



ETHICS COMMITTEE

REPORT NO. 172

**MATTER OF PRIVILEGE REFERRED BY THE SPEAKER ON 15 SEPTEMBER 2016
RELATING TO AN ALLEGED DELIBERATE MISLEADING OF THE PARLIAMENT****Introduction and background**

1. The Ethics Committee (the committee) is a statutory committee of the Queensland Parliament established under section 102 of the Parliament of Queensland Act 2001 (the POQA). The current committee was appointed by resolution of the Legislative Assembly on 27 March 2015.
2. The committee's area of responsibility includes dealing with complaints about the ethical conduct of particular members and dealing with alleged breaches of parliamentary privilege by members of the Assembly and other persons.¹ The committee investigates and reports on matters of privilege and possible contempts of parliament referred to it by the Speaker or the House.
3. The matter in this report concerns allegations that the Member for Mount Ommaney, Mrs Tarnya Smith MP (Member for Mount Ommaney), deliberately misled the Parliament in her statement during Matters of Public Interest on 16 August 2016.
4. During her statement, the Member for Mount Ommaney stated:

In estimates, it was revealed that, to date, the government's Advance Queensland program, the centrepiece to the government's whole focus on the budget this year, which originally had a price tag of over \$180 million over three years, has created only 121 direct jobs. That is a cost of over \$500,000 a job.
5. In accordance with Standing Order 269, on 17 August 2016, the Minister for Innovation, Science and the Digital Economy, Minister for Small Business and Member for Algeester, Ms Leanne Enoch MP (the Minister) wrote to Mr Speaker alleging that the Member for Mount Ommaney's statement 'wilfully ignored the evidence of the Director-General provided during a proceeding of this Parliament and was deliberately intended to mislead the House'.
6. On 15 September 2016, after examining the information before him, the Speaker made a ruling on the Matter of Privilege raised by the Minister, referring the matter to the committee.

¹ Parliament of Queensland Act 2001, section 104B.

The referral

7. On 15 September 2016, the Speaker made the following statement in the House:

Mr SPEAKER: Honourable members, on 17 August 2016 the Minister for Innovation, Science and the Digital Economy, Minister for Small Business and member for Algester, Hon. Leeanne Enoch, wrote to me alleging that the member for Mount Ommaney deliberately misled parliament when she stated—

In estimates, it was revealed that, to date, the government's Advance Queensland program, the centrepiece to the government's whole focus on the budget this year, which originally had a price tag of over \$180 million over three years, has created only 121 direct jobs. That is a cost of over \$500,000 a job.

In her letter to me the minister contended that the member for Mount Ommaney's statement was deliberately misleading because the government has created 121 jobs from expenditure of only \$8.29 million as advised by the director-general of the department at the estimates hearing on 26 July 2016 at which the member for Mount Ommaney was in attendance. I sought further information from the member for Mount Ommaney about the allegations made against her in accordance with standing order 269(5). The member for Mount Ommaney explained that the statement she made related to the government's allocated funding over three years and that she did not state that the \$180 million allocation had been spent. However, the evidence suggests that the member knew that only \$8.29 million had been spent in creating the 121 jobs. Therefore, the evidence suggests that the member knew that her claim that each job cost over \$500,000 was incorrect. I also note that the member has declined the opportunity to correct the record. Accordingly, I have decided to refer the matter to the Ethics Committee. In doing so, I wish to emphasise that I have formed no view as to whether there has been a breach of privilege but rather that there are sufficient issues in play to warrant the further consideration of the House via the committee. I again remind members that standing order 271 now applies and members should not refer to this matter in the House.

Committee proceedings

8. The committee has established procedures for dealing with privileges references, which ensure procedural fairness and natural justice is afforded to all parties. These procedures are set out in Chapters 44 and 45 of the Standing Orders. The committee is also bound by the Instructions to committees regarding witnesses contained in Schedule 3 of the Standing Orders.
9. Following the referral by the Speaker, the committee invited the Member for Mount Ommaney and the Minister to provide further information on the alleged contempt of deliberately misleading the House. Both the Member for Mount Ommaney and the Minister responded.
10. The committee then found that it had sufficient material before it to deliberate on the allegations.

