Speech by

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MEMBER FOR WARWICK

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EVIDENCE (WITNESS ANONYMITY) AMENDMENT BILL

Mr SPRINGBORG (Warwick—NPA) (Deputy Leader of the Opposition) (11.29 a.m.): In rising to speak on the Evidence (Witness Anonymity) Amendment Bill, I indicate at the outset that the Opposition will be opposing this legislation and will be opposing it most strongly. I will be seeking to outline the reasons for that during the course of my contribution.

To give the Attorney-General some credit, I understand that a great deal of what is contained in this legislation strikes very much at the heart of what the Attorney-General has espoused in the past as being his basic philosophy and his basic concerns as a civil libertarian. I understand also that the Attorney-General may not necessarily have supported the passage of this legislation through Cabinet; it may have actually been the case that others were successful in Cabinet in having this legislation brought to the Parliament. Nevertheless, today we have a situation in which this Parliament is debating legislation that will have a very profound effect on the way that people have traditionally been able to exact natural justice in the courts of Queensland.

There is little doubt that crime is something which concerns the community at large. There is little doubt that we need to make sure that we have effective legislative provisions to combat it. We need to have well resourced crime fighting organisations that are capable of tackling crime, particularly organised crime, which seems to be flourishing in many areas because of the big profits to be made. We need to make sure that our crime fighting bodies, whether it be the police or the Crime Commission, have the capacity to work within Queensland and also nationally and internationally to be able to tackle organised crime. The Bill before us today is not an effective or a fair way of achieving that aim.

There is no doubt that covert operatives are in danger every time they go out in the field. I think that is something that we all realise. I personally have some concerns about whether we should have covert operatives at all. However, I will leave that to the shadow Minister for Police, because that comes within the Police portfolio and he will be speaking on that matter later in the debate. If we concede that crime and organised crime is something which strikes at the core of what we all believe in, which often involves very elaborate schemes and the use of the latest technology, then we need to have covert operatives who are able to go out and infiltrate these particular organised crime networks. Our crime fighting bodies need information from covert operatives in order to break them.

A fundamental tenet of our justice system to date has been the right of an accused person to face their accuser. Whatever we do, we need to be very careful to ensure that that fundamental right is not diminished in any significant way. I am on the public record as saying that I have little time for accused people once they have been convicted by our courts, particularly if they have been found guilty of serious crimes. If that is the case, I believe they should have the book thrown at them. My concern is to ensure that people who are accused have the right to a fair trial and to use all capacities of natural justice which have traditionally been available to them to face their accuser and to be able to clear their name.

In many cases, they will not be able to clear their name because the volume of evidence against them—the evidence of witnesses and the argument mounted against them in the court—is too overwhelming and profound. However, from time to time there are cases where people have been able to face their accusers and, through natural justice, put forward a very strong argument that they are

innocent and have been able to walk out of the court as free men or free women. We need to ensure that that fundamental tenet of natural justice is in no way compromised. If that were to happen, it would be to the detriment of the free and democratic society in which we live.

I am sure members of the committee responsible for drafting this legislation will have seen some of the submissions that have been forthcoming from people who have an interest in this area. Some very good points have been raised in those submissions, and I intend to mention them during my contribution to the debate today. I will not read all of the details which have been provided to me, but there are some salient points on some issues contained in this legislation which the Parliament needs to know about. Firstly, I refer to the submission of the Queensland Council for Civil Liberties. Whilst I spend more time at loggerheads with the Council for Civil Liberties than in agreement with it—actually, I am very rarely in agreement with it—we must remember that the Civil Liberties Council represents a point of view that may not necessarily otherwise be represented by members in this Parliament because of the issues raised and their public sensitivities.

