# MEMBERS' ETHICS AND PARLIAMENTARY PRIVILEGES COMMITTEE

## REPORT ON A MATTER OF PRIVILEGE–UNAUTHORISED RELEASE OF CORRESPONDENCE BETWEEN A COMMITTEE AND MINISTERS

## REPORT NO. 42

### 1. INTRODUCTION AND BACKGROUND

#### 1.1 Prohibition against the unauthorised release of committee proceedings

Standing Order 197 of the Legislative Assembly's Standing Rules and Orders provides:

> *Disclosure of evidence and documents*
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> *The evidence taken by a Committee and documents presented to it which have not been presented or reported to the House, shall not, unless authorised by the House or the Committee, be disclosed to any person other than a Member of officer of the Committee.*

The Standing Order is one manifestation of a larger principle of parliamentary law and practice: the proceedings of parliamentary committees are confidential until the committee reports those proceedings to the House or otherwise orders their release or publication.

It has also long been held that the premature or unauthorised release of committee proceedings is a contempt of Parliament. In this context "proceedings" includes evidence taken by committees by way of in camera hearings, submissions presented to the committee, briefing papers prepared for the committee by its secretariat, draft reports by the committee and correspondence between the committee and witnesses, departments and Ministers.

#### 1.2 Review of the Parliamentary Commissioner and role of LCARC

On 15 July 1999 the Legal, Constitutional and Administrative Review Committee ("the LCARC") tabled it report No. 14 titled *Review of the Report of the Strategic Review of the Queensland Ombudsman (Parliamentary Commissioner for Administrative Investigations).* In that report the LCARC recommended an external management review of the Office of the Parliamentary Commissioner for Administrative Investigations ("the Ombudsman").

On 26 August 1999 the Premier, as Minister responsible for the Ombudsman's Office, in a statement to the Legislative Assembly indicated agreement with the LCARC's recommendation for a management review of the Ombudsman's Office.

On 15 September 1999 the Legislative Assembly passed a motion calling on the Premier to conduct a management review of the Ombudsman's Office. The Acting Premier subsequently tabled a response to the LCARC's report No. 14 on 26 October 1999 consistent with the Legislative Assembly's resolution.[1]

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[1] The Premier was required to respond to the LCARC's recommendation under s.26 of the *Parliamentary Committees Act 1995* (Qld).

On 23 November 1999 the Premier introduced the *Parliamentary Commissioner and Freedom of Information Amendment Bill.* The purpose of the Bill was largely to facilitate the management review of the Ombudsman's Office and the Office of the Information Commissioner.[2]

Pursuant to the amended *Parliamentary Commissioner Act 1974* and the *Freedom of Information Act 1992,* the LCARC is to be involved in the selection of the person who is to conduct the review. Specifically, the responsible Minister must consult with the LCARC about the appointment of the person and the terms of reference for the review.[3]

In summary, as part of its responsibilities, it appears that the LCARC corresponded with the Premier and the Attorney-General about the selection of the person to conduct the review and the terms of reference of the review.

### 1.3 LCARC's correspondence a proceeding in Parliament

There is no doubt that the correspondence between the LCARC and a Minister is a proceeding of the committee and, therefore, a proceeding in Parliament.[4]

### 1.4 Unauthorised release of LCARC's correspondence

From 8 March 2000 a series of articles appeared in *The Courier-Mail*.

- 'Consultant declares donations to Labor', *The Courier-Mail,* 8 March 2000;
- 'Beattie helped hire donor for consultancy', *The Courier-Mail,* 9 March 2000; and
- 'Consultant claims tripartisan support', *The Courier-Mail,* 10 March 2000.

On 13 March 2000 an article appeared on the front page of *The Courier-Mail* titled 'Beattie's role in contract blasted'.

The article substantially referred to a letter dated 'December 23' between the Chairman of the Committee, Mr Gary Fenlon MLA, and (incorrectly)[5] Dr Glyn Davis, Director-General of the Department of the Premier and Cabinet.

