



## **ETHICS COMMITTEE**

### **Report No. 118**

*Matter of Privilege referred by the Speaker on 26 May 2011 relating to alleged insufficient care being taken by a Member when tabling documents and on 10 June 2011 relating to an alleged breach of the sub judice rule by a member when tabling documents*

*and*

*Matter of privilege referred by the Speaker on 18 August 2011 relating to an alleged contempt of impugning the Assembly's ethics processes and by pre-judging an inquiry outcome impugning the Ethics Committee's processes and deliberations*

### **INTRODUCTION AND BACKGROUND**

1. The Integrity, Ethics and Parliamentary Privileges Committee (IEPPC) was a statutory committee of the Queensland Parliament established under the *Parliament of Queensland Act 2001* (the POQA or the Act). The IEPPC was appointed by resolution of the Legislative Assembly on 23 April 2009.
2. The IEPPC was replaced by the Ethics Committee (the committee) on 16 June 2011, following amendments to the POQA. At its first meeting the committee resolved to continue matters that were before the previous committee which included this matter.
3. The committee is established under section 102 of the POQA. Section 104C of the POQA provides that 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.
4. The committee investigates and reports on matters of privilege and possible contempts of parliament referred to it by the Speaker or the House, and inquires into and reviews other significant issues regarding parliamentary privilege.
5. This report concerns two matters in relation to the Member for Burnett, Mr Robert Messenger MP.
6. The first matter referred by the Speaker on 26 May 2011 raises two issues: an alleged contempt when tabling documents identifying a child or children; and an alleged breach of the sub judice rule when tabling documents.
7. The second matter, referred by the Speaker on 18 August 2011, relates to an alleged contempt of impugning the Assembly's ethics processes and by pre-judging an inquiry outcome impugning the committee's processes and deliberations.

## THE FIRST MATTER

### The referral

8. On 26 May 2011, Speaker Mickel made the following statement in referring the first matter of privilege to the committee—

**Mr SPEAKER:** Honourable members, as I have reminded all honourable members in the past, the Queensland Legislative Assembly has a very liberal approach to the tabling of documents by members. It is certainly much more liberal than other houses of parliament. The particular distinction in this House is that members have an almost unfettered right to table documents, at least in the first instance. In most other houses of parliament, the tabling of documents is limited to particular classes of documents or tablings by ministers of the Crown unless leave of the House or the chair is first sought and given.

In the United Kingdom House of Commons, the Canadian House of Commons and the Australian House of Representatives, private members have no right to table papers without specific consent of the House. The same privileges that members enjoy in their speeches in the House are effectively also transferred to documents tabled by them in the House.

As I have emphasised in previous rulings, with such a right also comes risk and responsibility. On 24 February 2004 Speaker Hollis reminded members of their duties as regards material that relates to children, and in a ruling on 17 June 2005 Speaker Hollis emphasised the duty on members as regards their speeches and tabled documents. On 21 February 2007 Speaker Reynolds made a comprehensive ruling in this House regarding the rights and duties of members in tabling documents in the House, and as recently as 16 September last year I warned members about redacting information from tabled documents.

I inform the House that once a document has been tabled it cannot be altered or otherwise interfered with unless the House otherwise orders. On occasions members seeking to protect the identity or private details of constituents or others who provide them information seek to redact information by using black texta to black out names, addresses or other identifying features. There is absolutely no difficulty in this from a procedural perspective. However, members who wish to protect the identity of constituents or others need to be very careful to ensure that their efforts to redact information are actually effective. Oftentimes, simply placing a black texta through an identifying feature is insufficient to ensure that the original words cannot be viewed in a copy or electronic version.

Unfortunately, a matter has come to my attention which, on the face of it, demonstrates that a member has acted, at the very least, in a careless manner regarding tabled material and in so doing has breached their duty under standing order 35, which places a very clear obligation on members to ensure that tabled documents cannot be used to identify children.