Nonetheless, the Civil Liberties Council raised some very valid points, as did the Queensland Law Society. Those views deserve the consideration of the Parliament. The submission of the Civil Liberties Council on this legislation states—

> "No convincing case, especially by reference to actual examples of Covert Operatives (hereinafter referred to as 'CO's') being threatened has been advanced for this legislation.
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> A feature of post Fitzgerald criminal law change in Queensland was supposed to be that there is an onus on those who propose greater police powers to make out a case for those powers, particularly by way of actual examples of how the current law which is to be changed is inadequate.
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> I have not seen any examples put forward to indicate that there is currently a problem with Covert Operatives requiring the enactment of the Bill under submission. It is therefore proper to proceed on the basis that no examples exist to justify this new legislation. The Bill's genesis seems to emanate from the 'wouldn't it be a good idea if...' public policy basket. The Bill seems to be change for change's sake."

With regard to section 14B, the submission goes on to state—

> "A senior police officer or the head of the QCC or CJC (hereinafter referred to as 'the Head') can give a witness anonymity certificate if he considers it reasonably necessary to protect the person who is, or was, a Covert Operative for the agency.
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> This is an incredibly wide provision. It does not prescribe any criteria at all to be considered by the senior police officer/Head for a certificate to issue. This does not even require the senior officer or Head to hold a belief that the person for whom the certificate is to be granted is even in any danger.
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> This is in contradistinction to requirements by the European Court on Human Rights that in the case of police witnesses that presumptions about the risk of reprisals are not enough. Efforts should be made to establish whether there was an actual threat to the officers or their families (see New Law Journal, 14 May 1999 page 703).
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> This is a recipe for cover ups and consequential increased risks of police corruption and a higher rate of miscarriages of justice."

Further, the Civil Liberties Council's submission states—

> "The senior police issuing a Certificate will be greatly comforted by the fact that the decision to grant an Anonymity Certificate cannot be challenged in any court.
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> ...
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> A further problem with the incredible width of the Section is that a Certificate can be granted for a person who is a CO not for a particular operation but simply on the basis that he was a CO for the particular law enforcement agency."

As is demonstrated by the breadth of concern outlined in the submission from the Civil Liberties Council, there are other very real issues. I table this submission for the benefit of members of Parliament who are interested in reading it. I suppose there might not necessarily be many except for those who have a particular interest in this area. Nevertheless, there are some salient points worthy of consideration and worthy of commitment to the public record.

Another submission also before the committee responsible for drafting this legislation is from the Queensland Law Society. Much of what it says in its extensive submission reflects the concerns of the Queensland Council for Civil Liberties. Nevertheless, they are very relevant points which deserve to be read into the public record of this State. That submission states—

"The Witness Anonymity Bill not only proposes to reinstate the concept of indemnified witnesses, it proposes further that witnesses indemnified in advance will commit State approved crimes and will then give evidence anonymously. It would appear that this Bill has been drafted without regard to the report of Judge Carter QC in the Trident Inquiry. It is difficult to contemplate how such a relevant and damning report into the 'controlled operation' could be so readily forgotten or ignored.

By way of introduction, the Society questions the need for such legislation.

The Society's Criminal Law Committee are not aware of any actual problems which have been caused by undercover police having to use their real names in court, as opposed to using a pseudonym.

Logically, if an undercover officer is to be permitted to give his evidence by way of a pseudonym then the next policy development we will see in this area will be that arresting officers who have brought in, interviewed and charged a particular person will then be asking to give their evidence anonymously on the equally vague basis as is sought in relation to undercover agents, namely the non specific, probably non existent, threat to their personal safety.

Concerns about changing laws or procedure in favour of witness anonymity have been addressed by no less a figure than the Queensland Crime Commissioner, Mr Tim Carmody. In an article in the Queensland Lawyer, February 1999, Mr Carmody, after considering a range of cases which strongly articulate the need for open justice concludes:-

'Subject to appropriate safeguards, a Judge or Magistrate should be able to modify the principle of open justice a little to permit a witness to give evidence without disclosing his or her name, address and occupation where it is necessary so to ensure the overall attainment of justice.

In such cases, the proceedings will be fair in the relevant sense notwithstanding that the accused's right of confrontation has been curtailed in some degree to meet an unusual exigency.' ... (ref. 'Witness Anonymity and Criminal Justice in Queensland' by Tim Carmody, Queensland Crime Commissioner, Queensland Lawyer Volume 19. page 126-134).

