Speech by

Mr S. SANTORO

MEMBER FOR CLAYFIELD

Hansard 28 April 1999

PARLIAMENTARY MEMBERS (OFFICE OF PROFIT) AMENDMENT BILL

Mr SANTORO (Clayfield—LP) (12.01 p.m.): There is no doubt that the current law governing parliamentarians who are appointed to an office of profit is outdated, vague, conflicting and open to injustice. I believe that the Bill currently before the House introduces some long overdue reforms that will overcome some of these anomalies and allow members of Parliament greater scope to better serve the people of Queensland. Nevertheless, as the Leader of the Opposition pointed out, there are aspects of the Bill that should cause some concern, and it is absolutely imperative that the scope provided under this proposed legislation not be misused by this or any future Government.

Just as the current law is unfair and counterproductive, the proposed replacement legislative scheme has its own inherent drawbacks. Office of profit provisions have been the subject of various law reform proposals over the years, ranging from the Senate select committee report on the constitutional qualifications of members of Parliament to the report of the Western Australian Law Reform Commission on disqualification for membership of Parliament—Offices of Profit Under the Crown and Government Contracts—to both EARC and LCARC.

In the case of both EARC and LCARC, reform of office of profit provisions was part of wider constitutional reform proposals, and no doubt some people would question why we are engaging in piecemeal reform at this stage. This question is especially relevant as LCARC presented its interim report on the consolidation of the Queensland Constitution only last May and there are currently a number of constitutional initiatives being discussed in the context of the referendum on the republic later this year. In addition, as the Premier has pointed out, this Bill does not even deal with all of the reforms to the law governing offices of profit recommended by LCARC, including possible amendments to the Electoral Act 1992.

It is therefore a little disappointing that, once again, we are dealing with important constitutional law reform in an ad hoc fashion. However, as much as I think approaching constitutional reform in this fashion devalues the reform process, I agree with the Premier that this is one area that does require tidying up, and for that reason I am prepared to put my reservations aside and offer qualified support to the thrust of the Bill.

The rationale for legislation which places strict limits on a member of Parliament being appointed to an office of profit under the Crown goes back to the days when the British Crown and the House of Commons were at loggerheads, resulting first in the English Civil War and the rise of Oliver Cromwell and eventually in the overthrow of James II and the constitutional settlement which saw the end of a near absolute monarchy and the rise of parliamentary government.

The Law Reform Committee of Western Australia summarised the rationale for office of profit legislation as follows: the need to limit the control or influence of the Executive over the Parliament which could otherwise exist if an undue proportion of members were office-holders; the incompatibility of certain offices with membership of Parliament—this covers not only the physical impossibility of fulfilling both the duties of the office and the duties of a member of Parliament but also the need to prevent certain offices, such as judicial and senior Public Service positions, being held by persons who as MPs would be engaging in political controversy; and the need to maintain the principle of ministerial responsibility by preventing office holders whose duties involve the making of decisions on matters of public policy and for whose decisions a Minister

is ultimately responsible to Parliament, being themselves MPs.

Although the constitutional arguments that first led to office of profit legislation are now only of historical interest, it is clear that there remains an ongoing need for legislation to prevent a Government in effect buying influence in Parliament. Just as it is obvious that strong legislation is needed, it is equally clear that the current legislative provisions have long since passed their use-by date. All commentators who have looked at the current law have concluded that it is unsatisfactory, and possibly conflicting.

The Premier quite rightly pointed out that if a member is currently caught up by the law there may be a need for up to two resolutions of this House, as well as a regulation. Alternatively, it may be necessary for a special Act of Parliament to be passed permitting the particular office of profit to be held. Certainly those interested in parliamentary history can search the lists of repealed Acts and find a number of enabling statutes for both parliamentarians and judges who have been caught up by these provisions in the past.

Those of us who were members in 1990, for example, will recall that the then Premier had to move a motion that the then member for Stafford, now member for Everton, continue as a member of Parliament, notwithstanding that as a guest lecturer at the South Brisbane College of TAFE he received a fee of $21.50. I raise this incident to highlight just how trivial and inconsequential matters that raise no issues of public concern can be picked up by this area of the law. I add that the changes we are debating would not have exempted the member for Everton from that very minor indiscretion, but it is illustrative of the potential for injustice that could occur.

I agree with the Premier's contention that the combined effect of section 7 of the Legislative Assembly Act 1867 and section 5 of the Officials in Parliament Act 1896 makes the appointment of members to an office of profit complicated and cumbersome. Yet there are many who would argue that it should be difficult and cumbersome to appoint an MP to such a position because, otherwise, MPs would accept various offices of profit with the consequent possible conflicts of duty and interest, as well as a diminished capacity to represent the people they were elected by in the first place. This Bill deals with these very real and legitimate concerns by providing that MPs can be appointed to offices under the Crown but cannot be appointed to offices of profit.

The Bill lifts the embargo on appointments to offices under the Crown where there is no profit element and allows appointment to offices of profit provided that the member by written notice irrevocably waives for all legal purposes the entitlement to any fee or reward. To deal with the obvious situation of a member facing out-of-pocket expenses, the Bill allows for reasonable expenses actually incurred with respect to accommodation, meals, domestic air travel, taxi fares or public transport charges and motor vehicle hire. I think the approach I have outlined is a fair one.

