Speech By

Hon. Yvette D'Ath

MEMBER FOR REDCLIFFE

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CIVIL LIABILITY AND OTHER LEGISLATION AMENDMENT BILL

Hon. YM D'ATH (Redcliffe—ALP) (Attorney-General and Minister for Justice) (12.04 pm), in reply: In summing up this bill, I would like to thank all members for their contributions to this debate. This debate has brought out the best sides of members in this place and also reminded all of us of the very dark aspects of humanity. There are former serving police officers in this chamber and there are other people who have sadly been involved in roles in their previous careers and volunteer work where they have had a lot of exposure to this sort of abuse and to victims and survivors of this sort of abuse. In coming into this role as Attorney-General, I could never have imagined the types of abuse that I would be exposed to on a weekly basis. My job entails sitting and reading briefs about children being raped and physically abused in catastrophic ways and the psychological abuse that comes after that. As we know, sometimes that psychological abuse is just too much to bear and those people take their lives.

Every one of us in this House stands for survivors and victims. We stand up against child abuse in all forms. That is all there is to it. It does not matter what position we take on any individual clause or how we think best to do that. We all have the same objective, and that is to keep our kids safe. That is what this is all about. I truly thank those members who have told their own personal story because I know that cannot be easy to do in a forum like this or in any public forum.

We must always strive to stamp out child abuse regardless of whether it is sexual, physical or psychological, but where it does occur we must always fight to ensure that survivors can obtain justice. Let us be clear. I know this came out of the royal commission in response to institutional child sexual abuse, but sadly and all too often what I have to deal with every week is that a lot of the abuse is at the hands of a family member or a loved one. We must always be vigilant. This is not just about institutions. If any one of us believes there are signs that give us concern that a child is being abused—it may be a family member, it may be your best friend, it may be a neighbour, it may be a work colleague that you think is harming their child—you have to speak up and you have to protect that child first and foremost.

This bill is not just about achieving justice for survivors. This bill is about engendering a cultural shift in the way our institutions and the individuals associated with them address the risk of child abuse. This is about ensuring that institutions can no longer turn a blind eye to abuse. It is about ensuring that all possible safeguards are put in place to ensure abuse does not occur.

I would like to briefly address once more the contents of this bill and then discuss the proposed amendments that I will move in consideration in detail and address some of the issues that have arisen during the course of this debate. As introduced, the bill imposes a new statutory duty on institutions to 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. This will now be extended to serious physical abuse as well. The new duty is prospective in application, and an institution will be taken to have breached the duty unless it proves it took all reasonable steps to prevent the abuse. While there have been some calls to make the application of the duty retrospective, this was

not proposed by the royal commission recommendations and will not be adopted by the government. You cannot retrospectively impose an obligation and say what is required now must have been done in the past. It is just not possible.

I will address the expansion of the application of the duty shortly. The bill also establishes a statutory framework for the nomination of a proper defendant by unincorporated institutions to meet any liability incurred by the institution under a judgement in, or a settlement of, an abuse claim. Survivors will also be able to access trust property associated with an institution to ensure that judgement debts are properly paid. It is unconscionable to think that, despite courts having found that an institution should pay compensation to a survivor of institutional abuse, the institution is able to exploit a loophole to avoid payment.

In my second reading speech I foreshadowed that I would be moving a series of amendments to address some drafting issues raised during the committee process and provide closer alignment between Queensland and other jurisdictions which have also implemented recommendations 91 to 94 of the royal commission. Yesterday it was my pleasure to announce that the Palaszczuk government would be moving further amendments to this bill. In 2017 the Palaszczuk government removed the limitation period that had applied to legal action for survivors of child sexual abuse. Yesterday on the first anniversary of the national apology for institutional child sexual abuse I was honoured to stand with Minister Farmer and Mr Bob Atkinson AO, a commissioner of the Royal Commission into Institutional Responses to Child Sexual Abuse, to announce that we would be extending the removal of the limitation period for actions of serious physical child abuse and psychological abuse connected to child sexual abuse or serious physical child abuse.

