Speech By

Hon. Yvette D'Ath

MEMBER FOR REDCLIFFE

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CRIMINAL CODE (CHILD SEXUAL OFFENCES REFORM) AND OTHER LEGISLATION AMENDMENT BILL

Second Reading

Hon. YM D'ATH (Redcliffe—ALP) (Attorney-General and Minister for Justice) (4.52 pm): I move—

That the bill be now read a second time.

On 27 November 2019, I introduced the Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Bill 2019 into this House. The bill was referred to the Legal Affairs and Community Safety Committee for consideration. The committee tabled its report on 7 February 2020 and made one recommendation only—that the bill be passed. I would like to take this opportunity to thank the committee for its timely and detailed consideration of the bill. A total of 26 submissions were received by the committee in the course of its inquiry. I extend my thanks to those individuals and organisations that provided submissions and gave evidence before the committee. I would also like to thank my department for their tireless work on this bill.

Released by the royal commission in August 2017, the *Criminal justice report* contains 85 recommendations aimed at reforming the criminal justice system to provide fairer and more effective responses to victims of child sexual abuse, including institutional child sexual abuse. Since the release of the *Criminal justice report*, the Palaszczuk government has conducted a comprehensive examination of each recommendation. Thorough and extensive consultation has also occurred to determine the best way to implement these recommendations in Queensland.

The bill before the House contains several important reforms to our criminal justice system in response to certain key recommendations of the *Criminal justice report*. I will briefly outline for members the nature of the amendments and address key issues raised during the committee inquiry. The royal commission took a favourable view of Queensland's offence under section 229B of the Criminal Code relating to maintaining a sexual relationship with a child, but considered it could be improved by having retrospective application given the lengthy delays in reporting that is a common feature of child sexual abuse. Consistent with recommendation 21 of the *Criminal justice report*, the bill amends the Criminal Code to retrospectively apply the current section 229B offence of maintaining a sexual relationship with a child.

Retrospective operation of the maintaining offence, which was introduced in 1989, will have the effect of altering the way in which unlawful sexual conduct toward a child is relied upon by making the 'relationship' an offence. I acknowledge that some submitters to the committee suggested that the title of this offence should be changed to 'persistent child sexual abuse' given it fails to adequately reflect the illicit nature of the offending and trivialises the sinister nature of such conduct.

As the royal commission acknowledged, the maintaining offence in Queensland is a model provision for effectively dealing with persistent child sexual abuse and has been the subject of High Court consideration. It is imperative that any change to the provision does not compromise its operation

or ability to effectively hold offenders to account or have any unintended impacts, particularly given the concept of 'persistent child sexual abuse' is not referred to in the offence itself. While I am not proposing to make any changes to the title of the offence in section 229B of the Criminal Code at this time, I will continue to monitor this issue, including developments in other jurisdictions.

The bill expands the current offence of grooming a child under 16, in section 218B of the Criminal Code, to conduct directed towards a person who has the care of the child, which is broadly defined to include a parent, foster parent, step parent, guardian or other adult in charge of the child, whether or not the person has lawful custody of the child. In implementing recommendation 26 of the *Criminal justice report*, this amendment in the bill better acknowledges the wide array of manipulative measures employed by offenders to gain sexual access to a child.

Recommendations 33-35 of the *Criminal justice report* relate to the introduction of a criminal offence targeted at reporting to police. The royal commission observed that children are likely to have fewer opportunities and less ability to take steps to protect themselves, leaving them particularly in need of active assistance and protection by adults. Consistent with a number of other jurisdictions, and to send a clear message to all of the community that child sexual abuse is not something that you can turn a blind eye to, the bill amends the Criminal Code to create a new offence mandating that all adults 18 years and over, unless they have a reasonable excuse, report to police information gained by the adult that causes the adult to believe on reasonable grounds, or ought reasonably to cause the adult to believe, that a sexual offence against a child under 16 or a child aged 16 or 17 years who has an impairment of the mind, is being, or has been, committed. This new reporting offence will carry a maximum penalty of three years imprisonment.

