Speech By

# Hon. Yvette D'Ath

## MEMBER FOR REDCLIFFE

Record of Proceedings, 12 June 2019

## CIVIL LIABILITY AND OTHER LEGISLATION AMENDMENT BILL

### Second Reading

**Hon. YM D'ATH** (Redcliffe—ALP) (Attorney-General and Minister for Justice) (6.18 pm): I move—

That the bill be now read a second time.

The Civil Liability and Other Legislation Amendment Bill was introduced on 15 November 2018 and referred to the Legal Affairs and Community Safety Committee. I am pleased to inform the House that on 28 February 2019 the committee tabled its report and made just one recommendation: that the bill be passed. I thank the committee for its careful consideration of the bill. I also thank the stakeholders who contributed to the committee process through their submissions and the stakeholders who provided feedback during consultation on the provisions in the bill. I note the statement of reservation from the opposition members of the committee, and I will address their issues in my contribution to today's debate of the bill.

The bill implements the government's response to recommendations 91 to 94 of the Royal Commission into Institutional Responses to Child Sexual Abuse in its *Redress and civil litigation report*. The Palaszczuk government has already acted on the recommendations in the commission's report for the removal of the limitation period for actions for personal injury arising from sexual abuse as a child and participation in the National Redress Scheme, which commenced in Queensland in November 2018.

This bill establishes a statutory framework that: allows institutions to satisfy liability arising from child sexual abuse out of the assets of an associated trust that the institution uses to carry out its functions or activities; for unincorporated associations, allows for the nomination of a proper defendant to defend a claim and meet any liability incurred by the institution; provides for continuity of institutions that are liable for historical abuse; and introduces a new statutory duty—applied prospectively—under which an institution must take all reasonable steps to prevent the sexual abuse of a child by a person associated with the institution while the child is under the care, supervision, control or authority of the institution.

The bill will prevent institutions from avoiding liability by hiding behind unincorporated status or complex trust arrangements and remove legal impediments that prevent responsible institutions from accessing their trust assets. The bill is also about preventing future abuse by making institutions liable where they fail to take all reasonable steps to prevent the abuse from occurring.

I would like to foreshadow that I will be proposing a number of amendments during consideration in detail to strengthen and clarify the bill to be moved. The amendments address issues raised by stakeholders and are designed to achieve greater consistency with equivalent provisions in other jurisdictions while also providing for better outcomes for both survivors and institutions. Before I explain the amendments, I would like to turn to the substantive elements of the bill examined by the committee.

The bill amends the Civil Liability Act 2003 to provide that institutions will be taken to be liable for the sexual abuse of a child that is perpetrated by a person associated with the institution while the child is under the care, supervision, control or authority of the institution unless the institution can prove that it took all reasonable steps to prevent the abuse. An institution's opportunity to demonstrate that it took all reasonable steps to prevent the abuse has been described as a reverse onus because after sexual abuse of a child has occurred the obligation shifts to the institution to demonstrate what steps it took to prevent the abuse.

The bill includes a list of factors relevant to whether the institution did in fact take all reasonable steps. Ultimately, whether an institution has taken all reasonable steps will be a question of fact that depends on the circumstances. The reverse onus is consistent with the royal commission's recommendation and equivalent provisions that have been legislated in New South Wales and Victoria. There is no one-size-fits-all list of reasonable steps. Going forward, institutions will need to consider the scope of their duty in their particular circumstances in order to consider, adopt and implement practices, policies and procedures to comply with their obligations and in order to be able to document and provide evidence of the steps that have been taken. The reverse onus will apply prospectively only. This means that for sexual abuse claims where the abuse occurred before the commencement of the provisions in the bill the burden of proof will be on the claimant, as it currently is, to establish that the institution owed a duty of care and that the other elements of the claim are made out.

I am aware that a number of stakeholders submitted to the committee that the new statutory duty should have retrospective application. With respect to those stakeholders, the government does not share that view. The prospective application of the reverse onus is consistent with the commission's recommendation. The commission did not support the retrospective application of the duty on institutions, noting it would mean that institutions would effectively face a new liability for abuse that has already occurred—potentially over many previous decades—and that no institution could now improve its practices or take steps to prevent abuse that has already occurred. At page 476 of the civil litigation report the royal commission also observed that the institution of retrospectivity would be likely to create unrealistic expectations amongst survivors as to their prospects of success.

The definition in the bill of a person associated with an institution is drawn from the commission's recommendation and corresponding legislation in other jurisdictions. The definition is inclusive, applying to specific classes of persons—officer, office holder, representative, leader, owner, member, employee, agent, volunteer, contractor, minister of religion et cetera—but it is not intended to limit persons who may be regarded as associated with that institution according to the ordinary meaning of the term.

