinion evidence about the traditional law and custom of his or her own group. The intention is to make it easier for the court to hear evidence of traditional laws and customs, where relevant and appropriate.

The exceptions proposed in the bill shift the focus away from whether there is a technical breach of the Evidence Act to whether the particular evidence is reliable. Factors relevant to reliability or weight will include the source of the representation, the persons to whom it has been transmitted, and the circumstances in which it was transmitted. The requirements of relevance in sections 55 and 56 may operate to exclude representations that do not have sufficient indications of reliability. Reliability will also be ensured if courts continue to use their powers to control proceedings to create a culturally appropriate context for the giving of evidence regarding the existence or content of particular traditional laws and customs.

Further safeguards are provided by the court's powers under sections 135, 136 and 137 to exclude or limit the use of evidence. For the purposes of the exceptions to the hearsay and opinion rules, the commissions also concluded that a "broad definition of traditional laws and customs" was desirable. The everyday meaning of a "traditional law" or "traditional custom" is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. However, the High Court has held—in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 [46], per Chief Justice Gleeson, Judge Gummow and Judge Hayne, with Judge McHugh agreeing—that for the purposes of the Native Title Act 1993 "traditional laws and customs" refers specifically to traditional laws and customs "whose content originates in the normative system of Aboriginal and Torres Strait Islander societies prior to assertion of sovereignty by the British Crown".

The commissions considered that for the purposes of the Evidence Act, "traditional laws and customs" should not be limited to that interpretation. To ensure that the Act covers the full range of matters within the scope of "traditional laws and customs", a broad definition of "traditional laws and customs" has been inserted. The new definition is not limited to "normative rules". It contains a non-exhaustive list of matters that includes customary laws, traditions, customs, observances, practices, knowledge and beliefs of a group, including a kinship group, of Aboriginal or Torres Strait Islander people. The commissions consider that this broader definition will enable the court to receive more diverse evidence that can be used to prove the existence and content of traditional laws or customs.

The definition also refers to "any of the traditions, customary laws, customs", and so on, of the group. This is to make clear that the new exceptions to the hearsay and opinion rules apply to traditions and customs generally, and not only to those whose content has been shown to originate in traditional law and custom in force prior to the assertion of sovereignty by the British Crown. Just like the common law we have inherited from Britain, Aboriginal and Torres Strait Island traditional law and custom did not ossify in 1788. Moreover, it is impractical and inappropriate to require courts to inquire whether the content of any given traditional law or traditional custom has its origins before sovereignty in order to decide whether the exceptions may apply. Requiring such an inquiry would be contrary to the purpose of the new exceptions, which is to shift the focus away from technical obstacles to admissibility, and on to whether the particular evidence is reliable and what weight it should be accorded.

Again I am disappointed that the Commonwealth Attorney-General has decided that—contrary to commonsense, and to the interests of the administration of justice—he will not implement any of the model uniform evidence provisions relating to traditional law and custom. I am concerned that Mr Ruddock's refusal to implement these exceptions to the hearsay and opinion rules stems from a misapprehension that Aboriginal tradition may somehow cause, or excuse, violence against women or children. Such assumptions are offensive, and they are comprehensively wrong. The great advantage of the proposed exceptions for traditional law and custom is that the exceptions make it easier for community members to speak to the court and to explain what their traditions really are. If any person tries to misrepresent tradition out of self-interest, community members can much more easily set the record straight in court.

These exceptions are supported not only by the Australian, New South Wales and Victorian Law Reform Commissions but also by the Law Reform Commission of Western Australia and the New South Wales Aboriginal Justice Advisory Council. These exceptions are consistent with the recommendations of the Royal Commission into Aboriginal Deaths in Custody, and Rex Wild, QC, and Patricia Anderson's report entitled "Little Children Are Sacred".

If traditional law and custom is a relevant and appropriate consideration in a court case, it is highly impractical to exclude it on the grounds that it breaches the hearsay or opinion rules. As I said earlier, the exceptions proposed in the bill merely shift the focus away from whether there is a technical breach of the Evidence Act to whether the particular evidence is reliable. There is simply no sensible reason to oppose them, and certainly no reason for the Commonwealth Attorney-General to refuse to implement these exceptions.