During matters of public interest on 10 May 2011, the honourable member for Burnett tabled a large bundle of documents and electronic information. This comprised a bundle of various documents containing a total of 104 pages and a USB stick. Only one document had redactions. This is a 71-page document listed in the records of the House as tabled paper No. 4395 which has 53 redactions spread over nine pages—that is, pages 58 to 66—in the bundle of 104. Unfortunately, insufficient care has been taken with the redactions and the names are visible in some light and when the documents have been scanned in for the database. If members' rights regarding tabled papers are to be preserved then the duties upon them must also be enforced. When they fail in their duties there must be a consequence.

Therefore, I am referring the member's actions to the Integrity, Ethics and Parliamentary Privileges Committee.<sup>1</sup>

---

<sup>1</sup> Queensland Legislative Assembly, *Parliamentary Debates (Hansard)*, 26 May 2011, at 1686.

## **Committee Procedures**

9. The committee follows established procedures for dealing with privileges references, which ensure procedural fairness or natural justice is afforded to all parties. These procedures are set out in Chapter 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.
10. With respect to the first matter, having considered the material referred by the Speaker, the committee invited Mr Messenger to provide a written submission on the referral. The committee received a submission from Mr Messenger on 22 July 2011.
11. The committee subsequently considered this submission and determined that they had sufficient material before it to initiate an investigation into the alleged contempt.
12. The committee then wrote to Mr Messenger detailing the specific charges of contempt of breach of duty and invited a supplementary submission addressing the elements of those specific charges. On 15 August 2011, the committee received a supplementary submission from Mr Messenger.
13. Having considered Mr Messenger's supplementary submission the committee invited Mr Messenger to an oral hearing which was conducted on 10 October 2011.
14. Following the hearing, the committee advised Mr Messenger of its preliminary findings on the evidence presented to that point and provided him with an opportunity to make a submission as to the appropriate penalty.
15. Mr Messenger responded to this invitation in correspondence on 19 and 20 October 2011. However, rather than making a submission as to penalty, Mr Messenger instead raised a number of issues outlining his perception of a lack of procedural fairness or natural justice in the committee procedures. The committee deals with these issues under the heading "Other issues" below.

## **Contempt**

### **Definition of contempt**

16. 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.
17. The term 'contempt of parliament' may include any offence to the dignity of the House or interference with its processes where no established privilege has previously existed. As detailed in Erskine May's Parliamentary Practice:

Each House also claims the right to punish as contempts actions which, while not breaches of any specific *privilege*, obstruct or impede it in the performance of its functions, or are offences against its authority or dignity, such as disobedience to its legitimate commands or libels upon itself, its Members or its officers...<sup>2</sup>

---

<sup>2</sup> CJ Boulton (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and usages of Parliament*, 22<sup>nd</sup> edition, Butterworths, London ,1997, at 65.

18. Accordingly, a contempt may be committed if it amounts to an act or an omission that offends the authority or dignity of the House or, as in the case of this matter, a breach of a duty legitimately imposed by the House upon its Members.

### **Issue 1 - Alleged Tabling of Documents Identifying a Child**

19. Standing Order 35 (SO 35) of the Legislative Assembly's Standing Rules and Orders provides—

#### **Tabling of documents identifying a child or children**

- (1) A member must ensure that when tabling any documents concerning a child or children subject to the *Child Protection Act 1999* or the *Juvenile Justice Act 1992* the document is tabled in a non-identifying manner such as by replacing any identifying features likely to lead to the identification of the child with a cipher such as “[name withheld]”.
  - (2) A member choosing to replace an identifying feature with a cipher when tabling a document shall provide the Clerk with the “key” to the full identifying features relating to the document.
  - (3) Any member who so requests shall be granted access to the “key” to the full identifying features relating to the document by the Clerk.
  - (4) For the purpose of this order, the term “non-identifying manner” refers to information which if published would identify, or is likely to lead to the identification of, a child the subject of either the *Child Protection Act 1999* or the *Juvenile Justice Act 1992*.
20. In the letter dated 10 June 2011 to the Integrity Ethics and Parliamentary Privileges Committee the Speaker stated—