Definition of contempt

11. Section 37 of the POQA defines the meaning of 'contempt' of the Assembly as follows:
- (1) *"Contempt" of the Assembly means a breach or disobedience of the powers, rights or immunities, or a contempt, of the Assembly or its members or committees.*
 - (2) *Conduct, including words, is not contempt of the Assembly unless it amounts, or is intended or likely to amount, to an improper interference with—*
 - (a) *the free exercise by the Assembly or a committee of its authority or functions; or*
 - (b) *the free performance by a member of the member's duties as a member.*

Nature of the contempt of deliberately misleading the House.

12. Standing Order 266(2) provides that an example of a contempt includes:

*Deliberately misleading the House or a committee (by way of submission, statement, evidence or petition).*²

13. David McGee, in *Parliamentary Practice in New Zealand*, states that deliberately misleading the House or a committee 'consists of the conveying of information to the House or a committee that is inaccurate in a material particular and which the person conveying the information knew at the time was inaccurate or at least ought to have known was inaccurate'.³
14. Previous ethics committees, and David McGee, have noted that the standard of proof demanded in cases of deliberately misleading parliament is a civil standard of proof on the balance of probabilities, but requiring proof of a very high order having regard to the serious nature of the allegations. Recklessness, whilst reprehensible in itself, falls short of the standard required to hold a member responsible for deliberately misleading the House.⁴
15. The Ethics Committee of the 48th Parliament stated that the term 'misleading' is wider than 'false' or 'incorrect'. The committee considered it 'possible, although rare and unlikely, that a technically factually correct statement could also be misleading'—for example, by the deliberate omission of relevant information.⁵
16. The committee applied the three elements to be established when it is alleged that a member has committed the contempt of deliberately misleading the House:
 - firstly, the statement must, in fact, have been misleading
 - secondly, it must be established that the member making the statement knew at the time the statement was made that it was incorrect, and
 - thirdly, in making it, the member must have intended to mislead the House.⁶

Element 1 – Was the Member for Mount Ommaney's statement misleading?

17. The first limb of this element is whether the person's statement contained factually or apparently incorrect material.
18. In her letters to Mr Speaker and the committee, the Minister contended that the Member for Mount Ommaney's statement was incorrect because the government had created 121 jobs from expenditure of \$8.29 million as advised by the Director-General of the Department of Science, Information Technology and Innovation (DSITI) at the estimates hearing conducted by the Education, Tourism, Innovation and Small Business Committee on 26 July 2016, not \$180 million as stated by the Member for Mount Ommaney.
19. The Member for Mount Ommaney argued in her correspondence in response to the allegation,:

The statement I made clearly related to the Government's allocated funding over 3 years. I did not state that the \$180 million allocation had been spent.

...

² Standing Order 266(2), Standing Rules and Orders of the Legislative Assembly, available at <http://www.parliament.qld.gov.au/work-of-assembly/procedures>

³ McGee, David, *Parliamentary Privilege in New Zealand*, Third Edition, Dunmore Publishing Ltd, Wellington, 2005, p.653.

⁴ McGee, David, *Parliamentary Privilege in New Zealand*, Third Edition, Dunmore Publishing Ltd, Wellington, 2005, p.654.

⁵ MEPPC, *Alleged Misleading of the House by a Minister on 14 November 1996*, Report No 4, Goprint, Brisbane, 1997, at 10.

⁶ McGee, David, *Parliamentary Privilege in New Zealand*, Third Edition, Dunmore Publishing Ltd, Wellington, 2005, p.653-655.

My statement was to inform the House that so far this \$180 million program had only generated 121 jobs, so in terms of outcomes that is a cost of \$500,000 a job.