In addition to foreshadowing that he will depart from the uniform scheme in relation to de factos and traditional law and custom, the Commonwealth Attorney-General has already enacted amendments to the Commonwealth Evidence Act that depart from the model bill on the subject of the confidential communications privilege. The Law Reform Commissions recommended that the New South Wales confidential communications privilege be adopted by all uniform evidence jurisdictions. This privilege allows the court, in certain circumstances, to protect private communications to professionals from being disclosed in court. Earlier this year, however, the Federal Government amended the Commonwealth Evidence Act to insert its own new version of the privilege. This Commonwealth version of the privilege is limited to journalists' sources, and therefore does not protect those who confide in doctors, for example.

In light of Mr Ruddock's very public enthusiasm for uniformity in national model legislation, it is most surprising that he should have chosen to depart from the agreed model in relation to this privilege. It is particularly surprising, given that he is on record as having expressed support for the New South Wales version of the privilege during meetings of the Standing Committee of Attorneys-General. The New South Wales provision has been operating satisfactorily for 10 years and it already ensures that all important issues such as, for example, national security can be taken into account by the court. Mr Ruddock has never adequately explained the need for this departure from the recommendations of the Law Reform Commissions, and from his previous support for the New South Wales privilege.

The bill also sets out a proposed new test for determining a witness's competence to give sworn and unsworn evidence, as well as to clarify the distinction between sworn and unsworn evidence. Currently section 13 of the Evidence Act contains two different tests for giving sworn and unsworn evidence, both of which require a witness to demonstrate an understanding of the difference between truth and lies. The Law Reform Commissions' report noted that these tests have been criticised for being too similar and too restrictive. The proposed amendment clarifies the distinction between sworn and unsworn evidence. New section 13 provides that all witnesses must satisfy the test of general competence in new section 13 subsection (1). This test of general competence moves away from the truth and lies distinction and focuses instead on the ability of the witness to comprehend and communicate. The purpose of the revised test of general competence is to enhance participation of witnesses and to ensure that relevant information is before the court.

The revised test of general competence provides that a person is not competent to give sworn or unsworn evidence about a fact if the person lacks the capacity to understand, or to give an answer that can be understood, to a question about the fact, and that incapacity cannot be overcome. When considering whether incapacity can be overcome, the court will consider reasonable adjustments, including alternative communication methods, use

of technology, or support depending on the needs of the individual witness. The proposed new test of competence provides that even if the general test of competence is not satisfied in relation to one fact, the witness may be competent to give evidence about other facts. For example, a young child may be able to reply to simple factual questions but not to questions that require inferences to be drawn.

New section 13 subsection (4) provides that a person who is not competent to give sworn evidence about a fact may provide unsworn evidence about that fact. This provision will allow young children and others—for example, adults with an intellectual disability—to give unsworn evidence even though they may not understand or cannot adequately explain concepts such as an obligation to tell the truth. It is up to the court to determine the weight to be given to unsworn evidence. A number of criteria must be met before a person may give unsworn evidence. First, the person must be competent to give evidence under new section 13 subsection (1). Second, the court must inform the person that it is important to tell the truth, that he or she should inform the court if asked a question to which he or she does not know or cannot remember the answer, and that he or she should not feel pressured into agreeing with any statements that are untrue.

The bill sets out new section 13 subsection (8), which provides that when a court is determining if a person is competent to give evidence, the court may inform itself as it thinks fit, including by referring to the opinion of an expert. This expands on current provisions by specifically referring to information from experts. This provision is not intended to allow an expert to supplant the court's role in determining a witness's competence. Rather it is intended to emphasise that the court may have recourse to expert assistance—for example, to identify any alternative communication methods or support needs that could facilitate the giving of evidence by a person with a disability. Under this new general test of competence, rulings as to competence may be made not only before the witness commences to give evidence but also as that witness's evidence proceeds.

