Speech By

Hon. Yvette D'Ath

MEMBER FOR REDCLIFFE

Record of Proceedings, 19 April 2016

CRIMINAL LAW (DOMESTIC VIOLENCE) AMENDMENT BILL (NO. 2)

Second Reading

Hon. YM D'ATH (Redcliffe—ALP) (Attorney-General and Minister for Justice and Minister for Training and Skills) (3.13 pm): I move—

That the bill be now read a second time.

On 2 December 2015, the Criminal Law (Domestic Violence) Amendment Bill (No. 2) 2015 was introduced into the Queensland parliament. Parliament referred the bill to the Legal Affairs and Community Safety Committee for consideration and requested that the committee report on its consideration of the bill by Monday, 7 March 2016. The committee tabled its report on 7 March 2016 and made one recommendation: that the bill be passed. I thank the committee for its timely and detailed consideration of the bill.

The bill before the House contains important reforms to the criminal justice system in line with the government's response to the recommendations made by the Special Taskforce on Domestic and Family Violence in Queensland. The task force was established on 10 September 2014 to make recommendations to inform the development of a long-term vision and strategy to rid Queensland of domestic and family violence—an insidious and often hidden form of violence. On 28 February 2015 the task force released its report *Not now, not ever: putting an end to domestic and family violence in Queensland*, containing 140 recommendations. The Queensland government accepted all of the recommendations directed at government. This bill gives effect to recommendations 118 and 120 of the *Not now, not ever* report by making significant amendments to criminal justice legislation to increase perpetrator accountability and protections.

Firstly, the bill amends the Penalties and Sentences Act 1992 to make provision for domestic and family violence to be an aggravating factor on sentence. The aggravating factor increases the culpability of the offender which means that the offender should receive a higher sentence within the existing sentencing range up to the maximum penalty for the offence. The amendment is reflective of community attitudes about the seriousness of criminal offences that occur in a domestic and family context and will make these offenders more accountable.

Secondly, a new offence of choking, suffocation and strangulation in a domestic setting is inserted into the Criminal Code. The new offence reflects that this sort of violence is not only inherently dangerous but predictive of an escalation in domestic violence offending including homicide. The new offence acknowledges the importance of identifying this conduct to assist law enforcement and related agencies in assessing risk to victims and increasing protections for them.

The bill also makes amendment to the Penalties and Sentences Act and the Youth Justice Act 1992 to allow a court to receive a submission from a party on what they consider to be the appropriate sentence or sentence range for the court to impose. This amendment addresses the effect of a 2014

High Court decision in Barbaro & Zirilli v The Queen [2014] HCA 2 that prohibited the longstanding practice in Queensland of prosecutors making a submission to the court in relation to the appropriate penalty range. The amendment will therefore restore the practice and improve consistency in sentencing and assist in courtroom efficiency.

In recommending that the bill be passed, the committee requested that I respond to a number of issues that submitters raised during the committee consultation phase. I will now address these matters in turn. Firstly, in relation to the new strangulation offence, questions arose about why absence of consent is an element of the offence. The new offence is intended to target the insidiously threatening and dangerous strangulation and choking behaviours in a domestic and family violence context. The requirement for lack of consent in the offence reflects the necessity not to criminalise the consensual touching of the body. The requirement of a lack of consent is a safeguard for people who engage in behaviours that, whilst not considered mainstream, are nonetheless consensual. Additionally, family horseplay, such as roughhouse, wrestling type play between siblings, and accepted sporting holds are not intended to be captured by the offence.

The requirement for the prosecution to prove the victim did not consent to the conduct is consistent with the current approach in the Criminal Code for assaults. For a common assault or assault occasioning bodily harm to be unlawful, the application of force must be without the victim's consent. If it were to be otherwise, we would all be guilty of committing assaults on a constant basis, with contact that occurs in daily life and when participating in contact sports. While the conduct relevant to the new offence is of a more specific nature, nonetheless such conduct does occur with consent at times—for example, non-mainstream sexual practices and some sports. The new offence is drafted to account for this.

In addressing the issue of consent, the committee has asked that I deal with the issue of reckless indifference. I am aware that the Women's Legal Service submitted to the committee during the public hearing of the bill that the definition of consent under the Criminal Code should be amended to include the concept of reckless indifference, as is the case in New South Wales. This issue is usually raised in the context of sexual offences. In adult sexual offence trials, it is common for the defendant to admit the sexual activity but claim a belief that it was consensual. In some jurisdictions such as New South Wales, the element of rape includes that the defendant knew the other person was not consenting or was reckless to whether the other person was consenting. At common law the defence of mistake of fact applies if the defendant honestly believed that the complainant was consenting. However, in Queensland for the defence to apply the belief must be both honest and reasonable.

