Speech by

Hon. R. E. BORBIDGE

MEMBER FOR SURFERS PARADISE

Hansard 28 April 1999

PARLIAMENTARY MEMBERS (OFFICE OF PROFIT) AMENDMENT BILL

Hon. R. E. BORBIDGE (Surfers Paradise—NPA) (Leader of the Opposition) (11.29 a.m.): When the Senate Standing Committee on Constitutional and Legal Affairs presented its report on the constitutional qualifications of members of Parliament in 1981, it stated, "The expression 'office of profit under the Crown' is one which is uncertain in scope and application." More recently, the Legal, Constitutional and Administrative Review Committee said that this part of our constitutional fabric was "obscure and quite possibly conflicting".

Like the Commonwealth, Queensland inserted into its fundamental laws provisions based on the law and practice of the United Kingdom, most of which dated back to the late 17th and early 18th centuries. As the Senate standing committee highlighted, at the moment the law is not clear and has been the subject of a number of reform proposals, including those of EARC and, more recently, LCARC in its interim report on the consolidation of the Queensland Constitution.

The Opposition will be supporting this Bill, but I do say to the Premier that it may have been prudent to have introduced more comprehensive reforms rather than have a piecemeal attempt. To do this, of course, it would have been necessary to wait until comprehensive constitutional reform proposals were finalised by LCARC, but I note that it has tabled its final report in the House this morning. Nevertheless, I can understand why the Premier has seen fit to jump the gun, because this is one area of our constitutional fabric that is badly in need of renovation and the proposals presented to this House appear both sensible and reasonable. However, I will be seeking certain assurances from the Premier.

In the United Kingdom, the old law that we still operate under was reformed initially in 1957 and then even more comprehensively in 1975. Yet, as I mentioned, we are still governed by laws that date back to the Act of Settlement of 1701.

The various provisions in our law relating to office of profit are designed to give effect to a number of important objectives. The first was to prevent a conflict of duty situation with members of Parliament accepting money or benefits for the holding of other offices the very nature of which would have undermined both the effectiveness of the person as a member of Parliament and as the holder of the other position. Examples often given are the position of a public servant or the holding of judicial office. The second was to prevent the Executive Government of the day controlling the Parliament by, in effect, bribing certain members by offering them lucrative part-time positions funded by the taxpayer. The last was to ensure that the Parliament and its members actually carried out their role of holding the Executive of the day accountable for its actions rather than have a situation where all or most of the House was on the Executive's payroll.

Some of the rationale for office of profit provisions has become less acute with the rise of party politics, the proliferation of a variety of other accountability mechanisms and the exposure of misdeeds by the mass media. As we all know, the old fears of a powerful Executive, which I referred to just before, have long been overtaken by the reality of party discipline. Although certain arguments for office of profit provisions may have lost some of their relevance, others are just as real today as they were centuries ago. The fact that public servants cannot sit in this Parliament and still be part-time public servants was and remains integral to the acceptance of a non-political and permanent civil service. The

fact that judicial officers cannot sit in this Parliament is fundamental to the separation of powers and the public's acceptance of the independence and fairness of the judiciary.

It is also beyond question that it is undesirable that the Government of the day be in a position to offer to members of Parliament positions that attract fees and benefits, as clearly this puts the Government in a position to buy favours. In the context of current Australian politics where elections are closely fought and minority Governments are becoming more and more common, this could be a very real problem. Fortunately, we have a unicameral parliamentary system in this State and not the sort of organised mayhem that exists, say, in the New South Wales Upper House where the power to block, reject, delay or pass legislation is fundamentally in the hands of a range of fringe parties and disaffected individuals. I point out that in the New South Wales election, one member was elected to the Legislative Council representing the campers party with some 7,000 or 7,500 votes. Clearly, that is a situation of major concern.

