Speech By

Hon. Yvette D'Ath

MEMBER FOR REDCLIFFE

Record of Proceedings, 8 November 2016

LIMITATIONS OF ACTIONS (INSTITUTIONAL CHILD SEXUAL ABUSE) AND OTHER LEGISLATION AMENDMENT BILL; LIMITATION OF ACTIONS AND OTHER LEGISLATION (CHILD ABUSE CIVIL PROCEEDINGS) AMENDMENT BILL

Second Reading (Cognate Debate)

Hon. YM D'ATH (Redcliffe—ALP) (Attorney-General and Minister for Justice and Minister for Training and Skills) (12.51 pm): I move—

That the Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill be now read a second time.

On 16 August 2016, the Premier and Minister for the Arts introduced the Limitation of Actions (Institutional Child Sexual Abuse) and Other Legislation Amendment Bill into this House. The bill was referred to the Legal Affairs and Community Safety Committee for consideration for report by 1 November 2016. The committee tabled its report on 1 November 2016 and recommended that the government bill be passed. I would like to thank the committee for its timely and detailed consideration of the bill. I would also like to thank those individuals and organisations who submitted to the committee and took the time to discuss what is a complex and sensitive issue.

I note the committee also recommended that the Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016, introduced by the member for Cairns, Mr Pyne, on 18 August 2016, which touches on similar policy objectives as the government's bill, not be passed. I will speak to that recommendation and a number of other recommendations made by non-government members of the committee shortly.

I am sure we have all heard the stories that the courageous survivors of child sexual abuse have been reliving at the Royal Commission into Institutional Responses to Child Sexual Abuse and from those survivors whom we have met personally over the years. The stories are at times harrowing and difficult as we hear how these victims were, as children, subjected to abuse at the hands of people who were entrusted with their care. The stories that have been told have highlighted the long-term impact that this type of abuse has had on the wellbeing of victims. I acknowledge the courage and bravery of these people who have made the significant decision to tell their stories in public. The courage of these people has meant that others will also hopefully find the courage to speak out and be heard and, importantly, seek support.

I want to acknowledge their bravery here today. Sadly, I also want to acknowledge those who are no longer with us—those victims who took their own lives because the trauma was too great. Today this parliament must come together to recognise them. There will be disagreement on the two bills

before the House. However, it is important to note that this House collectively will deliver on the recommendations of the royal commission to remove the limitation period for litigation for victims of child sexual abuse in institutions.

I will now speak to the government's bill before the House. I would like to highlight that the core element of this bill is to introduce reforms to Queensland's civil litigation system in response to the recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse contained in its *Redress and civil litigation report* to create a more accessible civil litigation system for survivors of child sexual abuse where that abuse has occurred in an institutional context.

The bill gives effect to recommendations 85 to 88 of the report by retrospectively abolishing the limitation periods that apply to claims for damages arising from child sexual abuse that happens in an institutional context. Central to the argument that the limitation period for bringing actions should not apply in the case of child sexual abuse was the fact that the average length of time for a survivor to disclose the abuse is 22 years. This government recognises that for many survivors this is an important starting point while other civil litigation issues raised in the report are worked through.

I note a number of submissions to the committee considered it important for Queensland to be consistent with New South Wales and Victoria, which have enacted legislation to remove the limitation period for actions relating to child abuse more generally and do not limit claims to institutional abuse. The decision to extend the removal of the limitation period in these states followed considerable consultation. This is important as the broader scope of child abuse was not covered by the royal commission in its report, as its terms of reference were concentrated on child sexual abuse in institutions. For this reason, the government considers that it is equally important to consult with the community and key stakeholders to fully understand the implications for Queensland of broadening the scope of the removal.

Limitation periods are based on the longstanding principles of bringing fairness and certainty to civil litigation matters by removing the threat of open-ended liability; ensuring that a defendant is not unfairly prejudiced in proceedings through the passage of time; and ensuring disputes are resolved as quickly as possible. As has been the case for the removal of the limitation period for child sexual abuse in an institutional context, it would be important that there be a clear justification for overriding these principles in a wider range of circumstances. That is why on 16 August this year the Premier and Minister for the Arts also tabled the issues paper *The civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse: Redress and civil litigation report—understanding the Queensland context*.

