Speech by

Hon. R. WELFORD

MEMBER FOR EVERTON

Hansard 28 November 2001

ELECTORAL (FRAUDULENT ACTIONS) AMENDMENT BILL

Hon. R. J. WELFORD (Everton—ALP) (Attorney-General and Minister for Justice) (8.30 p.m.): I move the following amendment to the motion for the second reading—

Omit all words after 'bill' and insert 'be referred to the Legal, Constitutional and Administrative Review Committee for consideration and report back to the House before 31 March 2002 and that further consideration of the bill be delayed until the committee has reported.

Mr HORAN (Toowoomba South—NPA) (Leader of the Opposition) (8.31 p.m.): I second the motion.

Hon. R. J. WELFORD (Everton—ALP) (Attorney-General and Minister for Justice) (8.31 p.m.): The government has given some consideration to the Electoral (Fraudulent Actions) Amendment Bill proposed by the shadow minister. While we understand the intentions behind the bill, we think there are some fundamental problems with it. However, rather than simply engaging in a purely political debate about this with the opposition, we think it is appropriate that this be referred to the Legal, Constitutional and Administrative Review Committee—LCARC—for its further consideration.

The government, as the Premier indicated in his Barcaldine statement on electoral reform, is unequivocally committed to strengthening our electoral laws to enhance the integrity of electoral rolls and also stamp out the prospects of any future electoral fraud. We on this side of the House do not cavil one iota with the proposition that electoral fraud is an utterly unacceptable practice. It is anathema to our democratic system. Few things are more important to the stability of our system and the confidence that the public has in it than a sound electoral system based on regular, free and fair electoral processes.

So we do not disagree with the sentiment that the opposition seeks to express in proposing this private member's bill. However, there are some fundamental concerns that I as Attorney and the government have in relation to the bill. The first is that one of the difficulties with the drafting of the offence of electoral fraud in the private member's bill is that it very much mirrors a similar offence under Commonwealth law. As the members of the opposition would be well aware in relation to another law recently ventilated in the Court of Appeal, where a Commonwealth law covers the field in relation to a particular matter, then any attempt by the state to legislate in relation to that is inconsistent under section 109 of the Constitution and therefore invalid.

So the fundamental or threshold question in relation to the provision as drafted in the private member's bill is that it is very likely to be simply an invalid law. There is no point, obviously, in pursuing a law that has no effect in that respect. I think my discussions with the shadow Attorney and the Opposition Leader have drawn some mutual understanding in relation to that point.

That point aside, the other fundamental concern that the government has in relation to it is, of course, in relation to the matter raised by the Opposition Leader this morning in terms of mandatory minimum penalties. The government—for a range of very sensible reasons, in my view—does not support mandatory minimum penalties. For simple offences in our state, there are standard on-the-spot fines; there are fixed fines for a whole range of simple offences. Traffic fines are an example. A whole range of other offences have fixed penalties. But for indictable offences, or offences other than simple offences, it is a fundamental tenet of our justice system that the separation of powers reserves to the courts the principle of judicial independence.

Inherent in the principle of the independence of the judiciary is the capacity to exercise proper discretion in allocating penalties or sentences that are appropriate to the facts and circumstances of any offence that is determined to have been committed. So mandatory minimum penalties are, as a matter of principle, an inappropriate intrusion into judicial independence. That is a fundamental, time-honoured, traditionally acknowledged foundation of our criminal justice system.

Although it is appropriate for the parliament to express in its laws a view about the relative severity of various crimes and the types of penalties that should be imposed, it is not appropriate for the executive government, through the parliament, to dictate or constrain the exercise of judicial independence in relation to the assessment of sentences for indictable offences.

Apart from that question of principle, there are further reasons for not supporting mandatory minimum sentences. Firstly, where do you set the mandatory minimum? Secondly, it simply does not work. In relation to the first element, mandatory minimum sentences, by their nature, deal only with those offences of any particular kind at the lowest end of the scale. In other words, where someone has committed any offence, and let us take electoral fraud or burglary, there may be mitigating circumstances—pressure from associates or some other circumstances. They may admit the error, they may confess, they may cooperate with authorities—they may do all those things that a person who essentially is not a criminal but has made an error of judgment would do and, in that cooperation, admit their guilt and accept a penalty. But by imposing a mandatory minimum custodial sentence, one takes away the opportunity for any recognition of that cooperation or that confession to be acknowledged. That is the problem with mandatory minimums, because they can deal only with the bottom end of the range of offences of a particular kind, and they deprive the opportunity of responding to genuine remorse by an offender who confesses and admits their guilt. So in that respect, they are unworkable.

The second respect in which mandatory minimum custodial sentences do not work is simply by historical experience. The mandatory penalties that the Northern Territory trialled under its previous ill-fated government and the mandatory penalties that operate in a number of the states of the United States of America have not resulted in a reduction in the incidence of crime in any of those jurisdictions, least of all in the incidence of the crimes for which minimum jail sentences were imposed.

In practical terms and in effectiveness terms, minimum jail sentences for particular crimes simply do not work. One does not have to argue on a question of principle or have a philosophical debate or adopt a position of political ideology about this to understand that while at a superficial level the desire to ensure that someone who commits certain types of offences does time in jail is a natural reaction to the heinous intrusion on the rights of victims, the simple reality is that the best mechanism for that judgment to be made is through the respect for the independence of the judiciary, which is a foundation stone of our criminal justice system. Any attempt to fiddle with that or to modify it by what, in the end, can be only half-baked measures can work injustice and can work against a system which seeks to encourage people who have committed crimes to confess their guilt, admit it before a court and accept a penalty. There is no encouragement for anyone to do that if they know that they have no choice but to go to jail. They have no incentive not to put the system to all the expense and difficulty of proving all the evidence necessary to find the guilt in the first place.

These are matters which I think are appropriate to be referred to LCARC. This reference to LCARC is entirely consistent with the recommendations of the Fitzgerald inquiry in the late 1980s. Commissioner Fitzgerald, when he conducted the inquiry into corruption in the then police force, made a recommendation that any future amendments to electoral laws should be scrutinised by a parliamentary committee. So this proposal is understandable in its sentiment and consistent with the government's concern to stamp out electoral fraud and make it absolutely clear that electoral fraud is utterly unacceptable and intolerable to our system of parliamentary democracy.

This proposal is appropriately referred by the government—and I thank the opposition for its cooperation in this regard—to LCARC for more extensive consideration and analysis so that the committee, an all-party parliamentary committee, can report back to the parliament and advise the parliament as a whole on the best way forward in dealing with what is undoubtedly an intolerable misdemeanour or offence, namely, the attempt to corrupt the due process of democratic elections in our state. I commend my amendment to the House and thank the opposition for its cooperation in this matter.