Yesterday Mr Atkinson described how in many of the royal commission's closed sessions he heard survivors describe the sadistic physical abuse that victims suffered at the hands of individuals associated with institutions. I want to note and thank—and I apologise because I cannot remember which member said it—the member on the opposite side who yesterday acknowledged Julia Gillard's contribution. I thank them for that because this is beyond politics. Julia Gillard started this royal commission many years ago and I do not think anyone truly understood the depth of how bad it would be but also what good would come of it.

In relation to the type of abuse, the Palaszczuk government has given significant consideration to this issue and has come to the view that the removal of the limitation period for serious child physical abuse and connected psychological abuse is the right thing to do so that all survivors of child abuse can have equality before the law. The removal of the limitation periods will have retrospective effect so that current survivors of historic child abuse can have their day in court. Our changes will also give the court the discretion to set aside a previous settlement made between a survivor and an institution where it is appropriate to do so.

Further to the removal of the limitation period, I can also confirm to the House that I will be moving further amendments to the bill to expand the relevant duty of institutions and the application of the reverse onus of proof that will be imposed upon institutions. Institutions will now have a duty to take all reasonable steps to prevent child sexual abuse and serious child physical abuse being perpetrated by individuals associated with their institution upon children under the care, supervision or control of the institution. Where the duty is breached, the onus will be on the institution to prove to the court that it did take all reasonable steps to prevent that abuse in order to avoid liability for the breach.

The reason the Palaszczuk government has included the word 'serious' as part of the duty applying to institutions for physical abuse is because of the stories we have heard from people like the member for Mirani. While some other jurisdictions have excluded liability for acts that were lawful at the time, the Palaszczuk government is of the belief that where child abuse occurred, the appropriate question is whether there has been abuse and the seriousness of the harm, not the legality of the act or omission that caused the harm. I want to thank the member for Mirani, who shared the story of his father's experience. Those stories and the stories of others in this House and the strength it takes people to share them are the reason we are here today debating this legislation.

One amendment that has received some attention in the course of the debate relates to the admissibility of apologies. The royal commission demonstrated that while civil litigation is one avenue for survivors that they may wish to take, it is not the only one. This amendment ensures institutions are not disincentivised from providing an apology that may make a world of difference to the healing process of a survivor.

Discussions of bills like this one often bring out the best of our parliament. Reasonable minds can differ as to the best way to achieve justice for survivors. However, I know that all members come to this issue with the best of intentions. I do, however, want to provide an explanation as to why it is that the Palaszczuk government differs from the opposition as to how best to achieve that justice for survivors.

The opposition did circulate amendments suggesting that the definition of 'abuse' be expanded to include physical abuse. However, the opposition amendments required the abuse to be an act or omission that at the time it was alleged to have occurred constituted a criminal offence. Such an approach would impose a threshold that may be difficult for the plaintiff to satisfy in many instances. It is our view that the government approach rather than the opposition's will be the best way of achieving justice for survivors.

Some members have articulated their preference that rather than having a direct duty of care applying to institutions, we instead have a statutory codification of the common law doctrine of vicarious liability. It is the view of the Palaszczuk government that in light of the recent common law developments, particularly in relation to the High Court case Prince Alfred College v the ADC, the doctrine of vicarious liability be left to the common law. I should also note that the LNP amendments circulated in relation to this bill do not impose vicarious liability upon institutions. One of the stronger advocates for the introduction of statutory provisions relating to vicarious liability in this debate has been the member for Maiwar, and I would like to briefly reflect on his contribution to the debate.

