Speech by

Hon. R. E. BORBIDGE

MEMBER FOR SURFERS PARADISE

Hansard 10 November 2000

WITNESS PROTECTION BILL

Hon. R. E. BORBIDGE (Surfers Paradise—NPA) (Leader of the Opposition) (10.36 a.m.): In addressing the Witness Protection Bill, I must say that after his performance this morning I am surprised that the Premier has not decided to go home and have a rest and a Bex. I think that would be appropriate in light of this sort of performance.

Mr BEATTIE: Mr Deputy Speaker, I rise to a point of order. This is quite against the traditions of the Parliament. If the Leader of the Opposition wants to abuse Parliament in this way, then perhaps we should change the Standing Orders.

Mr DEPUTY SPEAKER (Mr Fouras): Order!

Mr BORBIDGE: You are really having a bad day, aren't you?

Mr BEATTIE: Point of order, Mr Deputy Speaker. I draw your attention to the issue of relevance. These comments are not relevant to the Bill. That is in Standing Orders.

Mr DEPUTY SPEAKER: I heard the point. The Opposition Leader's comments were obviously not relevant to the Bill. I ask him to continue with his speech.

Mr BORBIDGE: Thankyou, Mr Deputy Speaker. I note the extreme paranoia and sensitivity of the Premier and the desperation—

Mr BEATTIE: I rise to a point of order. I find those comments offensive and untrue, and I ask for them to be withdrawn.

Mr DEPUTY SPEAKER: I seek a withdrawal.

Mr BORBIDGE: He is obviously sensitive. I will withdraw.

Witness protection is a crucial part of today's justice environment. It makes sense to negotiate national rules under which witness protection may be managed on a national basis within a standard matrix—something this Bill proposes to do.

The Opposition has no objection to the principles brought into play in this process. In fact, we give it our full support. But there is another important principle involved—that is, the issue of public faith in the process, of guarantees as absolute as they can possibly be that suitable checks and balances are in place in the State's witness protection program. The Opposition does not believe that the Witness Protection Bill 2000 provides a system of checks and balances that passes the necessary tests of public confidence.

We believe this legislation is flawed. It should be withdrawn and it should be resubmitted in an improved form. For that reason the Opposition will be opposing this Bill. As happens so often with this Government and this Premier, they get it wrong. We do not oppose the Bill churlishly. We do not do so just to be difficult, and we do not do so from a position that will brook no argument from the contrary side of the equation that we would apply to setting policy of this level of importance and this level of inherent public risk.

The Witness Protection Bill 2000 proposes that the question of who should be brought into the Queensland witness protection program should, in effect, be decided by the chair of the Criminal Justice Commission. We oppose that because we believe it is fundamentally bad policy in the

Queensland context and because it ignores the fact that the Criminal Justice Commission is only one arm of the system here. We believe that the chairperson of the Criminal Justice Commission—whoever that person is, and however qualified that person may be—should not be placed in a position where the critical issue of who should get witness protection is a question ultimately decided by the chairperson of the CJC alone. We believe that this is a fundamental flaw in the legislation before the House; that it would, in fact, confer this singular duty upon the chairperson of the Criminal Justice Commission.

We believe that under our system of justice the courts are the ultimate protectors of the liberty of citizens who come to the attention of the law for whatever reason and that in the area of criminal justice it is the courts and the judges of those courts who must be the ultimate arbiters in the difficult questions of dealing with the law. We should not forget that in dealing with witness protection we are fundamentally dealing with the exercise of lawful jurisdiction over citizens.

In our view, a Star Chamber approach to justice is contrary to the public interest. In our view, a Star Chamber is irredeemably flawed as an agent of justice. That is not to say that the Criminal Justice Commission is unsuitable in any way as an agency of justice or its personnel as agents of justice. Any such arguments over any particular matter concerning the commission are not matters that we would want to argue here in this debate over this Bill. Our concern as the alternative Government—and given the political swamp into which the Government of the day has now been plunged, the only alternative to the Government—is for absolute probity in delicate matters of legislation.

In Queensland where the checks and balances on Executive power are fewer than in other places and where, as we have seen, this Government will guillotine anything through this House to avoid embarrassment or to play catch-up with its legislative timetable, there is a strong argument for placing fundamentally extra-judicial decision making in more than one pair of hands.

Witness protection is one such area where, to modify an old saying, many hands will throw more light on the work to be done. We believe that throwing more light onto this subject would be both a significant public service and a sensible outcome of policy. We therefore propose that decisions about witness protection and about access to the witness protection program should be made by a triumvirate: the chairperson of the Criminal Justice Commission, the head of the Queensland Crime Commission and the Chief Justice. Such a system would engage the courts directly in the administration of an area of State action where the presence of a justice would be a direct benefit to the people. Such a system would also engage the Crime Commission in the process to the benefit of the system of justice as a whole. Such a system would broaden rather than narrow the mechanisms by which the State operates to control the activities of citizens and deepen the administrative and judicial base from which such critical decisions are made.