The amendments I will introduce during consideration in detail of the bill will address minor changes to the definition of 'associated with' in order to more fully reflect the commission's recommendation and the position in other jurisdictions. Under the provisions of the bill, institutions, whether incorporated or unincorporated, may satisfy liability arising out of the settlement or a judgement in respect of an abuse claim using the assets of the institution and the assets of an associated trust that the institution uses to carry out its functions or activities.

Under the bill, unincorporated institutions may nominate a proper defendant, such as the trustee of an associated trust, to defend a matter and to incur the liability of the institution. If the claim proceeds against the nominee, the liability may be satisfied from the assets of the nominee and the assets of the institution or, if the nominee is a trustee of an associated trust, out of the assets of the institution and the assets of the associated trust. If the unincorporated institution does not appoint a nominee or the nominee does not have sufficient assets to satisfy liability that may arise, the court may, in certain circumstances, order that the trustee of an associated trust is the nominee for the unincorporated institution.

The Queensland Law Society submitted that the definition of 'associated trust' could be narrowed to apply only to trusts which have a charitable purpose that includes, or is the same as, the charitable purposes of the institution. In a stakeholder round table that considered an exposure draft of the bill stakeholders generally did not support narrowing the definition in this way, suggesting that institutions could be expected to be mindful of their diverse responsibilities in deciding which trust assets, if any, to access. The bill is consistent with the Victoria and New South Wales position, neither of which narrow the definition of associated trusts in this way. Similar to the position in Victoria, the bill provides that an associated trust is one that the institution uses to carry out its functions or activities.

I will move amendments to the definition of 'associated trust' to clarify that in all situations an associated trust of an institution is a trust that satisfies the relevant definition, including that the institution uses the trust to carry out its functions or activities. While I appreciate the view that the

provisions in the bill may result in some trust property being used in ways that do not correspond with the intentions of the donor of that trust property, it is also important that institutions are able to do the right thing by sexual abuse survivors and satisfy liability that arises.

The bill provides that if an institution does not appoint a nominee or that nominee does not have sufficient assets, the claimant may apply to the court for an order appointing the trustee of an associated trust as the institution's nominee. During consideration in detail I will move amendments to the bill to expand the power of the court in such applications so that the institution will be required to identify for the court any associated trusts of the institution and the financial capacity of those trusts.

I will also move an amendment to expand the range of trustees which the court may appoint as the institution's nominee to include the trustee of a trust that was formerly an associated trust of the institution if the court is satisfied that: the trust ceased to be an associated trust in an effort to avoid the trust property being applied to satisfy a liability that may be found under a decision on an abuse claim; and that the order would be appropriate. These amendments respond to issues identified in the submissions to the committee and have been included in the legislation adopted in New South Wales. Taken together, the amendments will give the court significant power with respect to associated trusts and formerly associated trusts and will encourage institutions to nominate proper defendants with sufficient assets early in a proceeding.

The bill also provides for a number of consequences upon the appointment of a nominee for an institution, including that the institution must continue to participate in the proceeding and that the nominee may rely on any defence, immunity or right to be indemnified that would be available to the institution.

The Queensland Law Society submitted that the consequences that flow for the institution and the nominee on the appointment of a nominee should also apply in situations where the cause of action proceeds against the current office holder or a current institution on the basis of liability of a former office holder or through the continuity of office provision.

I foreshadow that I will move amendments to address this issue so that: any liability, duty or obligation of a former office holder will be taken to be a liability, duty or obligation of the current office holder or the current institution, as relevant, and any defence, immunity or right to be indemnified, including under a policy of insurance, that would have been available to the former office holder will be available to the current office holder or institution.

The bill currently provides that an institution, an institution's nominee, a current office holder or the trustee of an associated trust of an institution may act to satisfy liability as permitted under the bill—and, in the case of a trustee, may consent to be the institution's nominee—despite: another law; the terms of the associated trust; or a duty, whether as current holder of an office in the institution, or as a trustee or otherwise. The Queensland Law Society submitted that trustees of an associated trust of an institution should have statutory indemnities for reasonable legal costs and for liability for breach of trust for taking actions in accordance with the provisions of the bill. I will move amendments that clarify that a reference to liability under a judgment in or a settlement of an abuse claim includes any costs associated with the proceedings and that a trustee is not liable for a breach of trust only because of doing anything authorised by the bill to satisfy liability of an abuse claim.

The Queensland Law Society also submitted to the committee that unincorporated institutions normally have a management committee comprising the relevant office holders. I will move an amendment to define an 'office of authority' in an institution to include: a position as a member of the management committee; and a position in which the holder is concerned with, or takes part in, the management of the institution.

Furthermore, the bill provides for continuity of institutions and offices of institutions, where the institution has changed its name, structure or incorporated status or where the office within an institution has changed. The continuity provisions address an issue raised in the commission's report that an institution, or a current office holder in an institution, could avoid liability for abuse on the basis that the abuse was perpetrated under the tenure of a former office holder or when the institution was differently structured. On this issue, the Queensland Law Society submitted that the continuity provisions should only apply prospectively after a transition period and should limit the liability of the successor institution to the value of assets that were transferred from the earlier institution.