It is all too easy to envisage how, without office of profit legislation, a Government anxious to see its legislative agenda implemented could be tempted to do deals with key independents or the leaders of fringe parties, involving some form of personal benefit to those persons or parties. Therefore, it is critical that there remain in place strong office of profit legislation that prevents action that would otherwise result in the corruption of the body politic as well as undermine true parliamentary and democratic accountability.

The Bill attempts to achieve these aims by providing—

(1) that parliamentarians can accept an office of profit provided that they waive for all legal purposes any right to profit from the office;

(2) that parliamentarians are not prohibited from accepting an office that confers no profit; and

(3) in either case, a member is entitled to appropriate out-of-pocket expenses. These are defined to include accommodation, meals, domestic air travel, taxi fares or public transport charges and motor vehicle hire. In addition, these out-of-pocket expenses must be reasonable in the circumstances.

The Bill adopts a subjective standard of care for members, with the requirement to waive any office of profit entitlement as soon as practicable after the member becomes aware of it. The first matter that I would like to speak to is the proposition that there should be no prohibition on a member of Parliament accepting an office that entails no profit. That was initially the case in this State as the 1899 Supreme Court decision of In re the Warrego Election Petition highlights. It was held by the court that parliamentarians were legally competent to accept an office if all that it conferred was a right to reimbursement of reasonable expenses.

More recently, the Senate standing committee that I referred to recommended that the Commonwealth Constitution be amended by providing, amongst other things, that a Commonwealth parliamentarian not be precluded from accepting a position on a statutory authority provided that the member receives only reimbursement of reasonable expenses. I will briefly quote certain comments of the committee, as I think that they are relevant to the sort of problems that the office of profit provisions have caused over the years. The committee stated—

> "We have concluded that employment by a statutory authority is incompatible with membership of Parliament. There are, however, some statutory authorities where the advice and experience of a parliamentarian, as a member of the governing body, would be of great benefit, and on which the Parliament has a legitimate right to representation."

I believe that that view will be shared by almost everyone. For example, who could question the desirability of parliamentarians being represented on the governing bodies of universities and the like? It is often in the interests of the community that bodies such as those have appropriate parliamentary representation and, over the years, that representation has undoubtedly advanced the public interest.

It should also be mentioned that in its interim report LCARC proposed that office of profit be replaced with the concept of paid public appointment provided such appointments were held for reward. In the draft legislation, LCARC defined "reward" to exclude amounts paid for out-of-pocket expenses reasonably incurred. Accordingly, there seems to be widespread support for recognising that if a member of Parliament is appointed to an office and that office entails no personal benefit to the member other than the reimbursement of reasonable out-of-pocket expenses actually incurred, such a member should suffer no disadvantage for taking up the office.

The second issue is the ability of a parliamentarian to accept an office that entails a profit, but only on the condition that the member irrevocably waives for all legal purposes the entitlement to the fee or reward. The revocation must be in writing and a copy given to the Speaker. That concept goes well beyond either the current law or that which was previously in place. In the Warrego Election Petition case, the Supreme Court actually held that it is the holding of an office of profit under the Crown that is precluded and it is not necessary to go further and show that a profit was actually received. Although

this is a new concept, it is a reasonable one. The harm that must be targeted is the actual receiving of a profit or a reward. If a member irrevocably waives any such entitlement and receives no benefit other than out-of-pocket expenses, in my view, the member should suffer no detriment. If no profit is obtained, no detriment should follow. If no profit is obtained and the member has ensured that none will ever eventuate, what harm is done? Once it is accepted that there should not be a blanket prohibition on a parliamentarian holding any office under the Crown provided that the member does not get a benefit, it is axiomatic that a provision such as this should be in place.