While the new offence will only apply to information received on or after commencement, it will have some retrospective application where the information relates to a child sexual offence that occurred before commencement. Without limiting what may constitute a reasonable excuse, the bill provides that a reasonable excuse exists where the person has already reported the information, or believes on reasonable grounds that the information was or will be reported by another person, under existing legislation, including the Education (General Provisions) Act 2006 and the Child Protection Act 1999. The reasonable excuse provision in the failure to report offence in the bill operates to reverse both the evidential and legal onus of proof to the accused person. An explicit provision is also included excusing liability where a person reasonably believes that disclosure would endanger the safety of a person.

Consistent with recommendation 35 of the *Criminal justice report*, the failure to report offence applies to information gained by the adult during, or in connection with, a religious confession. This aspect of the offence has consistently raised strong views. A large number of submitters voiced concerns that negating the sanctity of religious confession represents a significant and unwarranted intrusion into the right to freely practise faith and religion. The Palaszczuk government acknowledges that the right to practise religion is a fundamental human right and understands the strongly held views on maintaining the sanctity of religious confession. However, these concerns must be weighed against the need to protect children from sexual abuse.

The royal commission heard comprehensive evidence in relation to the issue of religious confessions. It ultimately concluded that there should be no exemption or privilege from the failure to report offence for clergy who receive information during religious confession that an adult associated with the institution is sexually abusing or has sexually abused a child. The bill reflects the position that the requirement to report child sexual abuse is one that should rest with every adult in the community and is too important to be fettered by reason of religion or anything else.

There was some concern expressed to the committee by certain submitters, including the Queensland Law Society, that the obligations in the failure to report offence might negate legal professional privilege and, despite usual rules of statutory interpretation, that this issue should be put beyond doubt via an amendment to the bill. However, the Palaszczuk government is concerned such an amendment to the bill in relation to legal professional privilege may have unintended consequences for other similar provisions across the statute book and create uncertainty in relation to other privileges. I note that the explanatory notes for the bill already make it clear that there is no intention to override legal professional privilege and I can give that assurance again to members today.

Consistent with recommendation 36 of the Criminal Justice Report, the bill contains a new offence of failure to protect a child from child sexual abuse. This offence is focussed on abuse in an institutional setting and ensuring that practices of moving around and covering up known child sexual abusers in institutions do not continue. The failure to protect offence will apply to an 'accountable person'—that is, an adult aged 18 years or over who is associated with an institution—where the person knows there is

a significant risk that another adult who is associated with an institution or is a regulated volunteer will commit a child sex offence and the accountable person has the power or responsibility to reduce or remove the risk and wilfully or negligently fails to reduce or remove the risk.

A 'regulated volunteer' is an adult, in the home of certain people who care for children in their homes, who requires a blue card under the Working with Children (Risk Management and Screening) Act 2000. These include all adult household members of family day care residences, home-stay providers, home based standalone care services, and foster and kinship carers.

The failure to protect offence will apply to a child who is under the care, supervision or control of an institution and the child is either under 16 years or is 16 or 17 years of age with an impairment of the mind. A maximum penalty of five years imprisonment will apply to the new failure to protect offence.

In response to issues raised before the committee, I have considered the need to amend the bill to include an immunity provision in similar terms to the report offence. However, I note no other jurisdictions have included such a provision in their similar failure to protect offences.

Also, distinct from the report offence, the failure to protect offence includes an element that an accountable person must have the power and responsibility to reduce or remove a significant risk of a child sexual offence being committed by another adult in relation to a child and that they have wilfully or negligently failed to remove or reduce a risk in relation to a child. This would negate the need for any such similar immunity provision. The operation of the offence will continue to be monitored in relation to this issue. Similar to the failure to report offence, the failure to protect offence applies to knowledge gained in, or in connection with, a religious confession.

When confronting the scourge of child sexual abuse, we need to examine why such abuse was able to flourish, unimpeded by law enforcement, even in cases where members of our community knew it was occurring, even when they could have done something to stop it. We need to examine why it is that, instead of doing something to stop the abuse, some institutions acted to protect the abuser instead of ensuring justice for the victim. I hope the offences in this bill end the culture of silence and cover-up of child sexual abuse in our community once and for all.