*In the sitting in Mackay, my office was contacted by a media outlet. They reported that the redactions in the scanned tabled document posted to the Parliament's website, were not effective and as a result a child subject to the Child Protection Act 1999 (Qld) could be identified. Furthermore, it would appear, on the face of the original tabled document that the redactions were ineffective and that the Member for Burnett has failed to comply with the procedures set out in Standing Order 35 which places an obligation on members to ensure that tabled documents cannot be used to identify children.*

21. Members have a duty to the House to abide by Standing Order 35. Accordingly, the elements of the Standing Order itself provide the elements of contempt of breach of that duty, as follows:

- a member must ensure;
- when tabling documents;
- concerning a child or children subject to the *Child Protection Act 1999* or the *Juvenile Justice Act 1992*;
- the document is tabled in a non-identifying manner.

22. The committee viewed the original tabled documents and were satisfied that the name of the child and parent in question could be seen and therefore likely lead to the identification of a child subject to the *Child Protection Act 1999*.

23. The committee resolved to, in line with Mr Messenger's request, base their considerations on the original tabled documents, and felt it did not need to consider the scanned copy as it would have appeared on the internet until edited by order of the Speaker.

24. In his submission to the committee Mr Messenger did not contest that he tabled the relevant document, and that the document was in a form that allowed the identification of a child subject to the *Child Protection Act 1999*. Accordingly, Mr Messenger stated:

*I accept that, despite my attempt to expunge the names on the original documents, they are visible through the black permanent marker pen covering the whole of the names.*

25. On 10 October 2011, in Mr Messenger's oral hearing before the committee, the Chair of the committee detailed the committee's preliminary findings on the material that had been submitted at that time, as follows:

*The committee finds that on 10 May 2011 as a member you tabled a document which became identified as Tabled Paper No. 5311T4395. That document included a copy of your letter of 27 August 2010 to the Chairperson of the CMC. In your written submissions of 22 July and 15 August you do not dispute that you tabled the said document and that in the form that it was tabled it allowed the identification of a child subject to the Child Protection Act 1999.*

26. When asked if Mr Messenger agreed with the Chair's summation of the facts in accordance with the elements of the charge above Mr Messenger replied:

*I believe that that is an almost accurate summation of the facts. The summation of the facts as you give it do not acknowledge that when I tabled the document I was under the belief that the names were not readable and were redacted.*

27. Accordingly, the committee is of the view that Mr Messenger, has agreed to the Chair's summation of the facts, as they relate to the elements of the contempt charge.
28. Mr Messenger's arguments as to his belief that that he had properly redacted the names and associated lack of intent do not go to the elements of the charge of breach of duty. However, these arguments are relevant to the committee's consideration as to penalty as detailed below.

### **Conclusions**

29. The committee finds Mr Messenger to have acted carelessly in redacting identifying details in the document that was tabled in the House on 10 May 2011, and that the elements of the contempt of breach of breach of duty under SO 35 as detailed above, have been satisfied.
30. The committee notes Speaker Mickel's previous statement in the House on 16 September 2010, that:
- ... members who wish to protect the identity of constituents or others need to be very careful to ensure that their efforts to redact information are actually effective. Oftentimes simply using a black texta to black out an identifying feature is insufficient to ensure that the original words cannot be viewed in a copy or electronic version.*
31. This case further highlights the requirement for members to exercise due care when redacting identifying details on documents as per the Speaker's warning.
32. On the material before the committee, the committee finds that Mr Messenger MP breached a duty to the House expressed in SO 35 by failing to ensure documents concerning a child in relation to the relevant Act, were tabled in a non-identifying manner. Accordingly, the committee recommends that the House find the member guilty of contempt.