Before I conclude, I will touch on one or two issues that we, nonetheless, need to keep in mind. The Bill specifically deals with the issue of reasonable expenses actually incurred. I have already outlined how this is defined. I wish to make a few observations on this proposal. Firstly, I agree with the requirement that the expenses must be reasonable and must be actually incurred. Nevertheless, there is still an element of uncertainty inherent in these proposals. As the Premier said, members will have to be vigilant and diligent that they receive only reasonable expenses lest their future in Parliament is determined by office of profit exclusion provisions. The issue that I query is: what is reasonable? Whom will determine what is and is not reasonable? What may be reasonable to the Government of the day may be unreasonable to the Opposition and vice versa. What is reasonable to one member may be either extravagant or petty to another.

It is critical that the Members' Entitlements Handbook be examined thoroughly to provide practical guidance so that these new provisions do not become a trap to the unwary. In the spirit of bipartisanship, I suggest to the Premier that he seek the cooperation of the Auditor-General and his office in this exercise. When I was Premier, the Auditor-General and his senior officers were involved with officers of the Department of the Premier and Cabinet in the rewrite of the Ministerial Handbook, and the sage advice of the Auditor-General was very useful. A partial rewrite of the Members' Entitlements Handbook in the area of what would be reasonable and unreasonable and the type of methodology that would be adopted in forming a view in given cases would ensure that the potential problems that I have alluded to do not arise and that, if they did, the member of Parliament in question could not claim that he or she was being treated unfairly.

Secondly, I query the desirability of limiting the expenses to a small and finite list in the legislation. As we all know, in the scheme of things certain expenses may arise which are actually incurred and which are reasonable having regard to the particular office in question. It would be more realistic and appropriate to provide the ability to add to the list by way of regulation. Obviously, if too much latitude was proposed, it could be disallowed by the House. However, that would make these provisions more flexible and relevant.

Finally, I read with interest the comments on the Bill by the Scrutiny of Legislation Committee in Alert Digest No. 4. The committee pointed out that the passage of this Bill will enhance the capacity of the Government of the day to use parliamentarians for Executive purposes and that this could have a bearing on their independence. The committee also quite correctly pointed out that a member's independence can be reduced by appointment to offices that carry no extra monetary benefits but which give greater public exposure to a member and enhance the career prospects of that member. All of that is true, but the committee noted also that these risks had to be weighed up against the benefits of having members more involved in the range of activities which these appointments concern.

The real risk that we need to focus on is the ability of a Government to buy support or favours by offering lucrative positions to members of Parliament whose vote and support it needs. However, we should not have laws in place that throw out the baby with the bathwater. There is nothing wrong in principle with members of Parliament serving on various offices under the Crown—and in fact there are many positive spin-offs—provided that a member's time on these positions does not detract from his or her duty to the Parliament and to his or her constituents.

The problem that this Bill poses is that it opens up a range of appointments to members of Parliament that currently are not allowed, and therefore some caution will have to be exercised by the Government. It would be a retrograde step if any Government started offering to members of Parliament a range of positions under the Crown and in the process limited the capacity of those members to fulfil their primary and critical obligations as members of Parliament. I seek some assurance from the Premier that the Government will not be using the enhanced appointment capacity under this Bill to widen the field of appointments for members of Parliament. I understand from my briefings that that is not the intent of the Government, but I would ask the Premier, in his response, to give that very firm and unequivocal assurance to this House.

I accept the legal reasons as to why we are progressing down this track. I accept the intent of the legislation. However, I think that members on this side of the House would have a different attitude to this Bill if it were a Bill designed for political purposes to open up the widespread appointment of members of Parliament to a whole range of Government boards and statutory bodies far beyond what has been the norm and what has been accepted in the past.

In conclusion, subject to those assurances being given by the Premier in his summing-up, the Opposition supports the Bill because it makes an area of our constitutional law which is vague and possibly contradictory more understandable and logical. Any person reading the Bill and understanding the logic of office of profit provisions could well have some reservations, especially those of the type that I have just outlined. It is incumbent on this Government and any future Government to act sensibly and appropriately. Provided that commonsense is exercised, the Bill should produce a number of positive benefits for the community. This is a long overdue reform.