In fact, the Chairman wrote to the Premier on behalf of the committee (and in accordance with a committee resolution) on 23 December 1999 regarding the appointment of The Consultancy Bureau to conduct the management review of the Offices of Ombudsman and Information Commissioner.[6] That letter was marked 'private and confidential'. A copy of the letter was provided to the Hon Matt Foley MLA, Attorney-General, Minister for Justice and Minister for The Arts.[7]

The Members' Ethics and Parliamentary Privileges Committee ("the MEPPC") accepts that at no time had the committee authorised the publication of that correspondence.

According to the LCARC, the article not only referred to the existence of that correspondence, but accurately quoted from that correspondence. It was clear, therefore, that there had been an unauthorised release of the committee's proceedings.

## 2. LCARC'S RESPONSE

### 2.1 Relevant procedure

The Standing Rules and Orders do not specifically provide for the procedure to be adopted in relation to the unauthorised or premature release of committee proceedings.

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2 The Ombudsman also acts as the Information Commissioner.

3 See s.32 *Parliamentary Commissioner Act 1974* (Qld) and s.108A *Freedom of Information Act 1992* (Qld).

4 See s.3 *Parliamentary Papers Act 1992* (Qld).

5 According to the LCARC's letter to the Speaker dated 13 March 2000.

6 Ibid.

7 Ibid. The Attorney-General is the Minister responsible for the Office of the Information Commissioner.

Erskine May,[8] at page 124, makes the following observation in respect of the premature publication or disclosure of a committee report:

> *The procedure for dealing with improper disclosure of select committee evidence or proceedings was altered with effect from the beginning of session 1985-86, following a report from the Committee of Privileges. The committee concerned seeks to discover the source of the leak and to assess whether it constitutes (or is likely to constitute) a substantial interference with its work, with the select committee system, or with the functions of the House. If the committee considers that there has been or is likely to be such interference, it reports to the House accordingly, and a report of this character stands automatically referred to the Committee of Privileges.*

The authority quoted by Erskine May for this proposition is the *Second report from the Committee of Privileges - Session 1984-85 Premature Disclosure of Proceedings of Select Committees*.[9] Extracts from that report are attached as Appendix I.

On 18 March 1986 the House of Commons resolved that the House agreed with the above report of the Committee of Privileges and declared that the recommendation contained in paragraph 14(iv) of the Summary of Conclusions and Recommendations of the report had effect from the beginning of the session.[10]

The LCARC having recourse to the relevant procedure and practice of the House of Commons:

- made some preliminary investigations to discover the source of the unauthorised release; and
- came to a conclusion as to whether the disclosure was of sufficient seriousness to constitute 'a substantial interference, or the likelihood of such, with the work of the committee, with the select committee system or the functions of the House'.[11]

### 2.2 Possible sources of the disclosure

As to the first point, the LCARC advised that the following persons had access to, or were provided with, a copy of the committee's letter dated 23 December 1999:

- committee members;
- the Premier;
- the Attorney-General;
- presumably, staff of the Premier and the Attorney-General; and
- staff of the committee secretariat.

In accordance with the relevant procedure, the Chairman wrote to all staff and members of the committee asking them if they could explain how the unauthorised release came about. Not surprisingly, this yielded little information as to the identity of the source.

### 2.3 Seriousness of the release

As to the second point, the committee concluded that the release of this correspondence was of sufficient seriousness to constitute a substantial interference with the work of the committee, with the committee system or the functions of the House. In coming to this conclusion the LCARC in its letter to the Speaker stated:

> *If parliamentary committees are to fully and diligently discharge their statutory responsibilities then it is imperative that they are able to correspond on a confidential basis with relevant ministers, departments and agencies. [In this case we were discharging our responsibility to be consulted in relation to the appointment of a person to conduct a strategic review in accordance with the Parliamentary Commissioner Act 1974, s 32(5).]*

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8 D Limon & W R McKay (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usages of Parliament*, 22nd ed, 1997, Butterworths, London.

9 HC 555 (1984-85).

10 Commons Journal (1985-1986) 252.

11 HC 555(1984-85) at paras 64-66.

The LCARC in its letter to the Speaker noted that the MEPPC might have difficulty in ascertaining the source of the unauthorised release. However, the LCARC believed that that the MEPPC through an investigation might be able to make some findings and observations relevant not only to this matter but similar situations which might arise in the future.