While the member for Maiwar wants to hold himself out as speaking on behalf of survivors, the reality is that his understanding of this issue is skewed. He has previously told the House that the imposition of vicarious liability is the same thing as imposing a non-delegable duty on institutions. It is not. He has told the House that the bill he has before the House imposes strict liability on institutions. It does not as it makes defences available to institutions. If you are going to lecture people about the legislative process, it is advisable to at least be across the detail in the first place. Notwithstanding this misguided critique, I acknowledge the member for Maiwar does want to make a difference for survivors. In future I would encourage him to temper his remarks and focus more on policy than the politics.

The LNP amendments circulated by the member for Toowoomba South suggest a non-delegable duty be imposed on select institutions. In addition to the duty being non-delegable, the LNP seek to make a duty one of strict liability, meaning that an institution would be automatically liable where abuse was committed, even if they had taken all reasonable steps to prevent the abuse from occurring. I have previously explained that while reasonable minds may differ on the merits of adopting a strict liability approach, the government does not propose to adopt it. While I understand that the opposition's proposed amendments in this regard are well intentioned, I do fear that they could have unintended consequences.

There are three key reasons why I do not think it is advisable to introduce a non-delegable duty. The first reason is one that has been raised by numerous MPs from the opposition, which is the burden that it places on smaller institutions. Notwithstanding the definition of 'relevant service' in the opposition amendments, there is significant risk that a strict liability approach would apply to a significant number of institutions including smaller community associations. It is incongruous for LNP members to express reservations about the excessive burden the government bill places on smaller institutions with a reverse onus while also purporting to support amendments that extend that burden without any defence being available to an institution, even where it has taken every reasonable step to prevent abuse from occurring.

Secondly, I can foresee situations where institutions, fearful that they will be caught in the opposition's strict liability provision, could throw inordinate amounts of resources at interlocutory applications, seeking rulings from the court, for example, that they are not a relevant service as per the definition set out in the opposition amendments. This will exhaust the resources of claimants and may make it less likely that they will achieve justice. On this point, I would also observe that, contrary to the assertions of the member for Gympie and others, no other jurisdiction has legislated for the imposition of a non-delegable duty on institutions with strict liability. I think at least three members on the other side said that we should follow other jurisdictions when they have a non-delegable duty with strict liability. It is not true; there is no jurisdiction that has that. To suggest otherwise is misleading, and I would invite the members to correct the record.

Finally, I also fear a more perverse outcome would follow from the opposition amendments. The sad reality is that where a strict liability approach is adopted, the only way that an institution can escape liability is by attempting to prove that the relevant child abuse did not occur. I fear that, if adopted, the opposition amendments will create a perverse incentive for institutions to invest their significant resources to cross-examine and discredit survivors in order to escape liability. The opposition amendments will transfer the focus of litigation from legal argument surrounding the nature of a duty that is owed to the very core of a survivor's integrity.

By contrast, the government bill allows a court to assess all factors it considers to be relevant when determining whether an institution breached its duty to prevent child abuse. Such factors include the nature of the institution, the resources available to the institution, the relationship between the

institution and the child, and the position in which the institution placed the person in relation to a child. This approach creates a uniform duty that applies to all institutions while recognising that the question of liability will often turn on the individual facts of the case. Regardless of the stature of the institution, they are obliged to take all reasonable steps to prevent child abuse from occurring.

These reforms make it easier for child abuse survivors to claim civil damages now and in the future. The royal commission revealed a horror that so many survivors have had to endure. It showed that institutions and individuals associated with those institutions used the high esteem in which they were held by the community to commit unspeakable acts against children. It was because of the stature of these institutions that survivors who did speak up were often disbelieved and unfairly discredited. This bill is only one small step to righting those historical wrongs and attempting to prevent these horrors repeating, but it is an incredibly important one. While we will never be assured of justice, we must always fight for it.

For the survivors, the stakeholders who are present in the gallery today—including I believe Allan Allaway, who will join us—members of the Truth, Healing and Reconciliation Taskforce, survivors, all those here today, those watching, those listening, those across the state and especially those who are no longer with us, this House says with one united, unified voice: we believe you and we support you. I commend this bill to the House.