Speech By

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CRIMINAL LAW (CHILD EXPLOITATION AND DANGEROUS DRUGS) AMENDMENT BILL

Ms PALASZCZUK (Inala—ALP) (Leader of the Opposition) (4.05 pm): I rise to make a contribution on the Criminal Law (Child Exploitation and Dangerous Drugs) Amendment Bill. Most of the proposals contained in this bill were contained in the Criminal and Other Legislation Amendment Bill 2011 introduced by the former Attorney-General. The bill lapsed when the 53rd Parliament was prorogued.

This bill increases penalties for the child exploitation offences contained in the Criminal Code. It is appropriate to periodically review criminal offences in Queensland and the penalties that apply to ensure that they keep up with community expectations. The community is rightly appalled by these offences. It is incumbent on governments to take action to ensure that our most vulnerable citizens receive the fullest protection that the law can provide.

That is why when in government we proposed to increase these penalties. Currently the penalty for involving a child in the making of child exploitation material, making child exploitation or distributing child exploitation material is 10 years. This bill increases that penalty to 14 years. The current penalty for possession of such material is five years. There will be a significant increase of this penalty to 14 years, bringing it into line with the other offences.

Another significant change in the bill is to include animated, virtual or fictitious images in the definition of child exploitation material. It has been said that such material is victimless, and because no actual children are involved there should be no offence. In fact, in the United States in 2002 the Supreme Court, in the case of Ashcroft v Free Speech Coalition, found that a law making such material an offence was in breach of the first amendment right to freedom of speech.

This is not the right argument. In 2008 the UN Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography warned that, although this kind of photography does not involve the direct abuse of a child, its power to normalise images of child sexual abuse and incite sexual exploitation of children should not be underestimated and must be adequately addressed.

If possession of virtual images is legal, this can create real evidentiary problems for prosecutors in child exploitation material cases. The accused person may claim that the images are virtual and do not involve real children. The prosecutor's job, in disproving this, can be virtually impossible. The Special Rapporteur on Human Rights of the United Nations supported the proposal to criminalise the possession, supply and making of child exploitation material involving computer generated images.

The Special Rapporteur also recommended an absolute prohibition on pseudo-child pornography, including the morphing of child and adult bodies to create virtual child pornographic images. In addition, the UN Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, the Council of Europe Convention on Cybercrime 2011 and the EU Council framework decision on combatting the sexual exploitation of children and child pornography all include provisions criminalising various offences involving virtual photographs. There is also clear evidence of the fact that photographs of children engaged in sexual activity are used as tools for grooming children into

pornography and sexual activity and it makes no real difference whether real photographs or virtual photographs are used for this purpose.

No arguments about the freedom of speech of individuals can be entertained in this context. These laws, first proposed by the Labor government, rightly place the duty of government to protect children above the rights of individuals to make virtual, animated or fictitious child exploitation material. In the United Kingdom, the Williams committee, headed by Professor Bernard Williams, found in its report—

Few people would be prepared to take the risk where children are concerned and just as the law recognises that children should be protected against sexual behaviour which they are too young to properly consent to, it is almost universally agreed that this should apply to participation in pornography.

This brings us to the inclusion in this bill of a new 'grooming' offence, which carries a maximum penalty of five years. This increases to 10 years where the child is under 12. As the explanatory notes provide, this offence is designed to 'target adults who engage in any conduct in relation to a child under 16 years (or a person the adult believes is under the age of 16 years), with the intent to facilitate the procurement of a child to engage in a sexual act or expose the child to any indecent matter'.

The purpose of this new offence is to allow police to intervene before a sexual act or a sex related activity has actually taken place. It was suggested by the Queensland Council for Civil Liberties in its submission to the committee that 'it may be simpler to leave such conduct to the law of attempt by charging grooming as an attempt to commit the more serious offences'. This new offence captures conduct which is preparatory to the commission of an offence. It goes beyond what would be captured by the law of attempt, and this is why a new offence has been included. It is also in line with the existing offence of using the internet to procure children under 16.

The bill also increases the maximum penalty for this offence. At present the penalty for using the internet to procure a child under 16 to engage in a sexual act is five years. This will be increased to 10 years. Where the child is under 12 years, the maximum penalty is increased from 10 years to 14 years. There is also a further circumstance of aggravation included in this bill, where the conduct referred to procuring conduct involves the adult meeting or travelling to meet the child. Once again, the penalty will be increased to 14 years in this situation.

I note that the submission received from the Queensland Law Society raised a concern about what it describes as the broad wording of the provision. In the view of the society, a Facebook posting which was not directed to any child in particular might be caught by the provision. The department has given its opinion that, because such a posting would not be directed to any particular child, it would not satisfy the wording of the offence which relates to 'intent to procure a child'.

The approved forms under the Criminal Practice Rules 1999 require an indictment to particularise who the alleged victim is. This could not be achieved where the conduct is to the world at large, so I am satisfied the provision will not have the effect that the Queensland Law Society has asserted. But I do ask the Attorney-General to keep an eye on how this provision is used in practice to ensure their concerns do not indeed become reality. These provisions were all included in the previous government's bill, and the opposition fully supports their inclusion in the criminal law of this state.