Apart from the steps described above, the LCARC did not take any further action in relation to this matter in order to avoid prejudicing any investigation that the MEPPC may undertake.

## 3. MEPPC'S CONSIDERATION OF THE MATTER

At its meeting on 12 April 2000, the committee formally noted a letter from the Speaker dated 3 April 2000 referring the matter of privilege raised by the LCARC.

The committee considered in some detail the House of Commons guidelines relating to unauthorised disclosure of committee proceedings. (See Appendix I)

### 3.1 MEPPC's discretion

The committee reaffirms its position that whether or not the MEPPC proceeds further with a privileges reference is the prerogative of the MEPPC which is exercised on a case by case basis in the light of individual circumstances.

### 3.2 Number of potential sources

In this particular case, the MEPPC notes that there was a large class of persons who had had access to the disclosed LCARC correspondence. The MEPPC has not with precision identified the number of potential sources, but believes it not unreasonable to suspect that there are in excess of 15 persons who may have had access. Depending upon the circulation of the correspondence within the relevant departments, the number of persons may greatly exceed this number.

### 3.3 Likelihood of identifying the source

The MEPPC believes that the likelihood of tracing the source of the unauthorised disclosure is minimal.

Indeed, the MEPPC is convinced that the only real prospect of identifying the source would be to force that information from the journalist. (Although, the MEPPC notes that it is far from certain that the journalist is actually aware of the identity of the source.)

History has demonstrated that journalists are unlikely to reveal their sources and that the media are likely to rally behind any journalist called to reveal their sources. The journalist involved becomes a martyr of the fourth estate, whilst an opportunity is provided to the media to publicly decry the powers of the Legislative Assembly.

Thus, what is likely to be achieved is a conflict between the MEPPC and the media. The source is unlikely to be revealed. Conflict and a protracted investigation are likely to be the only outcomes.

### 3.4 No evidence of a systemic problem

Another factor influencing the MEPPC's decision in this matter is the absence of any indication that there is a systemic problem. In short, the MEPPC has no evidence to suggest that the unauthorised release of committee proceedings is a problem within the Queensland parliamentary committee system. This appears to be an isolated instance of unauthorised disclosure, resulting perhaps from the number of people having access to the document.

The MEPPC's views may well have been different if this type of disclosure was becoming commonplace in the committee system and was apparently affecting the workings of the system.

In summary, the MEPPC believes that for it to undertake a full inquiry into the matter will serve no practical purpose. Consequently the MEPPC has exercised its prerogative not to undertake such an inquiry.

### 3.5 Finding and recommendation

**Any unauthorised (or premature) release of a committee proceeding may be treated as a contempt. An unauthorised (or premature) release is a serious matter and may warrant further and full investigation after all the circumstances of the release are considered.**

**In this case the MEPPC believes that the likelihood of identifying the source of the unauthorised disclosure of the correspondence is minimal, as is the likelihood of a recurrence of the incident. In all of the circumstances, the committee recommends no further action in respect of this matter.**

## 4. OTHER COMMENTS

### 4.1 Seriousness not doubted

The MEPPC stresses that its decision in this instance to not undertake a full inquiry should in no way be taken as signifying that the matter was of little consequence. On the contrary, any unauthorised disclosure of committee proceedings represents an attack on the integrity of the Parliament and the MEPPC continues to view any unauthorised disclosure most gravely.

Significantly, the MEPPC endorses the view of the LCARC that if parliamentary committees are to fully and diligently discharge their statutory responsibilities then it is imperative that they are able to correspond on a confidential basis. This includes correspondence with witnesses, ministers, departments and agencies.

In this respect it is worth questioning the public interest in the media's disclosure of the committee's correspondence. Certainly the public may have been interested to know about the correspondence, but that does not necessarily equate to the disclosure being in the public interest. The subject correspondence was on the face of it a frank and honest exchange on an issue within the LCARC's area of responsibility. The consultant had been appointed and the LCARC did not, apparently, desire to report to the Legislative Assembly about the matter.

