Speech By

Hon. Yvette D'Ath

MEMBER FOR REDCLIFFE

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CRIMINAL CODE AND OTHER LEGISLATION AMENDMENT BILL

CRIMINAL CODE AND OTHER LEGISLATION (MASON JETT LEE) AMENDMENT BILL

Criminal Code and Other Legislation Amendment Bill resumed from 12 February (see p. 39) and Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill resumed from 13 February (see p. 149).

Second Reading (Cognate Debate)

Hon. YM D'ATH (Redcliffe—ALP) (Attorney-General and Minister for Justice) (12.50 pm): I move—

That the Criminal Code and Other Legislation Amendment Bill be now read a second time.

On 12 February 2019 I introduced the Criminal Code and Other Legislation Amendment Bill 2019, which is the government's bill, into this House. The government's bill was referred to the Legal Affairs and Community Safety Committee for consideration, and on 16 April 2019 the committee tabled its report with just one recommendation—that the bill be passed.

The government bill seeks to expand the definition of murder and increase penalties for certain child harm related offences. The matters that we are debating today are both very serious and extremely sensitive in nature. All members of this House want to see an increase in sentences for the horrific child homicide offences we have all seen go before our courts. We all agree about what we want to deliver for victims and families, but the issue in question is how we best do that. We hold different views about this and I respect those different views, but we absolutely need to ensure that, in debating these different options before the House today and this week, we do so in a respectful and dignified manner as a sign of respect for the victims and their families.

In saying this I wish to acknowledge Kerri-Ann and Shane, the parents of Hemi Goodwin-Burke, and their daughter who is attending parliament this week along with Kerri-Ann's parents so they can watch the debate. I also acknowledge and thank them, along with many other family members, for their unwavering advocacy to see the laws changed in this state.

I note the LNP members of the committee issued a statement of reservation in relation to the government's bill, in which they state—

The amendments in this Bill, including expanding the definition of murder to include reckless indifference to human life, the new aggravating factor, and the changes to the offence 'failure to supply necessaries' should strengthen the existing legal framework and may lead to increased sentences for child killers.

LNP committee members were also of the view that the government bill should only be passed in conjunction with the Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019. I will address the statement of reservation in more detail shortly, but I hope it is not being suggested that in this debate it should be all or nothing.

I would like to take this opportunity to thank the committee for its timely and detailed consideration of the government's bill. I have no doubt it was a difficult process, and I want to thank all of those family members of victims who came forward to give their personal stories. I thank the individuals and organisations who provided submissions and also those who gave evidence before the committee.

The Palaszczuk government recognises there is significant public concern about whether sentencing for criminal offences arising from the death of a child is meeting community expectations. When a child's life is cut short, particularly under violent circumstances, the person found guilty should suffer the consequences. This bill delivers on the Palaszczuk government's commitment to implement the recommendations of the Queensland Sentencing Advisory Council report, *Sentencing for criminal offences arising from the death of a child: final report*, and to expand the definition of murder to include reckless indifference to human life.

The bill gives effect to recommendation 1 of QSAC's report by amending the Penalties and Sentences Act 1992 to introduce a new statutory aggravating factor for manslaughter of a child under 12 years. The new statutory aggravating factor will require that, when determining the appropriate sentence for an offender convicted of the manslaughter of a child under 12 years, a court must treat the child's defencelessness and vulnerability, having regard to the child's age, as an aggravating factor. This reform will ensure the community can have confidence that courts are focusing on the defencelessness and vulnerability of the child victim when sentencing an offender for child manslaughter. Such an approach will still allow courts to impose a sentence that is just in the individual circumstances of the case, while making clear the expectation that higher sentences should be imposed.

The new statutory aggravating factor will send a clear message to the community that violence against children of any kind is wrong and will not be tolerated. To ensure the new statutory aggravating factor achieves its legislative intention, it will be reviewed post commencement, consistent with recommendation 2 of QSAC's report. Recommendations 3 through to 8 do not require legislation to be implemented.

The government's bill also amends section 302 of the Criminal Code to expand the definition of murder by providing that a person commits murder if they have caused the death of another person by an act done or omission made with reckless indifference to human life. In its report QSAC acknowledged that many unlawful child killings in Queensland result in an offender being convicted of manslaughter rather than murder for a range of reasons, including difficulty in establishing intent, even where the death is due to physical abuse and violence. The issue of the legal elements required to establish the offence of murder was frequently raised with QSAC throughout its review. The decision to include recklessness as to death in the definition of murder reflects this government's view that a person who acts callously knowing that death is probable is just as blameworthy as the person who intends to kill another person.