Some concerns were raised before the committee about the implementation of the new failure to report and protect offences. These offences will commence on a date to be set by proclamation. The Department of Justice and Attorney-General is working closely with other departments, including the Department of Education, the Department of Child Safety, Youth and Women and the Queensland Police Service, to support effective implementation through a comprehensive communication strategy.

While there are no limitation periods that apply currently to child sexual abuse offences in Queensland, there is potential for the application of repealed limitation periods to apply to historic offending. Sections 212, 'Defilement of girls under 12', which has now been repealed, and section 215 of the Criminal Code, 'Carnal knowledge of children under 16', in the form that existed prior to 30 March 1989, applied a limitation period of six months within which a prosecution could be commenced. The repeal of this limitation period was prospective, which means that any immunity already arising in relation to offending prior to that time would continue. To implement recommendation 30 of the *Criminal justice report*, the bill gives retrospective effect to the amendments that removed these limitation periods. This will ensure that victims are not prevented from seeking justice for pre-1989 offending.

Recommendations 59 and 60 of the *Criminal justice report* relate to the establishment of an intermediary scheme to help prosecution witnesses with communication difficulties in child sexual abuse matters. The amendments in the bill support the introduction of a pilot intermediary scheme in Queensland at all levels of courts in the prescribed locations. The aim of the intermediary scheme pilot is to ensure better quality evidence for police and courts to assess child sexual abuse cases and to reduce the stress experienced by vulnerable witnesses.

Intermediaries are professionals who are typically speech pathologists, occupational therapists, psychologists and social workers. Some other jurisdictions have also used teachers and nurses according to need. They will provide communication support to prosecution witnesses in child sexual offence prosecutions who are children under 16 years, persons with an impairment of the mind, persons who have difficulty communicating or persons of a class prescribed by regulation. Intermediaries will be appointed as impartial officers of the court. Their functions include assessing witness communication and writing court reports on the witness's communication needs.

Although the bill focuses on those amendments necessary to implement the scheme during the court process, it is envisaged an intermediary will be used throughout the prosecution process, including at the initial police interview. These amendments will also commence on a date set by proclamation. Significant implementation work is required to support the establishment of the pilot, including

procurement of suitably qualified intermediaries for a panel. Consultation will continue to occur with stakeholders through the implementation process prior to the commencement of the pilot scheme and during its operation.

Often, and particularly in institutional settings, the good character of offenders, and the position of trust and authority that they hold, allows them to perpetrate offences. The bill implements recommendation 74 of the *Criminal justice report* by amending the Penalties and Sentences Act 1992 to provide that reliance on good character as a mitigating factor is prohibited where it assisted the offender in the commission of the offence.

The royal commission also noted that applying historical sentencing standards can result in sentences that do not align with the criminality of the offence as currently understood. Accordingly, recommendation 76 of the *Criminal justice report* provides for child sexual offenders to be sentenced according to the sentencing standards at the time of sentence, whether in legislation or by way of guidance in other decisions, rather than those that existed at the time of the offence. The bill amends the Penalties and Sentences Act to implement this recommendation. However, the amendments are not intended to affect the maximum penalty for the offence.

Recommendation 65 of the *Criminal justice report* requires jurisdictions to review and, if necessary, appropriately reform legislation to restrict the giving of particular common law directions. In this respect, the bill amends the Evidence Act 1977 relating to what is known as the Longman direction. This jury direction concerns the impacts on an accused person as a result of the delay in a complaint.

The bill inserts a new section to provide that in a criminal proceeding if a judge, on the judge's own initiative or on the application of a party, is satisfied the defendant has suffered a significant forensic disadvantage because of the effects of delay in prosecuting an offence, including a delay in reporting the offence, the judge must inform the jury of the nature of the disadvantage and the need to take the disadvantage into account when considering the evidence. However, the judge must not warn or suggest to the jury that it would be 'dangerous or unsafe to convict' or 'the complainant's evidence should be scrutinised with great care'. The judge need not give a direction under this new section if there are good reasons for not doing so.