20. The committee considered that it remains arguable as to whether the Member for Mount Ommaney's statement was factually incorrect, as she did not state that 121 jobs have been created from expenditure of \$180 million, but instead qualified her statement by specifically referring to the three-year funding allocation for the program as 'originally having a price tag of over \$180 million over three years', which then lead to her statement of the cost being over \$500,000 per job for the 121 jobs.
21. The second limb of this first element is whether the statement itself was misleading.
22. The committee noted that the Ethics Committee of the 48th Parliament held that the term misleading is wider than 'false' or 'incorrect'. That committee considered it '...possible, although rare and unlikely, that a technically factually correct statement could also be misleading...' by, for example, the deliberate omission of relevant information.⁷
23. The committee considered that, on the one hand, a reasonable person may not have been misled by the Member for Mount Ommaney's statement, as she makes clear that she is referring to the three-year funding amount for the program, and makes no particular reference to that amount, or any amount, having been spent to date
24. The committee also considered that, on the other hand, a reasonable person may have been misled if such a person believed the total amount of funding referred to was the amount that had been spent, as the Member for Mount Ommaney used the term 'That is a cost of over \$500,000 a job', which may have implied money having already been spent.

Consideration

25. On the evidence presented, the committee finds that it remains arguable as to whether the first element had been met.

Element 2 - Did the Member for Mount Ommaney know at the time she made the statement it was misleading?

26. In her correspondence with the Speaker and the committee, the Minister argued that the Member for Mount Ommaney was at the estimates hearing when the Director-General of DSITI advised the ETISBC that the 121 jobs that had been created to date was from expenditure of \$8.29 million, and therefore knew that her statement regarding the cost being \$500,000 per job for the 121 jobs was incorrect.
27. The Member for Mount Ommaney did not specifically address this element except to say that she had already outlined that her statement was not incorrect, and therefore this element did not apply.

Consideration

28. On the evidence presented, the committee finds that it remains arguable as to whether the Member for Mount Ommaney knew at the time she made the statement that it was misleading.

Element 3 - If yes, did the Member for Mount Ommaney intend to mislead the House?

29. David McGee in Parliamentary Practice in New Zealand states that for a misleading of the House to be deliberate:

...there must be something in the nature of the incorrect statement that indicates an intention to mislead. Remarks made off the cuff in debate can rarely fall into this category, nor can matters about which the member can be aware only in an official capacity. But where the member can be assumed to have personal knowledge of the stated facts and made the statement in a situation of

⁷ MEPPC, *Alleged Misleading of the House by a Minister on 14 November 1996*, Report No. 4, Goprint, Brisbane, 1997, p 10.

*some formality (for example, by way of personal explanation), a presumption of an intention to mislead the House will more readily arise.*⁸

30. The committee considered that it was likely that the Member for Mount Ommaney had, or should have had, personal knowledge of the facts as she had attended the estimates hearing on 26 July 2016 when the Director-General of DSITI had made the statement regarding the creation of 121 jobs from expenditure of \$8.29 million.
31. The committee also noted that the Member for Mount Ommaney made the statement in a situation of some formality (as a Matter of Public Interest statement), and not off the cuff.
32. The Member for Mount Ommaney did not address this element other than to state that she disputed all three elements.

Consideration

33. While the committee noted that the Member for Mount Ommaney should have had personal knowledge of the facts and made the statement in a situation of some formality, the committee considered that (a) in the absence of any direct evidence of an intention to mislead, other than the McGee presumption, and (b) given that they were not able to make a clear finding in relation to the first and second elements; that they could not find that the third element had been met.

Conclusion

34. On the matter of the Member for Mount Ommaney deliberately misleading the House, the committee finds that there is an absence of any direct evidence of an intention to mislead the House, and therefore does not recommend a finding of contempt.
35. However, as it is arguable that misleading statements were made, the committee recommends the Member for Mount Ommaney make a brief statement, at the next possible opportunity, correcting the record in the House.

Committee Comment

36. As part of the committee's consideration of the matter, it considered the contempt of deliberately misleading the House in the context of parliamentary privilege and a member's right to free speech and where the two concepts intersect.
37. The committee noted that in Queensland, parliamentary privilege generally refers to two parts of the law relating to Parliament:
 1. the privileges and immunities relating to the Legislative Assembly and its committees, and
 2. the powers of the Legislative Assembly to regulate itself to allow for the free performance of its functions and to protect itself, particularly through its power to punish contempts.
38. The main privilege or immunity of Parliament is that set out in Article 9 of the *Bill of Rights* (UK):

*That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.*⁹
39. Article 9 is part of the law of Queensland and is elucidated by section 8 of the POQA.¹⁰ Section 9(1) of the POQA sets out matters included in proceedings in the Assembly which are unable to be 'impeached or questioned':

⁸ McGee, David, *Parliamentary Privilege in New Zealand*, Third Edition, Dunmore Publishing Ltd, Wellington, 2005, p.654.