I turn now to giving evidence in narrative form. The bill implements an election commitment in relation to the evidence of vulnerable witnesses. Since 1995 section 29 of the Evidence Act has allowed parties to apply to the court for a direction that their witness give all or part of their evidence in narrative form rather than in a question-answer format. The Law Reform Commissions recommended that the court should be permitted to give such a direction where it thinks it is appropriate, without waiting for a party to apply for it. Accordingly, the bill proposes to amend section 29 to provide that the court may direct a witness to give all or part of their evidence in narrative form, either on application by a party or of its own motion.

The proposed new section can be used for any witness, but the commissions emphasised that giving evidence in narrative form may be particularly helpful in the case of vulnerable witnesses, such as child witnesses, or witnesses with an intellectual disability. The new section would also be helpful for witnesses who for cultural reasons are not accustomed to a direct question and answer style of communication. The purpose of this amendment is to send a clear message that the court can act to ensure the best outcome in receiving evidence from a witness. As is currently the case, before making any such direction the court will have to take into account a range of considerations, including fairness to all parties. The court would also take into account the witness's ability to comply with instructions about what evidence is admissible and the other options available to assist the witness to give evidence.

Should the process result in undue delay or inadmissible evidence being given, the court has general powers to control proceedings, and specific powers under sections 135, 136 and 137 to exclude or limit the use of evidence. New section 29 subsection (2) does not affect the ability of a witness to give evidence through an interpreter under section 30 or to be questioned or give evidence by an appropriate means under section 31.

Another important technical amendment is the bill's proposed clarification of the rule against hearsay. Section 59 sets out the rule against hearsay. It prevents evidence of a previous representation from being admitted for the purpose of proving a fact that the maker intended to assert by the representation. The main rationale for the rule is to avoid any unfairness that would be caused by the admission of representations made by witnesses whose evidence cannot be cross-examined directly in court. The bill proposes amendments to section 59 to clarify the test to be applied in determining whether a person intended to assert the existence of facts contained in a previous representation, for the purposes of that section.

The amendments are intended to counter the approaches to determining intention which were explored by the New South Wales Supreme Court in *R v Hannes* (2000) 158 FLR 359. According to the court's reasoning in that case, an intended fact could include: first, facts specifically and consciously adverted to by the maker and, second, any fact which is a necessary assumption underlying the fact subjectively adverted to. The Law Reform Commissions found that this reasoning is problematic. Proof of a subjective state of mind is very difficult to ascertain, and particularly so if a party must argue that the representation was not intended to assert the existence of a particular fact. The policy of the Act is to exclude unintended assertions from the rule against hearsay. Further, there is a risk that the reasoning in relation to necessary assumptions is too broad and could therefore give rise to practical difficulties. It may result in the exclusion of relevant evidence of implied assertions assumed by a fact adverted to, even though an implied assertion, when considered independently of the fact it supports, could not reasonably be supposed to have been intended.

The proposed amendments have been recommended by the Law Reform Commissions. They are intended to foreclose such difficulties by clarifying that in determining whether a person intended to assert the existence of facts contained in a previous representation, the test to be applied is what a person in the position of the maker of the representation can reasonably be supposed to have intended, having regard to the representation and the circumstances in which it was made. Although direct evidence of subjective intention can be considered, investigation or proof of the subjective mindset of the person who made the representation is not required.

I turn now to the definition of the word "lawyer". The bill proposes to clarify also the definition of "lawyer" in the Evidence Act. It has been unclear whether the definition of "lawyer" as "a barrister or solicitor" means that the lawyer must hold a current practising certificate, or whether it is sufficient to be admitted as a solicitor or barrister on the roll of the relevant court. The bill proposes amendments to clarify that the definition of "lawyer" in relation to client legal privilege includes Australian lawyers, that is, those who are admitted but do not necessarily have a current practising certificate, as well as foreign lawyers. These amendments implement recommendation 14-3 of the Law Reform Commissions' report. They also adopt the Australian Capital Territory Court of Appeal decision in *Commonwealth v Vance* [2005] ACTCA 35. In considering the definition of "lawyer" under section 117 of the Uniform Evidence Act, the Australian Capital Territory Court of Appeal found that a practising certificate was an important indicator, but not conclusive on the issue of whether the legal advice was sufficiently independent to constitute legal advice for the purposes of claiming privilege under the Act.