It is pertinent to observe that Mr Carmody has concluded that there is to be a change in procedures in relation to witness anonymity it should be 'to meet an unusual exigency'.

Immediately before the conclusion as outlined above, Mr Carmody also asserts:-

'The argument that anonymity is incompatible with the fair trial right, because it increases the risk of the wrongful conviction of an innocent person by weakening the defendant's ability to contradict untenable evidence has obvious logical force but it cannot be accepted as applying in every case without qualification.'

Even if one proceeds from Mr Carmody's standpoint that anonymity should be permitted in relation to undercover agents 'to meet an unusual exigency' (a position the Society does not share), it is clear that your proposed legislation goes considerably further than that contended for by Mr Carmody."

Also, the Law Society says with regard to the review of witness anonymity certificates—I think it raises a very good point—

"We are opposed to the so-called protection of review of the Certificates by the Criminal Justice Commission.

Those Certificates are reviewed well after a case is finished and we are at a loss to understand why the credible and practical alternative of the Public Interest Monitor is not put forward as having a central role in the operation of this Bill.

It will be remembered that the Public Interest Monitor was introduced to bring a degree of credibility to the issuing of listening devices."

I pay tribute to the member for Crows Nest, who was Police Minister in the coalition Government between 1996 and 1998, for his very firm commitment to that. I think it was a very important thing which underwrote the concept of natural justice and oversight in the State. I think the member for Crows Nest deserves commendation for that. The Law Society's submission continues—

"We would envisage that the Public Interest Monitor's role would be similar to that which he fulfils in the listening device legislation, namely that an application for a Anonymity Certificate ought to be made by the relevant police officer to a court and the court should properly be the Supreme Court on the basis that the Supreme Court's jurisdiction in criminal matters is quite

limited and the bulk of cases involving Anonymity Certificates were probably run in the District Court.

If our quite reasonable submission about the necessity for a covert operative to be shown to be in danger is adopted as part of the framework of this Act, then there could be evidence put forward before the relevant issuing Supreme Court Judge of that issue and the Public Interest Monitor could then argue whether the evidence justified the issuing of an Anonymity Certificate.

Indeed, as a practical suggestion following on our substantial criticisms of the almost unfettered discretion proposed to be given to a senior police officer to grant an Anonymity Certificate, we would strongly argue that that role should be performed by a Supreme Court Judge, rather than a senior officer.

As well as the Public Interest Monitor having a role in the issuing of Certificates via a Supreme Court hearing, we would envisage also that that Monitor would have a role in reviewing how a particular Certificate is working in practice so as to ensure a debacle such as Trident does not happen again."

I table that document for the benefit of members who would like to read it in full, because it is quite extensive and it contains the full range of concerns of the Queensland Law Society.

I do not know how many submissions the Attorney-General received in response to his call for public comment on the intention to introduce such legislation. I am unable to say how many submissions there were in support or in opposition. Maybe that is something the Attorney-General could elucidate when he replies to the debate. I would be most interested to know what other concerns were raised by other individuals or organisations in response to, firstly, the intention of the Government to introduce such witness anonymity legislation and, subsequently, the Act of Parliament which will flow from it.

As I said earlier, I think we must do everything we possibly can to ensure that the full range of protections exists in the community for the person who is accused, but of course we have to consider that in some cases—maybe not in all cases—a covert operative is in danger. I think this legislation seeks to put in place a mechanism whereby the balance tips too far against the accused and in favour of the covert operative, to the extent we could see some abuse. Let us face it: at the end of the day, not everybody involved in covert operations will necessarily be of absolute integrity. Far less a percentage of those who are accused will be of absolute integrity—that is for sure—but we need to ensure that we do not open ourselves up to the possibility of abuse which has been legislated by this Parliament and that something we seek to achieve does not have a detrimental effect. That is what this is all about. I am very concerned about that.

I think there are far greater, far more effective and far more protective ways that we can look to protect covert operatives. I think we should be preserving the common law right of the courts to make a decision in these particular cases. Let us face it: there have been a number of cases in Queensland, over the last decade in particular, in which magistrates have sought to provide an opportunity for witnesses to present evidence to court under a pseudonym and that has been rolled over in a higher jurisdiction, and fairly so.