The benefit of the Queensland approach is that the objective element of reasonableness focuses on the actual circumstances under which the conduct occurred. A purely subjective model focuses on the perspective of the particular defendant. I note that in the 2010 Australian Law Reform Commission report *Family violence: a national legal response*, the ALRC's view was that the issue of consent is best addressed by a defence that the defendant held an honest and reasonable belief that the complainant was consenting. This is the current position in Queensland.

Another concern with the new offence raised during the consultation process was the use of the term 'domestic setting' in the new offence title 'Choking, suffocation or strangulation in a domestic setting'. The use of the term 'domestic setting' is not intended to impose any limitation on the location of offending. While section 35C of the Acts Interpretation Act 1954 provides that a heading to a section forms part of the section, the term 'domestic setting' is not an element of the new offence. The term therefore must be read in the context of the offence, which provides no qualification on the location of the offending but provides the overall context or circumstances of the offence.

Another issue raised with the new offence was with the element of the offence that the offender is in a 'domestic relationship' with the victim, or the choking, suffocation or strangulation is associated domestic violence under the Domestic and Family Violence Protection Act 2012. Some submitters expressed concern that the requirement that the offender is in a domestic relationship with the victim is unduly limiting and may be difficult to prove. The term 'domestic relationship' is defined in section 1 of the Criminal Code. The Criminal Code definition adopts the definition of 'relevant relationship' contained in section 13 of the Domestic and Family Violence Protection Act, which is an intimate personal relationship, a family relationship, or an informal care relationship as defined under the Domestic and Family Violence Protection Act. The term 'associated domestic violence' is defined in section 9 of the Domestic and Family Violence Protection Act. These phrases are successfully proved in applications under the Domestic and Family Violence Protection Act on a regular basis.

While acknowledging that proceedings under the Domestic and Family Violence Protection Act are determined on the balance of probabilities, it is not anticipated that evidentiary issues will arise in proving a domestic relationship et cetera to the criminal standard of proof. Further, in a trial for a

defendant charged with an offence arising out of conduct on which an application under the Domestic and Family Violence Protection Act is based, the existence of an order made under the Domestic and Family Violence Protection Act is admissible with the leave of the court.

The committee has asked that I respond to concerns raised as to 'attempts' to commit the new strangulation offence. Whilst the new strangulation offence does not specifically legislate for attempted choking, suffocation or strangulation, attempted conduct of this kind is still captured by the general attempts provision in section 535 of the Criminal Code. Section 4 of the Criminal Code defines the term 'attempt'. Further, the general provision applying to attempts provides that an attempt to commit an indictable offence will carry a punishment equal to one-half of the relevant maximum penalty. I am satisfied that the general 'attempts' provisions in the Criminal Code adequately provide for attempts to commit the proposed new section 315A.

Finally, I address the concern raised as to why the new aggravating factor in the Penalties and Sentences Act is not extended to juvenile offenders. The bill amends the sentencing guidelines in the Penalties and Sentences Act to recognise domestic and family violence as an aggravated factor for the purpose of sentencing. The Penalties and Sentences Act applies to adult offenders. Some submitters queried why an equivalent amendment was not made to the sentencing framework of the Youth Justice Act that applies to juvenile offenders. The sentencing framework for juvenile offenders is quite distinct from the framework applied to adult offenders in the Penalties and Sentences Act.

Schedule 1 establishes the youth justice principles to be applied which include: recognition of the vulnerability of children; that children must be held accountable for their action and dealt with in a way that will give the child the opportunity to develop in responsible, beneficial and socially acceptable ways; and that diversion from the criminal justice system is to be considered where possible. Given the imperatives of the juvenile sentencing framework, an amendment to recognise domestic and family violence as an aggravating factor on sentence would be incongruous with the principles underpinning the Youth Justice Act.

I again would like to thank the Legal Affairs and Community Safety Committee for its consideration of the bill and acknowledge the very valuable contribution of all those who have made submissions on the bill and assisted the committee during its deliberations. The bill represents the government's continued commitment to delivering on the recommendations of the Special Taskforce on Domestic and Family Violence in Queensland. Improving the accountability of domestic violence perpetrators brings us closer to a Queensland free from domestic and family violence. I commend the bill to the House.