The policy of the privilege does not justify its restriction to those with a practising certificate, particularly since a range of lawyers may provide legal advice or professional legal services in various jurisdictions. It is the substance of the relationship that is important, rather than a strict requirement that the lawyer hold a practising certificate. The amendment is directed to clarifying that client legal privilege may pertain to Australian lawyers and their employees and agents. However, the amendment is not intended to affect the common law concept of independent legal advice.

This item also extends the definition of "lawyer" so that it includes a person who is admitted in a foreign jurisdiction. The rationale of client legal privilege is to serve the public interest in the administration of justice and its status as a substantive right means that it should not be limited to advice obtained only from Australian lawyers. This position reflects the reasoning of the Full Federal Court in *Kennedy v Wallace* (2004) 142 FCR 185.

I now turn to privilege against self-incrimination. The bill makes a number of key amendments relating to privileges. The first of these relates to the privilege against self-incrimination. Section 128 of the *Evidence Act* provides a procedure relating to the privilege against self-incrimination and the granting of certificates giving a witness immunity in some circumstances. The commissions found that the current certification process is cumbersome and hard to explain to witnesses. Comments were also made about the necessity to invoke the process in relation to each question. To address these concerns, the bill proposes a new section 128 subsection (1), which has been expanded to cover not only particular evidence but also evidence on a particular matter.

In addition, section 128 has been restructured to simplify the order in which the process of certification is outlined in the section. Rather than including the requirement for the court to inform the witness of his or her rights and the effect of the section, the new section provides that the witness may object to giving the evidence on the grounds that it may incriminate him or her or make him or her liable to a civil penalty—new section 128 subsection (1); that the court shall determine whether or not that claim is based on reasonable grounds—new section 128 subsection (2); if the claim is reasonable, that the court can then tell the witness that he or she may choose to give the evidence or the court will consider whether the interests of justice require that the evidence be given—new section 128 subsections (3) and (4), and if the evidence is given, either voluntarily or under compulsion, that a certificate shall be granted preventing the use of that evidence against the person in another proceeding—new section 128 subsection (5).

New section 128 subsections (8) and (9) address two issues that arose in *Cornwell v The Queen* [2007] HCA 12. In that case the accused was granted a certificate under section 128 in his first trial for evidence given by him that may have incriminated him in relation to other possible charges. After a hung jury, a retrial commenced for the same offence. There was argument over whether the retrial counted as a new proceeding for the purposes of the then section 128 subsection (7) and therefore whether the evidence for which the certificate had been granted could be adduced in the retrial. There was also argument as to whether the certificate had been validly granted in the first place.

In addition to the amendments made in response to recommendation 15-7 of the report, new section 128 subsection (8) has been included as a response to the High Court's decision in Cornwell. I note that at the time the commissions' report was published, the High Court had not yet delivered judgment in those proceedings. New section 128 subsection (8) provides that section 128 subsection (7) applies regardless of any challenge, review, quashing or calling into question on any ground of the decision to give, or the validity of, the certificate concerned. This amendment has been made on the basis that the granting of a certificate under section 128 is not the same as any other evidential ruling. To ensure that the policy of section 128 is carried into effect, the witness must be certain of being able to rely on that certificate in future proceedings.

New section 128 subsection (9) makes it clear that a proceeding under the section does not include a retrial for the same offence, or a trial of the defendant for an offence arising out of the same facts that gave rise to that offence. That is, new section 128 subsection (9) seeks to make clear that a certificate is not to be used by an accused to prevent the use of his or her evidence in another proceeding for the same offence, or in a proceeding in which he or she is charged with an alternative count, for example, manslaughter, if the first, failed trial in which he or she gave the evidence under certificate was for murder.