The LNP members of the committee have raised concerns, based on New South Wales case law, that expanding the definition of murder to include reckless indifference to human life will not always result in a murder conviction, even when the killing includes acts of violence or gross negligence. The application of the government's expanded definition of murder will depend on the particular facts and circumstances of the case. Ultimately, investigating police and prosecutorial discretion will determine the appropriate charge after considering all of the admissible evidence.

Charge negotiations will be a matter for the independent Director of Public Prosecutions in accordance with the principles set out in the director's guidelines. Those guidelines state that the public interest is in the conviction of the guilty; however, the prosecution must always proceed on those charges which fairly represent the conduct that the crown can reasonably prove, and a plea of guilty will only be accepted if, after an analysis of all of the facts, it is in the general public interest. A plea of guilty will not be accepted in certain circumstances, including if it does not adequately reflect the gravity of the provable conduct of the accused.

Neither of the bills before the House today remove the independent Director of Public Prosecution's discretion to charge what in his expert opinion is able to be proved based on the admissible evidence available in a particular matter. As the member for Toowoomba South noted himself during his explanatory speech in relation to the private member's bill—

> As always, the prosecution still has the discretion to charge a person with the offence of manslaughter if they reach the conclusion that that is appropriate.

Charging practices and plea negotiations were considered by QSAC in its report but it ultimately made no specific recommendations in this area. However, the government has accepted other recommendations which aim to improve the communication and support provided to the families of victims during the criminal justice process.

In relation to the LNP members' concerns that expanding the definition of murder to include reckless indifference to human life will not always result in a murder conviction, whilst no conviction is guaranteed, there are case examples where reckless murder in New South Wales has been successfully charged and convicted—for example, SW v R, which involved the tragic death of a seven-year-old girl as a result of neglect and starvation.

This government wants to see stronger sentences imposed when people take the lives of our most vulnerable—children, the elderly and the disabled. The expanded definition of murder in the government's bill is intended to provide police and prosecutors with a new weapon in the arsenal of law enforcement so that, where appropriate, killers can be charged with murder where death is caused by an act or omission done with reckless indifference to human life. If convicted of murder, such offenders will face mandatory life imprisonment or an indefinite sentence and will not be eligible to apply for parole for at least 20 years.

While the amended definition of murder in the bill will capture a wider range of offending as murder, the intention is to only capture those cases at the 'higher end of culpability or blameworthiness'—that is, where a person does an act or omission knowing the probability that it would cause death. This is an appropriately high bar given the gravity of the consequences that follow from a murder conviction.

I also note the concerns of some stakeholders in relation to the proposed amendment and a lack of definition of 'reckless indifference' in the bill. I can reinforce the statements made during my explanatory speech that the expanded definition is not designed to capture tragic accidents—such as a parent who accidentally kills their child while backing out of their driveway or a parent who leaves their child unattended in the bath who subsequently drowns. A range of defences and excuses apply to the offence of murder, and the bill does not change this.

 **Hon. YM D'ATH** (Redcliffe—ALP) (Attorney-General and Minister for Justice) (3.02 pm), continuing: In resuming the debate on the bills, once again I acknowledge Kerri-Ann and Shane Goodwin-Burke, their daughter and Kerri-Ann's parents. They are in the gallery and will be listening to the debate over the next couple of days.

The bill does not define the concept of 'reckless indifference' in line with the approach to other limbs of the definition of murder, some of which also do not require proof of intention to kill or do grievous bodily harm. The expanded definition is based on section 18 of the New South Wales Crimes Act 1900. While ultimately the application of the amendment will be a matter for the courts, it is therefore expected that New South Wales jurisprudence will be of some guidance. Further, insertion of any related definition may further complicate this issue and have serious unintended consequences.

Finally, the bill also amends section 324 of the Criminal Code to increase the maximum penalty for the offence of failure to supply necessaries from three years imprisonment to seven years imprisonment to better reflect the seriousness of this offence and the community's condemnation of such offending. The increase in the maximum penalty is consistent with similar offences in the Criminal Code, such as cruelty to children under 16 under section 364 and endangering life of children by exposure under section 326, which both carry a maximum penalty of seven years imprisonment.

The bill also makes necessary consequential amendments flowing from the increased penalty including: listing the offence as a serious violent offence in schedule 1 of the PSA, which will allow the court to make a serious violent offence declaration in relation to a conviction for the offence if the offender is sentenced to five years imprisonment or more; and listing the offence in the meaning of protected witness under the Evidence Act, which will prevent a self-represented accused from cross-examining a victim in person.