The Government may choose to argue that such a system would complicate matters. We reject that response. It seems to us that a meeting of the minds of the chairperson of the Criminal Justice Commission, the head of the Queensland Crime Commission and the Chief Justice would not unnecessarily complicate anything and that it would produce benefits both for the system and for the people. Such a system would not in any way fail to mesh with the principles of complementary legislation with which the various Australian jurisdictions have sensibly decided to endow their witness protection programs.

There is no fundamental difficulty in operating nationally in a manner that is complementary, but in terms of each participating jurisdiction's detailed requirements and different sets of regulations governing witness protection. The issue is whether witness protection works in any given jurisdiction and whether, within a given jurisdiction, witness protection conforms to the law as applied within those borders. I believe that is a fundamental point we often seem nowadays to miss and it is not just about witness protection. It is about the rush towards administrative conformity that is destroying the sovereign nature of the States in our Federation. That is not an argument I want to prosecute here in any detail, but it is a point that needs to be understood and this is as good an opportunity as any to restate and to reinforce the point.

I believe it is a point that the Government should be making much more often. It does not, of course; it prefers to complain. I believe, from hearing his constant repetition of the word, that the Premier's preferred term of the moment is whinge about how difficult everyone else makes it for him and his administration to get ahead. I think the spoke between his wheels is one that he puts there himself or perhaps others in his party help him do it.

Nowadays we hear too often that we need copycat legislation when in fact the requirement is for complementary legislation. What we need in areas where State law is the basis for State matters is Queensland legislation for Queensland's jurisdiction. This is a Federation. Our job as State politicians is to make sure it remains so despite the efforts of that deadly collective of Canberra centralists, Sydney and Melbourne money and Labor operators who think that they own Australia and they can do what they like.

We are here, however, to debate the merits of this Bill before us on the matter of witness protection legislation. I want to expand on some other comments. I know with witness protection the basic rule is the same as should be applied to any legislative arrangement involving separate State and sovereign jurisdictions. That is, while laws and regulations should of course be complementary, should facilitate action in one jurisdiction that could or should be taken in another, uniformity is neither necessarily desirable nor, in the final analysis, necessary.

One such instance of this fundamental law of Federation exists in the Bill being debated now. Under its proposals, the Criminal Justice Commission is the body that within the Queensland jurisdiction will, from time to time, have to decide on the evidentiary and policing issues of witness protection. It is precisely because of this factor that the commission should not also be the final arbiter, far less the only arbiter, on these questions. There is nothing in our system of justice that permits the prosecutor of an action also to be the judge of that action or the decision-maker in what action is then to be taken. That is a fundamental strength of our whole system of life.

It is the Opposition's view that the protection of the people—and that is importantly the people of Queensland as well as any persons actually requiring access to witness protection—will be best provided in this context by engaging the courts in the processing of witness protection measures. There are no questions of timeliness that would apply. There is no danger to witnesses genuinely requiring protection by the measures to be conferred under the Bill from the addition of the judiciary and the further check and balance provided by the Crime Commission to a process that would otherwise lie wholly within the brief of the Criminal Justice Commission. There is, in fact, greater protection to be gained from adding such a process to the flawed one proposed by the Government in the Bill. Indeed, I am sure that the Queensland people would heartily welcome the interposing of the judiciary between a recommendation of the Criminal Justice Commission and any executive action it subsequently took to carry out that recommendation.

I believe that sort of sensibility is also seen in evidence that the Commonwealth Ombudsman, Mr Ronald McLeod, gave to the joint committee on the National Crime Authority about complaints flowing from the Federal witness protection program. Mr McLeod told the committee at its hearing on Friday, 23 June this year—

> "Over recent years, while we have not received a large number of complaints from members of the witness protection program, we have had around a dozen complaints that have been lodged since the Act in its current form was introduced. So we have around two complaints a year. Unlike other parts of my jurisdiction, my role in relation to complaints about the witness protection program is somewhat more limited in that I do not have a capacity to conduct an own motion inquiry into a witness protection matter, nor do I have a basis for conducting any monitoring or audit activities associated with a program, which distinguishes that area from my general jurisdiction where I have wider powers.
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> With a program of this kind that obviously needs to be very highly protected. There are very good arguments why an office like mine should be able to provide some safeguard to program participants so that they can have an opportunity to have any grievances or problems addressed outside the framework of the people who are managing them if they feel that there are matters that affect them and are causing them concern. I think that is a very important safety valve for a program that, by its very nature, places people in a situation where their normal rights as citizens are often very much circumscribed."

That passage is important in terms of our consideration today of the proposed Queensland legislation. It is important not because it is pertinent to the issue at hand—other than on the periphery. It is important because it demonstrates that any activity—be it witness protection or whatever—is subject to fault. We need only remind ourselves of the well-publicised activities in the mid 1990s of Mr X. This enterprising gentleman parlayed a deal he made with the Criminal Justice Commission while he was under the witness protection program—with a new identity—to help put the organisers of a racket involving stolen Harley-Davidsons behind bars into a private scam. It took him to the United States—on the run of course—and, as a by-product of this location and status, out of the witness protection program.