I now turn to privilege against self-incrimination in interlocutory proceedings. The second key amendment to privileges under the *Evidence Act* relates to the procedure for dealing with claims for the privilege against self-incrimination, when these are made in certain interlocutory proceedings. The bill proposes a new section 128A, which provides a new process to deal with objections on the grounds of self-incrimination, which have been made by a person who is subject to a search order or a freezing order in certain civil proceedings. Examples of search and freezing orders are Anton Piller orders and Mareva injunctions respectively.

This amendment addresses, but does not implement, recommendation 15-10 of the report. Recommendation 15-10 was that self-incrimination privilege be abrogated in relation to search and freezing orders. The Victorian Law Reform Commission revisited this issue in its 2006 Report "Implementing the Uniform Evidence Act". The Victorian Law Reform Commission developed draft provisions that did not abrogate the privilege, but rather set out a new procedure to follow when a claim is made. The Standing Committee of Attorneys-General working group, which developed the model uniform evidence bill, preferred this refinement and the Victorian Law Reform Commission approach has been adopted in the model uniform evidence bill. Accordingly, the new section, rather than preventing claims for privilege being made, provides a means for evidence to be secured and provided to the court in a sealed envelope. Under these provisions the court is then empowered to require disclosure of that evidence to the party seeking it where, upon consideration, the court determines that the interests of justice require it and a certificate providing use and derivative use immunity is given to the disclosing party. The protection conferred by new section 128A does not apply to documents that were in existence before a search or freezing order was made. Any pre-existing documents annexed or exhibited to the privilege affidavit are also not covered by the protection conferred by section 128A.

I now turn to expanding privileges to pre-trial court procedures. The last amendment relating to privileges that I will address relates to pre-trial proceedings. The commissions noted that the introduction of the Evidence Act has resulted in two sets of laws operating in the area of privilege. Where the Evidence Act governs the admissibility of evidence of privileged communications and information, the common law does not apply. In all other situations, the common law rules persist unless a statute expressly abrogates the privilege. This means that within a single proceeding, different laws apply at the pre-trial and trial stages. An individual's ability to resist or obtain disclosure of the same information may vary depending on the stage of the proceedings in which it is sought.

The commissions recommended that the operation of client legal privilege, professional confidential relationship privilege and matters of State privilege should be extended to apply to any compulsory process for disclosure and they are recommendations 14-1, 15-3 and 15-11 respectively. The bill proposes to implement these recommendations in part. New section 131A extends the operation of these privileges to pre-trial court proceedings. However, the provision does not extend the privileges to non-curial contexts. Extension to out-of-court proceedings may be considered in future, with the benefit of the Australian Law Reform Commission's final report on client legal privilege, which is due for publication later this year.

The last two amendments that I will address in detail relate to the manner in which the jury is to be directed in relation to children's evidence and the effects of delay. The commissions recommended that the current New South Wales sections 165A and 165B regarding children's evidence be adopted in the Uniform Evidence Act. This recommendation has been implemented, and our provisions regarding children's evidence have been included in the model bill. As part of the process, however, two existing provisions have been combined into a new section 165A and some changes have been made to update the drafting, and make it clearer. Accordingly, this bill proposes to combine and update current sections 165A and 165B so that they mirror the model bill.

New section 165A subsection (1) provides that in any proceeding in which evidence is given by a child before a jury, the judge is prohibited from warning or suggesting to the jury, firstly, that children as a class are unreliable witnesses; secondly, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny than the evidence of adults; thirdly, that a particular child's evidence is unreliable solely on account of the age of the child; and, fourthly, in criminal proceedings it is dangerous to convict on the uncorroborated evidence of a witness who is a child.