Including the offence of failure to supply necessaries in the serious violent offences schedule reflects the seriousness of this offence and is consistent with the current inclusion of other offences such as endangering life of children by exposure and cruelty to children under 16. Importantly, the sentencing court will retain discretion in relation to the setting of the head sentence and also whether to make a serious violent offence declaration in relation to a person convicted of an offence under section 324 of the Criminal Code.

I take this opportunity to briefly speak on the Criminal Code and Other Legislation (Mason Jett Lee) Amendment Bill 2019, which is the private member's bill introduced by the member for Toowoomba South on 13 February 2019. The private member's bill was also referred to the Legal Affairs and Community Safety Committee for consideration and the committee's report, which was tabled on 16 April 2019 alongside the government's bill, recommended it not be passed.

The private member's bill proposes amendments to the Criminal Code to increase the mandatory minimum non-parole period for the murder of a child from 20 years to 25 years and to introduce a new offence of child homicide, which carries a mandatory penalty of life imprisonment with a mandatory minimum non-parole period of 15 years. The government recognises and acknowledges that the opposition and the government, as well as, I am sure, the crossbench all want to see sentences for child homicide reflect the seriousness of the crime. For this reason, it is important that any changes to the law are considered and evidence based. The government believes its bill appropriately takes into account the findings of the QSAC report and is evidence based.

The government does not support the private member's bill and considers it should not be passed in conjunction with the government's bill. I will now outline why the government believes that this is the appropriate position to take.

The amendments in the private member's bill to increase the non-parole period for murder run contrary to the findings and recommendations made by QSAC in its report, which the Palaszczuk government has committed to implementing. This is acknowledged by the very fact that the opposition released their proposal prior to the final QSAC report being released; however, the LNP have not sought to amend their bill in recognition of the issues raised around manslaughter and mandatory sentencing.

In considering the appropriateness of sentences for child homicide, QSAC considered the mandatory minimum non-parole period that applies to murder. QSAC acknowledged the views of some that the same mandatory minimum non-parole period of 25 years should apply to the murder of children as currently applies to the murder of police officers in certain circumstances. QSAC also noted that, where a higher non-parole period is warranted, the court retains judicial discretion to set the non-parole period above the minimum non-parole period mandated by law. Taking that into account, QSAC made no recommendation to increase the current mandatory minimum non-parole periods that apply to the murder of a child.

Applying a mandatory minimum non-parole period of 25 years for the murder of a child is also inconsistent with most other Australian jurisdictions. In fact, we are the only jurisdiction that has life imprisonment with a mandatory minimum sentence of 20 years. The opposition relies on New South Wales in proposing this change. However, while New South Wales provides a standard non-parole period of 25 years for the murder of a child, a standard non-parole period is not binding and courts may choose to deviate from the standard—and they do—provided that they state their reasons for setting a longer or shorter non-parole period than the standard. Therefore, it is not a mandatory minimum period in New South Wales.

The private member's bill also proposes to introduce a new offence of child homicide, which carries a mandatory penalty of life imprisonment with a mandatory minimum non-parole period of 15 years. This offence is intended to apply in circumstances where an unlawful killing does not constitute murder and the person killed was a child under the age of 18 years, and the person that caused the person's death knew or ought reasonably to have known that the person killed was a child, and either the act or omission that caused the child's death involved violence, or was an offence of a sexual nature or was a breach of the duty in section 285 of the Criminal Code to provide necessaries of life or the duty in section 286 of a person who has care of a child. The proposed child homicide offence in the private member's bill removes judicial discretion to impose a sentence that is just in the circumstances of the case for a range of offending currently captured by the offence of manslaughter.

QSAC found that child homicide offences occur in a diverse range of circumstances and are committed by a diverse group of offenders. QSAC stated that courts have long acknowledged that manslaughter attracts the widest range of possible sentences of all serious offences on the basis that it can involve cases where the offender did not intend to cause any physical harm, let alone cause death, to circumstances where the offender intentionally inflicted serious harm that would reasonably lead to the death of that child but is found guilty of manslaughter because of difficulties in proving intent which, if proved, would lift the offending conduct into the realms of murder. Applying a mandatory penalty of life imprisonment with a mandatory minimum non-parole period of 15 years to child homicide offences will result in injustices.

The Bar Association of Queensland's submission to the committee starkly highlights this potential for injustice by reference to the case of a mother who pleaded guilty to the manslaughter of her baby who died while she was alone in the bath. The mother in this case was born and educated in Pakistan

and did not speak English or have paid employment, was imprisoned in her family's home and subject to repeated beatings. She was making telephone calls to arrange for the family to move to new accommodation at the time of her child's death. The mother in this case was sentenced to 18 months imprisonment with immediate release on parole. The Bar Association of Queensland states that if the private member's bill had been in force at the time of this offence, because the conduct involved a breach of section 286 of the Criminal Code 'Duty of person who has care of child', the mother would have been convicted of child homicide and the only available sentence would have been life imprisonment with a mandatory minimum non-parole period of 15 years. Few would argue this would be an appropriate or just sentence given the circumstances of the case.