The High Court found in Sykes v. Cleary in 1992 that members of Parliament can breach the office of profit rule even if they receive no benefit. In that case it found that the taking of leave without pay by a person who held an office of profit did not alter the character of the office. The person remains the holder of the office, notwithstanding that he or she is not in receipt of pay during the period of leave. In that sense the court looked at the person as the holder of an office and deemed it irrelevant that the holder obtained no pecuniary advantage.

This decision followed an 1899 Queensland Supreme Court case, and so it is appropriate that under this Bill an MP can irrevocably waive an entitlement and by doing so avoid the sort of legal nonsense that could otherwise come to pass. The Cleary case highlighted the potential injustice of this rule, where a school teacher on long-term unpaid leave could have his election to the Federal Parliament successfully challenged on the basis that he was the holder of an office of profit under the Crown.

The obligation to waive the entitlement only arises when the MLA becomes aware of the profit element of the office and, as the Scrutiny of Legislation Committee highlights in Alert Digest No. 4, difficult cases of proof may well arise as to when a member actually became aware of the entitlement. Although this is a potential problem, I think it is fairest to activate the provision from the time the member became aware. My major concern with the Bill is that it substantially widens the scope for any Government to appoint parliamentarians to various statutory offices.

I think that the following words of the Scrutiny of Legislation Committee are worth incorporating in Hansard and need to be very carefully considered by the Government. The committee said—

> "It is clear that this Bill enhances the capacity of the Crown to use members of Parliament for executive purposes. The effect this might have on the independence of members and hence of the Parliament is reduced by the absence of any pecuniary advantage to members. However, certain Crown appointments, even without reward, are likely to be attractive to members for various reasons, in particular, the benefit of public exposure and the opportunity to demonstrate administrative skills and hence ministerial potential."

My concern is heightened from reading the Premier's second-reading speech, wherein he seems to indicate that this Bill may be used to

increase the incidence of appointing MLAs to various offices. There is a very real risk that no matter how well intentioned this Bill is—and I believe that it is motivated by good motives—nonetheless, it gives far greater discretion to an incumbent administration to give jobs to those in their own party or those with whom they wish to curry favour.

We have a very tight situation in Parliament at the moment, with the Government having a majority of only one. During the last Parliament, the coalition did not even have a majority. Independents and members of other parties in Queensland, federally and in almost every State can play a critical role and even bring down a Government. In these circumstances, there will be a temptation, if the discretion is in place, to offer key parliamentarians various offices as a means of maintaining or gaining their support. Let me make myself clear. I am not suggesting that this is the case or would be the case under either this Government or the coalition. I am not trying to denigrate the motives of the Government in introducing this Bill. What I am highlighting is that this Bill substantially lowers the barriers so far as the offering to members of offices under the Crown are concerned. It enlarges the pork-barrelling armoury of Governments to a much greater extent than currently exists.

Both the Scrutiny of Legislation Committee and the Premier point out that the risks entailed in liberalising the law have to be weighed against the benefits that will flow from these reforms. The committee, for example, said—

> "While there is a risk of the Executive influencing members from both sides of the House, this must be weighed up against the benefits of having members more involved in the range of activities which these Crown appointments concern."

At the end of the day, this is an area where a difficult but necessary policy balancing decision needs to be made. Most of those who have looked at the matter have concluded that the benefits of liberalising the law outweigh the possible risks. It is clear that LCARC reached this conclusion, because in its Report on the Consolidation of the Queensland Constitution it recommended replacing the term "office of profit" with "paid public appointment" and would have excluded from this latter concept payments for out-of-pocket expenses reasonably incurred. Indeed, when one looks at LCARC's comments at page 10 of its report on the office of profit provisions, it becomes very clear just how unsatisfactory they are. The committee said—

> "Because the existing disqualification provisions are particularly obscure and quite possibly conflicting, the committee approached them in a less conservative manner than it had approached other areas."

Caution will need to be exercised by Government, nonetheless, to ensure that these reforms do not have the opposite result of what is intended and needed—perhaps some guidelines or a code developed to ensure that the current unlimited discretion of the Executive in appointing MLAs is not abused or transgressed.

Even if there is absolutely nothing wrong intended in appointing members to various positions, there is always the risk that a member who has many other parliamentary and constituency duties to perform could be placed in a position where his parliamentary duties suffer. I raise these points in an endeavour to assist and not with any intention of trying to secure a debating point. This is an area about which each and every one of us in this Chamber needs to be vigilant and careful, especially at the moment, when there is widespread public dissatisfaction with the political process.

I mentioned at the outset that these reforms only partially deal with all of the problems relating to office of profit situations. Anyone who has read the various legal opinions attached to the various EARC reports on this area or the full recommendations of LCARC would appreciate that these reforms go only part of the way in dealing with the current unsatisfactory state of the law. It is a little disappointing that we cannot tidy up this whole area once and for all and not leave it with the job only half done. In any event, I am pleased that some attempt has been made to put some logic into this part of our Constitution, because it currently is confused and confusing.

However, one point remains crystal clear, and that is that office of profit provisions remain relevant and essential to the proper functioning of our parliamentary system. These reforms seek to update the provisions but, as I said, open the door to possible abuses. I hope that the Premier gives some consideration, possibly in conjunction with his ethics adviser, to develop some guidelines that limit the current totally unfettered ability of a Government to appoint parliamentarians to offices. Without some guidance in place to ensure that the broad discretions we are now vesting in the Executive are not misused, there is always the possibility of the parliamentary process being tainted by an administration anxious to ingratiate itself with key parliamentarians. However, despite these reservations, and in the clear knowledge that this area of the law needs reforming, I support the Bill.

———————