Mr Lucas: That is the common law.

Mr SPRINGBORG: It is the common law, but we know that there is still a capacity at the moment—however reticent the courts may be to use it—to enable a witness to give evidence anonymously if it is felt that there is a threat to that witness. There is the capacity in the common law for a court to be able to do that. If the courts are reluctant to provide that protective mechanism, we should impose on them a statutory obligation to consider a range of issues. We should not have the Chairman of the CJC, the Crime Commissioner, the Police Commissioner or the assistant commissioner being able to provide these witness anonymity certificates which provide some safeguards but relatively few safeguards. That is a real concern that I have.

What we should be doing is providing a statutory regime for our courts to enable them to consider the issue of witness anonymity. I think what we are talking about here is much too open to abuse. Those who wish to put forward a proposition that a covert operative should remain anonymous for the purpose of giving evidence should be able to go before the court and argue it before the court. If it can be demonstrated that there is a risk to that particular person, then that person could be protected by the court.

I am surprised that those people who choose to be civil libertarians sometimes are not civil libertarians at other times. This issue is a case in point. It is too broad, it goes too far, and I think that it has the potential of leading to very, very many problems. We are using a sledgehammer to crack a nut. I do not know how many covert operatives have actually been called before a court to provide evidence. I would like to hear the Attorney-General on that. As I understand it, a lot of covert operatives

go in, provide the information, then the police swoop and they are out—that is it. I would like to know what the checks and balances are—the very real checks and balances.

The CJC will review the issuing of a witness anonymity certificate by the Crime Commission or by the Police Commissioner within a certain period. I am not necessarily heartened or comforted by that at all. Who reviews them?

Mr Lucas: The Parliamentary Commissioner.

Mr SPRINGBORG: And is that person going to have all the information? Is the Government able to say with total confidence that the information that is provided will ensure that the principles of natural justice will be upheld? I am not convinced of that. There are some real issues with this Bill. I think we could have looked at doing this in other ways.

I have proposed in the past that we should consider a trial of witness anonymity in Queensland that leaves it to the discretion of the courts but is nevertheless defined in the common law so that the courts are not as reticent to provide witness anonymity as they are at the moment. I think there are cases where it could be used but it is not being used. But this is not the right way to go about it. If the Government is hell-bent on pursuing this legislation, then I say to the Government and the Attorney-General that maybe they should be considering a public interest monitor. I think a public interest monitor would be an effective way of addressing some of these issues if the Government feels the necessity to push forward with this legislation.

I had considered moving an amendment along those lines, but I thought there was probably not much of a chance of it being accepted. The Opposition moves amendments in Parliament, makes a statement of principle, and those amendments are rejected. I would prefer to put it forward as an option for consideration by the Government. If it is working very well in the area of listening devices, why can't we do something similar in the area of witness anonymity? Why can't we do that, as proposed by the Queensland Law Society? It would address many of the concerns that I have outlined here today, and they are reasonable, rational concerns. It is not a case of standing up for crooks. I cannot be accused of standing up for crooks. What I am saying is that there is the capacity for abuse. I know that in the Attorney-General's heart of hearts, in the civil libertarian blood that courses through his veins, he would share some of these concerns. I am surprised that there was not a greater consideration of these sorts of issues, which were raised in the submission by the Queensland Law Society.

I ask the Attorney-General to consider that matter again, because there might be an opportunity at some future time for him to bring amending legislation to the Parliament in relation to that particular issue. He might say that it is a broader policy issue and that it requires legislation of its own. The next Bill that we will be debating contains a provision which relates to broad public policy, but it is to be amended by way of a miscellaneous provisions Bill. I think that is something that the Attorney-General should have a very serious look at.

I understand the intent behind the legislation. However, at the end of the day, I think it poses far too many problems and potential problems and undermines the principles of natural justice that have been upheld by the courts in Queensland for a long, long time. Therefore, I think it should be opposed by this Parliament.