However, section 165A (2) permits the judge to either inform the jury that the evidence of a particular child may be unreliable and the reasons for which it may be unreliable, or warn or inform the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it. The judge may give a warning or inform the jury if a party has requested the warning or information and the court is satisfied that there are circumstances particular to that child, other than his or her age, that affect the reliability of the child's evidence and warrant the giving of the warning or information. The expression "circumstances, other than solely the age of the child" is intended to encompass all of the following: characteristics of individuals or the witness's

age, such as suggestibility; characteristics unique to that child, such as disability; and historical or current circumstances unique to that child, such as the manner in which the investigation was conducted or the manner in which the child was questioned.

I deal now with the notion of the Longman warning and delay. Finally, the bill proposes to insert a new provision to deal with the Longman warning given to juries in relation to delay. It is proposed to implement a new section 165B to implement recommendation 18-3 of the report. The new section will replace the existing common law on Longman warnings so as to limit the circumstances in which they are given and clarify their scope. In *Longman v The Queen* (1989) 168 Commonwealth Law Reports at page 79, the majority of the High Court held that the jury in a sexual assault case should have been warned that, as the evidence of the complainant could not be tested adequately after the passage of time, it would be dangerous to convict on that evidence alone unless the jury, scrutinising the evidence with great care, was satisfied of its truth and accuracy. In addition to the warning about delay, the court also found that the jury should have been warned about the risk of fantasy and the potential for delay, emotion, prejudice or suggestion to distort recollection.

There is considerable evidence that Longman warnings on the effects of delay are given almost routinely and in circumstances where the delay is of relatively short duration. The purpose of this amendment is to clarify that there is no irrebuttable presumption of forensic disadvantage arising from delay. Information provided to the jury in relation to forensic disadvantage arising from a delay should be given only if the accused has applied for it and only where there is an identifiable risk of prejudice to the accused. Such prejudice should not be assumed to exist merely because of the passage of time. Delay, which may lead to forensic disadvantage, is not limited to proceedings for alleged sexual offences, nor is it limited to delay between an alleged offence and its being reported.

Section 165B subsection (2) provides that if the court is satisfied, on application by a party, that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence. The section contains two safeguards. First, the mere passage of time is not to be regarded as a significant forensic disadvantage—section 165B subsection (4). Significant forensic disadvantage arises not because of delay itself but because of the consequences of delay, such as the fact that any potential witnesses have died or are not able to be located, or the fact that potential evidence has been lost or is otherwise unavailable. The second safeguard is that the court need not take this action if there are good reasons for not doing so—section 165B subsection (3).

Section 165B subsection (5) provides that no particular form of words needs to be used in giving the information, but that the judge must not suggest that it would be dangerous or unsafe to convict the defendant because of the delay. These words are considered an encroachment on the fact-finding task of the jury and open to the risk of being interpreted as a direction to acquit. Accordingly, new section 165B has been drafted to refer not to warnings to the jury but rather to the court informing the jury of the nature of the significant forensic disadvantage suffered and the need to take that disadvantage into account. I refer to the use of the phrase "delay in complaint". In the new section it has also been deliberately avoided because of its association with discredited assumptions about the reliability of sexual assault complainants, particularly children.

The court remains bound by the overriding obligation to prevent any miscarriage of justice. As a result, if the judge considered that the requirements of new section 165B could be made out and counsel had failed to apply for the warning, the judge would be bound to ask counsel, in the absence of the jury, whether such a warning was requested. As noted in the report, if there are factors affecting the reliability of certain evidence, a warning may be sought in accordance with section 165 or, in the case of children's evidence, in accordance with new section 165A.

Though they may be of a highly procedural or technical nature, the amendments that I have addressed today, like all those in the bill, may be considered significant improvements to the manner in which civil and criminal proceedings will be conducted in our courts. Lawyers and many others in the community will need time to familiarise themselves with the amendments. In particular, police prosecutors, who are responsible for approximately 98 per cent of all criminal matters in New South Wales, will need time to update their training and operating procedures. Therefore, it is proposed that if the bill is passed the legislation will commence by proclamation at least six months after assent. The precise date of commencement will be determined in consultation with the courts, the Minister for Police and other stakeholders. If possible, commencement will also be coordinated with that of similar amendments that are planned for the Commonwealth Evidence Act. I commend the bill to the House.