The bill contains a provision not contained in the previous bill relating to the defence of incest. This is in response to a recent Court of Appeal decision which has exposed a loophole in the code. At present, section 222 of the code includes certain relationships within the definition for this offence, including half, adoptive or step relationships. A defence is included where the parties are married or lawfully entitled to be married. There are circumstances where an adult might be lawfully entitled to marry the child of their de facto partner who is under the age of 18 according to the rather broad interpretation given to this phrase by the Court of Appeal. This was the situation in the case of Crown v Rose. The judgement of Justice Atkinson in Rose referred to section 109 of the Commonwealth Constitution. This section provides that, when a law of a state is inconsistent with a law of the Commonwealth, the Commonwealth law should prevail and the state law should, to the extent of this inconsistency, be invalid.

The Queensland Law Society questions whether the proposed amendment might be inconsistent with the Commonwealth legislation and thereby constitutionally invalid. The department has sought advice from crown law on this point and is satisfied that the provision is indeed constitutional. Crown law has provided advice in relation to the constitutionality of various provisions

in legislation over recent years, including the Criminal Organisations Bill and the Dangerous Prisoners (Sexual Offenders) Act, that have been upheld in the High Court when similar legislation from other jurisdictions has been struck down. I am comfortable with the advice from crown law on this matter.

Another provision in this bill that was contained in the previous government's bill was that relating to joinder of multiple offences. The bill expands the circumstances where several charges might be joined on the one indictment for child exploitation material offences. This is a provision which will, in most cases, be used for guilty pleas, although it is not restricted to these.

The High Court has considered the issue of joinder and, in a rather conservative decision in Phillips v The Queen, the court found that Mr Phillips should have been tried separately on sexual assault charges relating to six separate victims. The reason this provision was included in the bill was that, without it, the date that must be relied upon in the indictment is the date of seizure of the material. This means that the indictment will not reflect the true criminality of the offending when the material is collected over a long time frame. Where a person pleads not guilty, the practice is to charge a separate count for each separate instance on the indictment. Where a person wishes to plead guilty, this provision will most frequently be used.

As I said before, it is incumbent on government to enact legislation that indeed protects our most vulnerable citizens. Children come within this ambit. But even more vulnerable are children with an impairment of mind and they deserve the best protection that we as a parliament can provide. That is why the previous government sought to create a circumstance of aggravation for offences of sodomy, indecent treatment of a child under 16 and unlawful carnal knowledge where the victim is a child with an impairment of mind. For indecent treatment of a child under 16, the penalty will increase from 14 to 20 years. For sodomy and unlawful carnal knowledge, the penalty will increase to life imprisonment.

This bill also includes a number of amendments to the Drugs Misuse Act. The most significant is the creation of an offence of trafficking in precursor chemicals. The act presently contains offences of unlawful possession, unlawful supply or unlawful production of precursors. There may be circumstances where the supply of these chemicals reaches such a level that the current charges do not reflect the seriousness of the offending. This is in a similar vein to trafficking in dangerous drugs.

The penalty for this new offence will be the same as for trafficking in dangerous drugs, from 20 to 25 years depending on the type of drug and its quantity. A charge of trafficking in precursor chemicals will now be available in the arsenal of prosecutors to attack what is an increasing problem. These provisions were included in the bill introduced by the previous government. The Queensland Law Society expressed some concerns in its submission to the committee that the new provision as it is drafted does not contain a defence of reasonable excuse, which is contained in the new provision, which I will discuss next, relating to the possession of certain substances. This is because the provision requires, as an element of the offence, that the trafficking be 'for use in connection with the commission of an offence'. This eliminates the risk that legitimate offences will be caught by the provision. Legitimate businesses will not be trafficking chemicals 'for use in connection with the commission of an offence'. A defence of reasonable excuse is provided and the onus is on the defendant to show this. The Law Society expressed some concern about this matter. They questioned—

> Does it extend to the chemistry teacher demonstrating distillation? To the same teacher later on holidays who has kept the glassware in the boot of their car? To the student experimenting at home? To the home hobbyist?

The reverse onus is in line with the common law principle that, where an accused person wishes to rely on a defence such as exception, exemption of proviso, they must raise the exception which they only need to prove to the civil standard on the balance of probabilities. The opposition has no problem with this approach.

The bill also amends the definition of 'dangerous drug'. In 2007 the government amended the Drugs Misuse Act to include analogue drugs. The definition required the prosecution to prove that the substance had a substantially similar chemical structure to a scheduled dangerous drug and had a substantially similar pharmacological effect. This was necessary because analogue drugs were being produced so quickly that it was difficult for legislation and regulation to keep up with the changes. The amendment allowed the new drugs to be captured until they could be scheduled under the act. The two limbs of the definition were causing some problems. This amendment now means that the prosecution need now only establish that the substance has a similar structure or a similar effect intending to have a similar effect to a scheduled drug.

These are the most substantive provisions in the bill. Although there are other amendments included, most of the matters in the bill were of concern to the previous government, as evidenced by their inclusion in the lapsed 2011 bill. I thank the Attorney-General for implementing the government's policy objectives in such a bipartisan way. The opposition will be supporting this bill, and I commend the bill to the House.