The issues paper sought community feedback on the remaining civil litigation recommendations of the royal commission's *Redress and civil litigation report* published in 2015 and removing the limitation periods for other types of child abuse and for settings other than institutional settings. The closing date for submissions to the issues paper was 25 October 2016. Twenty-three submissions were received from stakeholders including private citizens, a small number of legal professionals, a number of support and advocacy providers, a few religious organisations and private education institutions. I would like to thank those individuals and organisations for their contributions. Unfortunately, submissions were not received from a wider range of church and educational institutions, sporting or social organisations that provide services and activities for children, independent childcare operators and insurance and financial institutions. It will be important to consult with these stakeholders before considering these reforms.

The decision on whether or not to remove the limitation periods for other forms of child abuse and settings will be made after further targeted consultation, with other civil litigation reforms under consideration in the issues paper. It is important, however, not to delay the amendments to give effect to recommendations 85 to 88 of the royal commission any longer. Victims of institutional child sexual abuse have waited long enough to see the shadow of the limitation period removed to allow their claims to be determined on their merits.

I note that the non-government members of the parliamentary committee recommended in their statement of reservations to amend the scope of the removal of the limitation period to also cover child sexual abuse in non-institutions. Subject to considering the wording of that amendment, the government indicates its in-principle support. The government does so on the basis that such proposed amendment would be consistent with the general feedback received in relation to the government's issues paper. As we all said when this bill was first introduced, it is important to have bipartisanship when it comes to tackling such an important issue in this parliament.

In addition to the government's proposed removal of the limitation period, the bill also proposes to introduce a statutory regime for representative proceedings in Queensland; replace current funding arrangements under the Legal Practitioner Interest on Trust Accounts Fund, known as LPITAF, and improve solicitors' trust accounts administration generally; and permanently embed the arrangement whereby justices of the peace hear certain minor civil dispute matters in the Queensland Civil and Administrative Tribunal, QCAT.

Sitting suspended from 1.00 pm to 2.30 pm.

 **Mrs D'ATH:** I continue speaking to the government's bill in relation to the amendments to the Civil Proceedings Act 2011. Currently, Queensland has only court rule based provisions to facilitate representative proceedings under the Uniform Civil Procedure Rules 1999. These rules are not considered adequate. The bill amends the Civil Proceedings Act 2011 to introduce a comprehensive regime for the conduct and management of representative proceedings, also known as 'class actions', in Queensland. Representative proceedings, or class actions, enable one person to bring an action on behalf of multiple claimants whose claims are in respect of or arise out of the same, similar or related circumstances and give rise to a substantial common issue of law or fact.

Modelled on legislative schemes in the Federal Court of Australia and in New South Wales and Victoria, the bill sets out the threshold requirements for commencing a representative proceeding and the standing requirements to bring a representative proceeding on behalf of the group members. The bill also makes provision for potential claimants to opt out of the representative proceeding; the requirements for court approval of discontinuance or settlement of a proceeding; and for costs orders to be made only against the representative party or defendant with limited and specific exceptions. The provisions are prospective and will apply only to proceedings started on or after the commencement of the amendments. It will not matter, however, if the cause of action, the subject of the proceedings, arose before the commencement.

At present, Queenslanders who wish to take class action law suits have to operate through other jurisdictions to do so. For people who are often involved in emotionally and financially difficult circumstances, this can limit their access to justice through unnecessary complexity and inconvenience. There can also be an additional cost burden for claimants who currently need to pursue class action matters through other jurisdictions. For cases that are particularly pertinent to Queensland, it will also allow the knowledge and expertise of our judges and lawyers to be better utilised. Although all of the focus on this bill has rightly been on the removal of the limitation period for proceedings related to child sexual abuse in institutions, the power to progress class actions in Queensland is one for which many in the legal profession have advocated for many years and is an important reform for Queensland's legal system.