The only probable result of the disclosure of the letter would be to make committees more circumspect about being so frank. This was, therefore, hardly a disclosure in the public interest.

### 4.2 No precedent

The MEPPC stresses that the decision in this instance to not undertake a full inquiry should in no way be taken as precluding the MEPPC, or its successors, from undertaking a full inquiry into any future unauthorised disclosure of committee proceedings.

Each case must be assessed on its own merits. The likelihood of a successful investigation and whether the disclosure is one instance of a more systemic problem are issues to be considered.

## 5. PROCEDURE TO BE FOLLOWED IN THE FUTURE

### 5.1 Review of practice and procedure

The MEPPC carefully considered the observations and conclusions made by the Select Committee on Privileges and the procedure adopted by the House of Commons.

The MEPPC, while noting the worth of those procedures, believes that the practice and procedure does require some refinement. Accordingly, the MEPPC has recommended a new procedure to be followed by committees in the future should an unauthorised disclosure of their proceedings take place.

### 5.2 Recommendation

**The MEPPC recommends that the Legislative Assembly affirm the following as being the appropriate procedure upon an unauthorised disclosure of a committee's proceedings:**

1. **The committee concerned should seek to identify all possible sources of the disclosure.**

2. **The committee concerned should decide whether the disclosure is significant enough to justify further inquiry.**

3. **If the committee concerned considers that further inquiry is warranted, the Chair of the committee concerned should then write to all persons who had access to the proceedings. The Chair's letter should request an indication from each person as to whether the person was responsible for the disclosure or if they are able to provide any information that could be of assistance in determining the source of the disclosure.**

4. **If the source of the disclosure is identified, the committee concerned should then decide whether to report accordingly to the Legislative Assembly.**

5. **If the source of the disclosure has not been identified, the committee concerned should consider whether the matter merits further formal investigation by the MEPPC.**

6. **In considering (4) and (5) above, the committee concerned should take the matters below into account and balance the worth of further inquiry.**

   **(a) How serious was the disclosure and is there a public interest in pursuing the matter? (Was the disclosure a substantial interference, or the likelihood of such, with the work of the committee, with the committee system or the functions of the Legislative Assembly?)**

   **(b) If the source of the disclosure has been discovered, was the breach inadvertent or deliberate, mischievous or benign?**

   **(c) If the source of the disclosure has not been discovered, what is the likelihood of discovering the source of the disclosure? (How many people had access to the proceedings? Were the proceedings in the possession of persons outside Parliament, such as public officers?)**

   **(d) Is the disclosure an isolated occurrence, or is it one instance of a larger problem? Has there been a pattern of such disclosures?**

   **(e) What is the likelihood of a disclosure re-occurring?**

7. **If the committee concerned comes to the conclusion that the matter merits further investigation by the MEPPC, the committee concerned should write to the Speaker accordingly detailing the action it has taken in respect of the above steps.**

John Mickel MLA
Chairman
7 June 2000

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* At the time of adoption of this report Mr Nelson was a member of the MEPPC. On 1 June 2000 Mr Nelson was discharged from the committee

# APPENDIX I

## Extract

**The relevant observations and conclusions made by the Committee of Privileges are extracted below:**

*51. In the opinion of Your Committee privilege rules must be retained for dealing with really serious cases where a leak has caused, or is likely to cause, "Substantial interference" with the functions of the House or a committee. It agrees with those who argued that there would be dangers of encouraging more leaks if the rules of privilege on this matter were discarded or relaxed in any way (Q. 132, 137-8). And it points out that the frequently claimed analogy which equates, for the purpose of leaks, matters before the Cabinet and other Government business with matters before select committees, is based on a fallacy. The business of Government may, in various ways, be subject to adjudication by the courts: proceedings in Parliament, including those of select committees, cannot be judged by the courts. Parliamentary privilege is the only protection available to such proceedings.*

*52. Serious cases, of the kind referred to, Your Committee believes, could include the following types of leak. First publication of significant material improperly acquired, such as stolen documents, or documents clearly marked as confidential which have been found by chance, or information obtained by payment or for other improper reward or by means of threats. There is no recent evidence of leaks of this sort, but they could happen.*