On 20 July 2017, the Queensland Sentencing Advisory Council publicly released its report which contains 16 recommendations relating to child exploitation material offender sentencing and related matters. QSAC's review arose from recommendation 4.11 of the Queensland Organised Crime Commission of Inquiry report dated 30 October 2015. Consistent with recommendation 1 of the child exploitation material report, the bill amends the Penalties and Sentences Act 1992 so that the language used in that act to frame sentencing considerations for child exploitation material offences is consistent with the language used by the Criminal Code. Further, the Penalties and Sentences Act will be amended to specifically require a court sentencing a child exploitation material or child abuse object offender to consider an offender's conduct or behaviour in relation to the relevant child exploitation material or child abuse object.

The bill will also introduce a statutory requirement for the court to consider any relationship between an offender and a victim child in circumstances where the relevant offending is contact sexual offending against a child or a child exploitation material offence.

The bill will also establish a statutory power for a court to order that a report tendered at a sentence be provided to Queensland Corrective Services or the Department of Youth Justice in a timely manner, irrespective of the nature of the offence which has been committed. Reports of these types may yield valuable information which may support an offender's rehabilitation or information otherwise relevant to an offender's health and wellbeing.

In recent years, anatomical replications of pubescent and prepubescent children designed for sexual gratification—known as child sex dolls—have been detected arriving in Australia and have been located in Queensland. That child sex dolls have been found here and that there is a market for them is disgusting, and those who participate in this behaviour deserve to face the full force of the law.

The bill amends the Criminal Code to create new offences which criminalise the production, supply and possession of child abuse objects. The maximum penalty available for these crimes is 14 years imprisonment. However, where an offence of producing or supplying a child abuse object is for a commercial purpose, the maximum available penalty increases to 20 years.

The bill also provides for the serious organised crime circumstance of aggravation in the Penalties and Sentences Act to apply to these new offences. This enables the prosecution, with the consent of a Crown Law officer, to allege that the defendant committed the offences while a participant in a criminal organisation which, if proved, results in the mandatory imposition of a cumulative term of imprisonment.

The definition of ‘child abuse object’ is intended to capture dolls, robots or other objects a reasonable adult would consider as being representative of or portraying a child, or part of a child, under the age of 16 years. A doll, robot or other object which gives the predominant impression that it is a representation or portrayal of a child under the age of 16 years, despite the presence of adult-like anatomical features, may, under this definition, be a child abuse object. The definition also requires that a reasonable adult would consider that the doll, robot or other object be intended for use in an indecent or sexual context, or has been used in an indecent or sexual context.

Specific defences are also included for the new child abuse object offences which provide a person will not be criminally responsible if they can prove they engaged in the prohibited conduct for a genuine artistic, educational, legal, medical or public benefit purpose and the conduct was, in the circumstances, reasonable for that purpose. A similar defence is available for other existing child exploitation material offences in the Criminal Code.

The bill represents the Palaszczuk government’s unwavering commitment to protecting Queensland children from the scourge of child sexual abuse, improving the accountability of child sexual offenders and enhancing survivors’ access to justice. The bill will make a significant positive difference to the experience of many sexual abuse survivors of the criminal justice system.

I am proud to be a part of this Palaszczuk Labor government that has done so much work to implement the recommendations of the royal commission. The reforms that we have implemented in this bill and the bills that have come before it will make Queensland a safer and more just place for survivors of the past and all of our children into the future. Our work is not done. The royal commission demonstrated just how pernicious child sexual abuse in our institutions has been. In order to ensure that such horrors can never occur again, we need to remain vigilant. These laws are a form of vigilance. They ensure our laws learn the lessons of the past and they reflect our collective commitment to prevent such abuse from occurring in the future.

As I did in my introductory speech, I acknowledge all of the survivors who have advocated for so long, who advocated for the royal commission, who supported the work of the royal commission and who have continued to advocate and campaign for change since the royal commission’s recommendations came down. I acknowledge all of those who are no longer with us who were victims, and the pain and the suffering that they have all gone through and their families and friends as well. I commend the bill to the House.