The bill also provides for amendments to the Legal Profession Act 2007. The Legal Practitioner Interest on Trust Accounts Fund has been used to fund legal assistance, legal profession regulation and law library services. It was identified that this funding stream is no longer sufficient to fully fund these services. Consequently, these services are now being funded from the Consolidated Fund. The bill, therefore, amends the Legal Profession Act 2007 to effect the closure of the fund. The bill also amends the Legal Profession Act 2007 to simplify and improve the administration of solicitors' trust accounts. This is achieved by removing the requirement for law practices to hold a portion of trust account moneys in a prescribed account and transferring the responsibility for approval of banking institutions from the Queensland Law Society to the Department of Justice and Attorney-General.

The bill also amends the QCAT Act and the QCAT Regulation to make permanent the justices of the peace QCAT trial, whereby JPs hear particular minor civil dispute matters in QCAT. With respect to the amendments to permanently embed JPs in the QCAT model, I note that submissions made to the committee by the Queensland Law Society and Protect All Children Today raised concerns about the qualifications and expertise of JPs to determine minor civil disputes. The QCAT Act requires that when constituting the tribunal at least one of the two QCAT JPs hearing a matter must be legally qualified and that the legally qualified JP preside over the hearing. QCAT matters in general are heard by a range of legally qualified and non-legally qualified members. Having JPs in both of these categories is also consistent with this approach. The JP QCAT trial has delivered many benefits to QCAT including improved clearance rates and improved time-to-trial rates in the minor civil disputes jurisdiction. Importantly, it also provides JPs with a valued professional opportunity to enhance their role and their recognition in the community.

Finally, with regard to the duplication in subsection numbering in the government bill in proposed new sections 103T and 103V as noted by the committee, I am advised this will be corrected under standing order 165.

As members will be aware, on 18 August 2016 the Legislative Assembly agreed to the motion that the government's bill introduced on 16 August by the Premier and the Limitation of Actions and Other Legislation (Child Abuse Civil Proceedings) Amendment Bill 2016, introduced by Mr Rob Pyne, the member for Cairns, would be treated as cognate bills. The government has had an opportunity to consider the member's bill, which also proposes to remove time limits for commencing a civil damages action for child sexual abuse but has extended the scope of the removal to serious physical abuse and any other abuse perpetrated in connection with the sexual or serious physical abuse of the child, regardless of the setting. While it is acknowledged that this approach is consistent with that taken in New South Wales, expanding the scope, without consideration of the Queensland context, is not supported.

I understand the member was assisted by a number of victims groups and legal professionals in the development of the member's bill. Given that the proposed change would create another exception to the limitation period and expose a significant additional range of parties to potential litigation, it is important that the impact of this departure is known and clearly justifiable. As already stated in addressing the government's bill, many of these issues have been canvassed in the government's issues paper that was released on 16 August, submissions for which closed on 25 October this year. Some of the submitters to the issues paper requested additional consultation based on the complexity and the implications of broadening the definition of child abuse and whether it should extend beyond institutions. The government is, therefore, not prepared to support this aspect of the member's bill at this time.

The member's bill also seeks to reintroduce trials by jury for claims for personal injury damages arising from child abuse. Section 73 of the Civil Liability Act 2003 currently provides that a proceeding in court based on a claim for personal injury damages must be decided by the court sitting without a jury. Jury trials for personal injury proceedings were abolished in Queensland in 2002 under the Personal Injuries Proceedings Act 2003. The Queensland position is generally consistent with other state and territory jurisdictions with the exception of Victoria. I note that Soroptimist International in its representations to the committee raised valid concerns that jury trials would likely be cost prohibitive and counterproductive for victims or survivors wishing to access civil remedies. Their submission noted that jury trials are typically longer in duration than judge-only trials and the presentation of evidence before a jury takes longer than with a judge. Accordingly, there are greater costs to the court and litigants in holding jury trials. The organisation also raised the potential for victims to feel re-traumatised if required to provide evidence-in-chief before a jury.

In its supplementary submission to the committee, the Queensland Law Society also did not support the introduction of jury trials for personal injury resulting from child abuse. Importantly, the society states its 'complete confidence in the Queensland judiciary to apply the law and find facts to the highest standard'. The society also considers the removal of limitation periods is likely to affect the nature of evidence which can be produced to the court and will require careful consideration of the legal weight to be attached to many and varied materials. In addition to the above, it is important to point out that, although it had the opportunity, the royal commission, with its extensive policy and research program, has not recommended that juries be reintroduced for civil actions for personal injury damages arising from child sexual abuse claims.