In stakeholder roundtable consultation on this issue, there was a general view that it may be unfair if, for example, due to the acquisition of assets, an institution became liable for an unknown, and potentially unknowable, liability for historical child sexual abuse that occurred in an institution that has now been wound up. However, it may also be unfair if institutions with a significant historical liability for child sexual abuse could 'phoenix' and leave victims without an avenue to seek compensation. This

becomes a question about balancing competing interests—those of the victims of sexual abuse and those of institutions in the sector that provide services. The government's view is that the balance in the bill is right.

The opposition members of the committee noted a concern that the definition of abuse is confined to sexual abuse only and does not include serious physical or other serious abuse. This issue was raised by a number of submissions to the committee. The purpose of the bill is to implement the government's response to the recommendations of the royal commission with respect to civil liability for sexual abuse. Issues concerning physical abuse and associated psychological abuse remain under consideration separately to the issues addressed by the bill. These are subsequent and very significant issues that should not simply form part of this bill and should stand alone.

Recommendations 89 and 90 of the commission's report recommended that state and territory governments implement a non-delegable duty of care making particular high-risk institutions strictly liable for sexual abuse perpetrated against a child by a person associated with the institution while the child is under the care, supervision, control or authority of the institution, despite it being the deliberate criminal act of a person associated with the institution. As I stated in the explanatory speech for the bill, the government's position is that it would not be appropriate to adopt a strict liability approach where abuse occurs despite an institution having taken all reasonable steps to prevent such abuse. I am advised that, to date, no jurisdiction has legislated for the non-delegable duty. It is noted that the Victorian approach is similar to the approach reflected in this bill. New South Wales has, in addition, adopted a vicarious liability approach for employees and individuals akin to an employee.

The government does not consider it to be necessary to legislate vicarious liability as New South Wales has done. Since the civil litigation report was handed down by the commission, there has been a development in the common law. The High Court in the matter of Prince Alfred College Inc. v ADC clarified that an institution can be held vicariously liable for the criminal acts of an employee in certain circumstances. Such a proposition had previously been uncertain since the 2003 case of Lepore. It was in the context of that uncertainty that the commission made its recommendations. The common law provides one avenue that a survivor of sexual abuse may pursue, and the reforms in this bill will not limit a person's common law right to seek to hold an institution vicariously liable.

The government's view is that the reverse onus approach adopted in the bill is the appropriate response to improve the capacity of the civil litigation system to provide justice to survivors in a way that also recognises steps that institutions take to prevent child sexual abuse. The government will continue to monitor the operation of the provisions in the bill and legislative developments in other jurisdictions.

I now turn to an issue that has arisen separately from the committee's consideration of the bill. As part of the Palaszczuk government's response to the commission's report, the *Whole-of-government guidelines for responding to civil litigation involving child sexual abuse* were adopted to ensure a compassionate and consistent approach across government and to make civil litigation less traumatic for victims. Guideline 14 provides that the state and all agencies should offer an apology where the state has acted improperly. While an apology or an acknowledgement of regret in civil proceedings can go a long way towards improving the outcome of both applicants and respondents, the general principle at common law is that an apology may be an admission of liability for breach of duty.

The Civil Liability Act 2003 provides an exception to this general rule so that certain apologies cannot be construed or used as an admission of liability. The exception does not extend to civil liability of a person for an unlawful sexual assault or other unlawful sexual misconduct committed by the person. It is made clear by the Civil Liability Act that an apology given by the perpetrator of sexual abuse is not exempt and may be used in a civil proceeding as an admission of liability.

Presently, what is not clear, however, is whether an apology given by an institution in respect of the sexual abuse of a child perpetrated by a person associated with the institution can be used as an admission of liability in a civil proceeding. Today I flag my intention to move amendments to the bill during the consideration in detail to clarify that the exemption in the Civil Liability Act that prevents an apology being used as an admission of liability in a civil proceeding extends to, and includes, apologies given by an institution arising from the civil liability of the institution for child sexual abuse perpetrated by a person associated with the institution. This will ensure that institutions can give genuine apologies to survivors of sexual abuse, which can be incredibly important to survivors seeking to move on from the horror of their abuse.

The bill also includes an amendment to section 64 of the Civil Proceedings Act 2011 to clarify that a person under a legal incapacity may recover the cost of trustee management fees in the award of damages for wrongful death of a member of the person's family. The amendment addresses

conflicting Supreme Court decisions regarding whether an award for damages for wrongful death can include trustee management fees for claimants under 18 years. Trustee management fees are fees associated with the investment and management of settlement funds and are deducted from the monies held by the trustee. The trustee management fees can be substantial, and the amendment will ensure that the amount of any award will not be significantly depleted by the cost of managing funds.

My hope is that this bill provides a greater opportunity for survivors' voices to be heard and for justice to be done. I commend this bill to the House.