I do not seek here to apportion blame to any of the Queensland agencies involved in the management of that particular protected witness. But it is a case that surely illustrates that supposedly fruitful connections should always be tested to see whether in fact they are lemons. It indicates that risk assessment is a process that could profitably—and should, sensibly—be conducted by as wide a range of expert operatives as possible.

This is particularly the case because while Mr X may have given everyone a laugh by making monkeys out of the CJC, what it actually meant was that he had been provided by the State with the means of committing new crimes to the detriment not only of the public purse but also the private pockets of those he stole money from. That is simply not acceptable. That is why I am arguing that if

the Government was prepared to come in with legislation on the basis that I am proposing, where we widen the numbers of people who make the determination, the chance of a repeat of the Mr X fiasco would be minimised. It is even more particularly the case because, as we know from reading the newspapers and watching television programs, some protected witnesses wind up dead.

Our purpose in considering the Bill before this House is to seek to establish beforehand what possible quantum of faults exists within it and how to redress them before it passes into legislation. There is a fundamental flaw in any administrative arrangements that encompass a single agency being both the active operational agent and the arbiter of those arrangements. No doubt it can be argued that in fact the Commonwealth Ombudsman finds very little to argue with in the arrangements which the joint committee of the Federal Parliament is examining. That is to the good.

But the issue in Queensland remains that under this proposed legislation the Criminal Justice Commission would be both the active operational agent and the arbiter of the new, "improved" witness protection program.

We are not, on this side of the House, overly disposed to attribute infallibility to the Criminal Justice Commission. We on this side of the House would far prefer to see this legislation presented in the form of an arrangement that brought the courts into the equation. If this legislation were ours, that is what it would propose. We would then have no difficulty supporting it.

But it is not. Because it is not, because in this instance it is defective, the Opposition will not be voting for the Bill. It would be our intention, on resuming office, to amend the legislation to bring witness protection under the broadened arrangements I have detailed to the Parliament today.

In his second-reading speech, the Premier asserts this Bill provides greater certainty to a protected witness that their security will not be compromised in a situation where they are required to give evidence. We certainly accept the need to tighten up considerably on the whole business of witness protection.

In his second-reading speech, the Premier also said—and this is worth repeating so as to highlight the position—

> "The sensitive nature of witness protection decisions is currently recognised in the Judicial Review Act 1991, which provides in Schedule 2 that decisions made under section 62 of the Criminal Justice Act 1989 are decisions for which reasons are not required to be given. However, a person aggrieved by such a decision may still seek judicial review.
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> There are legitimate safety concerns with the external review of witness protection decisions. These concerns relate to the evidence that may be required in the course of external review. This evidence may prejudice the safety of witnesses and witness protection officers and may indirectly disclose witness protection methods. In a similar vein, this Bill proposes that the Freedom of Information Act 1992 should not apply to the witness protection function of the commission ...
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> If witnesses are to be truly protected and the integrity of the witness protection program is to be truly safeguarded, the usual administrative law review procedures cannot apply. Having said that, internal levels of assessment within the commission are strict and numerous. In addition, the Parliamentary Criminal Justice Committee and the Parliamentary Commissioner both have powers to review and investigate decisions or procedures undertaken by the commission with respect to witness protection.
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> This Bill provides a sound and comprehensive statutory basis for what is acknowledged internationally as a vital resource requirement of law enforcement. It must be remembered that witnesses are protected not just in their own interests but in the interests of the community at large."

There is nothing in what the Premier had to say in that passage I have just referred to with which the Opposition would want to argue. He is absolutely right. But he will fail in this mission—his usual mode of operations, admittedly, but a body of practice we on this side of the House would like to encourage him to abandon in favour of success—because he has brought built-in failure into this place, again, with this proposed legislation.

I do not intend to take up the full allotment of time available to me for this second-reading speech. I thought instead—having made all the points I wish to make at this stage of proceedings—that I would do my bit to help alleviate the Government's self-made mess of a parliamentary timetable. Here is one log we can swiftly remove from the legislative logjam that the Premier and his parliamentary business managers have created in this Parliament.

There is a fundamental flaw in this Bill that in our view goes right to the heart of the feasibility of the legislation it proposes to put in place.

If the Government were to be sensible— and we all hope that one day it will be—it would withdraw this Bill and come back with a model that meets the broader, more pertinent and certainly highly relevant requirements that I have just detailed. Were it to do so, it would have our support. It is unlikely we shall be able to advance this support.

As we have seen from the 17 Bills this Government has guillotined in its short and thoroughly lamentable two-and-nearly-a-half-years in office, Labor apparently believes itself to be in charge not of legislation so much as commandments and its Bills to be inscribed on stone rather than printed on paper. The Opposition looks forward to voting for legislative excellence. We support the principles in respect of the Bill. Once again the Government has comprehensively botched it up. Therefore, we will be voting against this Bill.