Another amendment in the private member's bill goes to the discretion of the court to permanently stay or dismiss a proceeding. Consistent with recommendation 87 of the commission's report, the government bill preserves the court's inherent jurisdiction to stay proceedings. The member's bill seeks to introduce overly complicated restrictions which are an unnecessary fetter on the court's discretion. For example, the member's bill proposes to amend the Civil Proceedings Act to prevent an institution from having civil proceedings stayed on the basis of passage of time where the institution caused or contributed to the delay in the start of the proceeding or to prevent an institution from having proceedings stayed on the basis of seeking to question facts—either facts of the child abuse or facts of liability—where the institution has already admitted those facts, or an inquiry has made formal findings regarding those facts.

I support the comments of the Queensland Law Society in its submission to the committee that the court is best placed to determine 'the individual factual matrix of any claim' and to 'ensure that claims can appropriately meet the standard of proof required in civil law matters as a safeguard against the initiation of highly speculative claims'.

It is also important to note that the commission specifically recommended in recommendation 87 that state and territory governments should expressly preserve the relevant court's existing jurisdiction and powers so that any jurisdiction or power to stay proceedings is not affected by the removal of the limitation period. In doing so the royal commission stated—

We acknowledge that institutions may face additional claims as a result of the removal of limitation periods with retrospective effect. However, we are satisfied that limitation periods have worked great injustices against survivors for some time. We consider that institutions' interests are adequately protected by the need for a claimant to prove his or her case on admissible evidence and by the court's power to stay proceedings in the event that a fair trial is not possible. Institutions can also take steps to limit expensive and time-consuming litigation by offering effective redress and by moving quickly and fairly to investigate, accept and settle meritorious claims.

Removing limitation periods may create a risk that courts will interpret the removal as an indication that they should exercise their powers to stay proceedings in a more limited fashion. We consider that it should be made clear that the removal of limitation periods does not affect the courts' existing powers.

The member's bill also allows for previous barred rights of action to be relitigated in circumstances where judgement was given. The court hearing the matter can set aside a previous judgement and take into account any amounts paid as damages or costs made under the judgement.

Unlike the government's bill, the member's bill does not specifically address the scenario of an action that has been dismissed on the ground that a limitation period applying to the right of action had expired, or an action has been started but either not finalised or discontinued before the commencement of the amendments. In the absence of such provisions such matters may not be able to be relitigated under the doctrine of res judicata. The government bill reflects similar provisions to those used in the New South Wales legislation to overcome this issue.

The government bill does not deal with the issue of settlements. This approach is consistent with New South Wales and Victoria. The member's bill, however, inserts a new section 51 into the Limitation of Actions Act to allow a person who has previously settled and entered into a settlement agreement after the limitation period had expired, but before commencement of the new provisions, to bring an action on the same matter. If they do, the settlement agreement is void. While a party to the voided agreement may not seek to recover any money paid under the agreement, a court hearing an action may, when awarding damages, take into account any amounts paid under the voided settlement agreement.

While the policy objective of these amendments seems to be providing a further opportunity for victims to renegotiate settlement amounts, the member's bill goes further to create an automatic right. It does not factor in that some defendants may not have relied on the expiry of the limitation period to influence settlement negotiations. The provision as drafted provides no opportunity for this to be raised. Although the court may consider previous amounts paid under a settlement agreement, a defendant will have to expend further costs regardless of whether the limitation period was relied on or not.

Turning again to the commission I note that, despite this issue being raised in hearings and submissions to the commission, the commission did not make any recommendation to provide for settlements to be relitigated. However, the commission did recommend in recommendation 23—

Survivors who have received monetary payments in the past whether under other redress schemes, statutory victims of crime schemes, through civil litigation or otherwise should be eligible to be assessed for a monetary payment under redress.

In recommendations 24 and 25 the commission went on to outline how previous payments should be considered against any monetary payments under a redress scheme.