⁹ <http://www.legislation.gov.uk/aep/WillandMarSess2/1/2/introduction>.

¹⁰ This was previously included in the now repealed *Parliamentary Papers Act 1992*.

(1) *“Proceedings in the Assembly” include all words spoken and acts done in the course of, or for the purposes of or incidental to, transacting business of the Assembly or a committee.*

40. Hence the committee acknowledged in its considerations that a member’s right to freedom of speech is an important privilege which enables the House to function properly.
41. However, the committee also acknowledged that while the POQA confirms the exemption of members from legal action stemming from what they say during proceedings, it does not exempt them from their responsibility to appropriately exercise that right. If members’ freedom of speech is to be respected by the community, then members must exercise responsibility when they draw on that privilege. The privilege needs to be balanced with the responsibility of members to ensure the accuracy and clarity of their statements in the House, to avoid making potentially misleading statements.
42. The committee wishes to remind all members that they are to strive at all times to conduct themselves in a manner which will tend to maintain and strengthen the public’s trust and confidence in the integrity of parliament and avoid any action which may diminish its standing, authority or dignity. In so doing, members need to balance the privilege afforded to them in making statements in the House with the responsibility to take care in making statements in the House.
43. At the same time, a statement made in the Assembly or its committees which might be considered misleading does not necessarily amount to a contempt.
44. The committee is of the view that it is regrettable that a matter such as the subject of this report has come before the Ethics Committee.
45. The committee wishes to remind all members that in making an allegation against another member of deliberately misleading the House or its committees they need to substantiate their allegations against the elements of the contempt of deliberately misleading. In particular, for the Ethics Committee to make a finding of contempt it would need to be presented with evidence to satisfy the second and third elements that the member knew the statement to be incorrect at the time and intended to mislead the House.
46. The committee wishes to reiterate the statement made by the Speaker on 16 February 2016 of the need for members making allegations of contempt to substantiate their allegation.
47. The Speaker noted, and the committee agrees, that an allegation of contempt is a serious matter, and making unsubstantiated allegations may not only bring the member making the allegation into disrepute but also harm the reputations of others and bring the House generally into disrepute.
48. In addition, the committee wishes to re-enforce the statement made by the Speaker on 15 September 2016 reminding members that Standing Order 269(4) requires the Speaker considering whether a matter should be referred to this committee to take into account whether an adequate explanation or apology has been made.
49. Mr Speaker warned that if members who make incorrect or misleading statements in the House or committee fail to correct the record, then Mr Speaker has little option but to refer those matters to this committee in accordance with Standing Order 269. The committee encourages members to provide an explanation or apology to the House if they become aware that their statement was, or had the potential to be, misleading in order to avoid an unnecessary referral to the committee.

Conclusion

On the matter of the Member for Mount Ommaney deliberately misleading the Parliament, on the information before the committee, it finds that in the absence of any evidence other than the McGee presumption that the member intended to mislead the House, it could not find that the third element had been met.

Recommendation 1

The committee recommends no finding of contempt be made against the Member for Mount Ommaney and that the House take no further action in relation to this allegation.

Recommendation 2

The committee recommends that the Member for Mount Ommaney make a brief statement, at the next possible opportunity, to correct the record in the House.

Committee Comment

The committee wishes to remind all members that in making an allegation against another member of deliberately misleading the House or its committees they need to substantiate their allegations against the elements of the contempt of deliberately misleading. In particular, for the Ethics Committee to make a finding of contempt it would need to be presented with evidence to satisfy the second and third elements that the member knew the statement to be incorrect at the time and intended to mislead the House.

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Don Brown MP

Chair

December 2016

Membership — 55th Parliament

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¹¹ On 29 November 2016, the Member for Stretton, replaced the Member for Logan as member of the committee.