*53. The second type of serious case would be those involving leaks of clearly classified information, including commercially confidential, whether in a classified document or by oral disclosure. Again there is no recent experience of such leaks (paragraph 26) but the evidence referred to in paragraph 35 makes plain the damage such leaks could cause the committee system, quite apart from the damage done by leaking the actual material.*

*54. The third category would be those cases where a Member or other person has deliberately attempted to damage the working of a committee by premature press publication–perhaps by revealing the contents of a draft Report or unreported evidence or other working documents–or where such publication can be shown to have caused, or to be likely to cause, substantial interference with the committee's work.*

…

*63. Your Committee accordingly recommends that the following practices should normally be adopted when a leak of the confidential proceedings of a select committee comes to light.*

*64. First the committee concerned should seek to discover the source of the leak. (For a successful exercise of this kind, see Q. 91). This might involve taking evidence, for example from staff regarding the security of documents or even, with their agreement, from Members of the committee. Your Committee would not normally see advantage in select committees examining journalists, who customarily refuse to disclose their sources.*

*65. One practice that could well be adopted in most cases is for the Chairman to write formally to all members of the committee and its staff, immediately following a leak, to ask if they can explain how the leak came about. This has been done by the Chairman of Your Committee, and by at least one other Chairman (Q. 207-11). Even though such formal letters and answers may not identify the person responsible for the leak, this process may well have a valuable effect in reminding all concerned of the seriousness of the issue and perhaps in deterring further leaks.*

66. *Secondly, and most important, the select committee should, whether or not the source has been discovered, come to a conclusion as to whether the leak, which is of course a breach of privilege, is of sufficient seriousness, having regard to the guide-lines mentioned in paragraphs 51-54 above and to the public interest, to constitute a substantial interference, or the likelihood of such, with the work of the committee, with the select committee system or the functions of the House.*

67. *The committee could then make a special Report to the House describing the leak and the investigations it had made. If it concluded that the leak had not caused serious damage it would recommend no further action. If it concluded that there had been substantial interference, or the likelihood of such, the committee should report to the House accordingly. If, in the process of seeking to discover the source of the leak, the Chairman had written formal letters as recommended in paragraph 65 above, then the terms of that letter and of the replies from those to whom it was addressed could also be published in the special Report. Again this should have a deterrent effect on potential future leakers.*

68. *If a special Report was made by a select committee stating that a leak had caused substantial interference, as described in paragraph 67, then that special Report should automatically stand referred to the Committee of Privileges. This procedural change, which would require a new Standing Order, would have the advantage of avoiding a debate and a vote in the House, on a potentially politically controversial matter, before the complaint had been fully examined by the Committee of Privileges, (who would normally take evidence from all concerned, including the journalists involved), and before the Committee had recommended what action should be taken.*

69. *Such preliminary examination by select committees, and automatic reference of serious complaints about leaks to the Committee of Privileges would not, in any way, limit the right of individual Members to raise a privilege complaint with the Speaker. Nor would it in any way fetter the discretion of the Speaker in deciding whether to give priority to such privilege complaints on the floor of the House. Your Committee would expect, however, that the Speaker, in considering such complaints from individual Members, would normally await any recommendations from the select committee concerned, and would take these into account when deciding whether or not to give priority to the complaint raised with him.*

70. *Finally, the findings and recommendations of the Committee of Privileges would, as now, be considered by the House. If the Committee of Privileges found that a serious breach of privilege or a contempt had been committed, and confirmed that substantial interference with the committee's or House's functions had resulted or was likely, and which was contrary to the public interest, the Committee might recommend that appropriate penalties be imposed on Members or other persons, including the press, especially if no apologies had been offered. In the opinion of Your Committee, in such serious cases the House should not deny itself the opportunity to impose such penalties. For if, even in such cases as those referred to in paragraphs 51 to 54 above, the House failed to take any action, then the authority of the House and of its committees could be seriously damaged, and further leaks from select committees could be encouraged.*

71. *… It does see, however, substantial benefit in adopting a number of practical steps to limit the application of those rules to the most serious cases and to make all concerned more aware of their importance.*