It is interesting to note that in the *Redress and civil litigation report* the commission considered the issue of whether a survivor receiving a monetary payment under a redress scheme should be required to enter into a deed of release. The commission at recommendation 63 stated—

As a condition of making a monetary payment, a redress scheme should require an applicant to release the scheme (including the contributing government or governments) and the institution from any further liability for institutional child sexual abuse by executing a deed of release.

In reaching this recommendation the commission states—

A number of submissions argued for including in the deed of release a power to apply to set it aside.

The commission goes on to state—

We are not satisfied that it is possible to identify clear criteria for setting aside a deed in certain limited circumstances that would not risk undermining the effect of deeds generally.

The commission's report also noted that, in its submission in response to the *Redress and civil consultation paper,* Catholic Church Insurance submitted—

Is likely then that insurance protection for determinations made on re-opened old settlements will not be available, leaving many non-government institutions vulnerable to settlements.

In case where insurers have indemnified policyholders in the original settlements, those insurers are likely to not provide any additional contribution where the original legal liability has been extinguished by an apparently valid settlement.

The consequences of the amendments proposed in the private member's bill are likely to result in non-government institutions being held solely liable for any damages that are above the original settlements, with the insurers unlikely to provide the funds. Noting that the definition of institutions is extremely broad, this could include local sporting clubs such as swim clubs, Little Athletics and Scout groups. Such claims could result in the organisation closing its doors.

It is also probable that insurers could increase their premiums, knowing that these types of institutions are liable for future claims despite past deeds. Alternatively, insurers may put caveats on government institutions to not enter future settlements at the risk of future parliaments legislating to reopen such settlements. The consequence of this is that the victims may be forced into pursuing civil claims through the courts, as non-government institutions will be less likely to settle due to the precedent that has been set by parliament willing to interfere with private settlements.

The wording of the amendment also voids the settlement upon a person bringing an action in relation to child abuse. The amendment does not provide for a situation where the person may be unsuccessful in their claim. In such case the settlement remains void. If such settlement provided ongoing payments or support for counselling, such relief under the settlement would immediately cease upon the action being brought and would not recommence upon the decision being released.

Importantly, it should be noted that currently a court may overturn settlements if vitiating factors such as misrepresentation, unconscionable conduct or mistake exist. The introduction of such amendments establishes a precedent that the Queensland parliament is willing to intervene or allow the courts to intervene in private settlements beyond the existing principles at law, and doing so could result in fewer settlements into the future, increased insurance premiums and non-government institutions being unable to adequately fund damages awarded. This could lead victims to be significantly disappointed after lengthy proceedings and could result in the non-government institution closing.

The government believes that the approach taken by the commission—to recommend that those survivors who have entered into past settlements be provided for under a redress scheme—is appropriate. For the reasons I have outlined the member's bill should not be supported.

Based on the non-government members' statement of reservation to the committee report, the opposition intends to move an amendment to provide a discretion to the court to reopen settlements in certain circumstances. Although the opposition's amendment does not go as far as the private member's bill, the arguments why the parliament should not intervene on private settlements beyond the court's current jurisdiction remain the same. Again I note that the commission did not make any recommendations regarding amendments overriding settlements, and neither New South Wales nor Victoria have legislated in that area; nor is there any other statute in this jurisdiction or others where the parliament has legislated to allow for intervention on existing settlement deeds. For these reasons the government will not be supporting the opposition's amendment on this point.

I would mention, however, that, while the government bill does not provide for settled matters to be reopened, this government has made a decision not to ordinarily rely on a release or discharge from liability made as part of a payment under the redress scheme following the Forde inquiry in matters where the state is the defendant institution in a matter. This approach is in recognition that these payments were not representative of common law damages but acknowledgement of the abuse that occurred. The *Whole-of-government guidelines for responding to civil litigation involving child sexual abuse* are available on the Department of Justice and Attorney-General website.

The Palaszczuk government has committed to consultation on the civil litigation reforms. The recommendations of the royal commission create a new and novel approach to civil litigation for personal injuries and it is important that we get it right for victims the first time. It would be remiss if, after all this time, we vote to pass legislation that is inoperable, has the potential to further traumatise victims and only acts to benefit lawyers.

I again 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 supporting the work of the royal commission, and I commend the bill to the House.