While the member for Toowoomba South has stated that the intention is that people who have the misfortune of being involved in an accidental death will not be caught by the new child homicide offence, the new offence will still have application to a person charged on the basis of criminal negligence to which the defence of accident does not apply.

In the case of criminal negligence related manslaughter cases, the extent of departure of the person's actions from reasonable community standards is a major consideration. QSAC noted that examples at the 'lower end of offence seriousness' are often those involving criminal negligence resulting in the death of a child where the death has resulted from a caregiver's temporary lapse of attention. Examples include causing the death by drowning of a child by leaving a young child unattended in a bath or leaving a young child in a car, resulting in death due to dehydration. The focus groups conducted by QSAC in its review show that people regard criminal negligence homicides as less serious and that such incidents can be tragic accidents, even where a child has died. However, the LNP is proposing that such cases will be subject to significant mandatory minimum penalties of 15 years imprisonment.

This starkly highlights how the private member's bill is a blunt instrument that is not supported by evidence. What the opposition do not tell the community is that the practical effect of the private member's bill will be to still treat those high-end culpability cases as manslaughter and to impose a mandatory 15-year imprisonment period on those low-end criminal negligence matters.

The one high-end case that will forever stick in my mind—there are so many tragic cases including Hemi's that QSAC's report talked about—was of the father who sexually and physically abused a toddler to the point of causing internal injuries to that child that led to that child's death. In anyone's mind, that is murder. They are morally culpable of that child's death. The opposition's child homicide offence would capture those people, whom we say should be convicted of murder, with a minimum life imprisonment with a mandatory minimum of 20 years but it also captures the father who accidentally left a child in the car, because that is a breach of duty of care with that section specifically listed under the new child homicide offence in the private member's bill.

We cannot bring those two together and say that all of those people should get 15 years. In my view, some of those cases—the most serious cases—should get life imprisonment with a minimum of 20 years for murder. Those other cases which are tragic accidents but which still are manslaughter as a result of someone's inattention and breach of duty should not get 15 years. There is the mother who was beaten, who was the subject of domestic violence, who did not get care for her daughter, who tried to but whose partner would not let her and by the time she finally got that child to hospital it was too late. She pleaded guilty to manslaughter. Under this new child homicide offence, she will get a minimum of 15 years. They are not the sort of people we want to capture. That is not what we are trying to achieve here. I absolutely understand what the opposition is trying to do, as this whole parliament is trying to do. We do want to increase the sentences for those cases where someone has deliberately taken action against a child to cause them such serious harm that their life has been lost, and that any reasonable person would see that their actions would lead to the death of that child. They should be charged with murder.

Imposing a mandatory minimum sentence of 15 years imprisonment will see an increase in the number of trials, which means witnesses having to endure the ordeal of giving evidence together with the possibility of a not guilty verdict. This is the reality—when you establish a mandatory minimum for a new offence of child homicide, people plead guilty on the basis of seeking to get a lenient sentence or a reduced sentence. If they know that pleading guilty or not they will get a minimum of 15 years, they will not plead guilty. This means more matters going to trial, more stress and trauma for witnesses but, most importantly, it also leads to an increase of a potential of no conviction at all for those individuals that we say should be charged under murder and at that low end should still remain in the manslaughter category where the courts will have that discretion.

We need to ensure that the sentencing process achieves justice. However, the community also expects that the sorts of injustices that would arise under the private member's bill do not occur. The government's reforms were developed after careful consideration of the in-depth work conducted by QSAC, are evidenced based and for these reasons strike the right balance of ensuring killers who show callous disregard for their victim's death are held to account for their actions and that justice is delivered for their victims and those who are left devastated by their deaths—their families and friends. We need to protect our most defenceless, and the community should have confidence that the state has a criminal justice system that is robust in its protection of the most vulnerable members of our community.

The Palaszczuk government's reforms in its bill before the House and the implementation of QSAC's other non-legislative recommendations will strengthen the justice system with the aim to being more responsive to the needs and expectations of bereaved family members while holding perpetrators to account. In commending the government's Criminal Code and Other Legislation Amendment Bill 2019 to the House, I also commend and once again thank all of those families, including Hemi's family, for their ongoing advocacy and campaigning to see the laws in this state changed. I hope that, although we can never ease their pain, what we do in this parliament this week will go some way to giving them comfort that we hope in the future others will face the consequences that they should when they take the life of an innocent child. I commend the bill to the House.