### ***Issue 2 - Alleged Breach of the Sub Judice Rule***

33. Standing Order 233 (SO 233) of the Legislative Assembly's Standing Rules and Orders provides—

#### **Sub judice rule**

(1) In general, members should exercise care to avoid saying inside the House that which would be regarded as contempt of court outside the House and could jeopardise court proceedings.

(2) Members should not refer to in the House matters awaiting or under adjudication in all courts exercising a criminal jurisdiction (including in motions, debate or questions) from the moment the charge is made against the relevant person. This Standing Order shall cease to have effect when the verdict and sentence have been announced or judgment given, but shall again have effect should a Court of Criminal Appeal order a new trial.

...

(7) The sub judice rule is always subject to the right of the House to consider and legislate on any matter.

34. Accordingly, a member has a duty or obligation to the House to abide by SO 233. Again, the Standing Order itself provide the elements of a contempt of breach of that duty. Taken specifically from SO 233(2) the elements are as follows:

- a member should not;
- refer to in the House matters awaiting or under adjudication in all courts exercising criminal jurisdiction (including in motions, debate or questions);
- from the moment the charge is made against the relevant person ...;
- until a verdict and sentence have been announced or judgement given.

35. On the information before the committee, the matter referred to in the document tabled by Mr Messenger on 10 May 2011 was a criminal matter before the District Court at that time. This fact has not been disputed.

36. The committee is of the view that tabling a document in the House that contains reference to a matter awaiting or under adjudication in a court has the same effect as a member referring to the matter orally in the House.

37. On 10 October 2011, in Mr Messenger's oral hearing before the committee, the Chair of the committee detailed its finding on the material that had been submitted at that time, as follows:

*On the material that has been submitted to date the committee finds that on 10 May 2011 as a member you tabled a document which became identified as Tabled Paper No. 5311T4395. That document included a copy of your letter of 27 August 2010 to the Chairperson of the CMC.*

*The committee finds that the letter passed comment on a matter that was at the time it was tabled (10 May 2011) a matter under consideration by a court exercising criminal jurisdiction.*

*The committee notes that the 7<sup>th</sup> page of that letter to the Chairperson of the CMC includes a paragraph to the effect that–*

*“As you are aware now that police charges have been laid against X my advocacy and raising of the matter in Parliament is not permitted under SO 233 sub judice.”*

*The committee also notes that in both your submissions (dated 22 July and 15 August 2011) you do not contend that you were unaware that the matter was before the courts at the time of tabling.*

38. When asked if he agreed with the Chair's summation of the facts above in accordance with the elements of the charge above Mr Messenger replied:

*Once again, I think that your summation is mostly accurate. I believe that there are other factors that could be added to that summation. If you give me an opportunity, I would be quite happy to expand on and clarify that.*

39. The other factors that Mr Messenger referred to relate to a purported “public interest” defence or exception to the charge based upon his allegation of improper motivation behind the laying of charges in the sub judice matter and an argument that the adherence to the duty in SO 233 is not mandatory, but discretionary.

#### **Purported "Public Interest" Defence or Exception**

40. Whilst not referred to in either of his earlier written submissions, during the hearing on 10 October 2011, Mr Messenger alleged that the matter before the courts was of "public interest" as there was an improper motivation behind the laying of charges upon his

constituent. Mr Messenger asserted that the charges were laid in order to prevent Mr Messenger from raising the matter in the House. Mr Messenger went into some detail to explain the purported "public interest" defence or exception. In summary, he stated:

*So after much reflection and research, I believe that I have acted within the principle of the law of sub judice for the following reasons, and there are four main reasons. First of all, the material tabled relates to a matter of public interest and, I would stress, great public interest. Secondly, the public benefit from the publication of the material outweighs the harm caused to the administration of justice. Thirdly, there was limited publication of the material which significantly lessened any harm caused to the administration of justice. Fourthly, broader public interest of freedom of speech was also served by the tabling of documents.*

41. The committee understands that the sub judice rule is a long standing convention in the Parliamentary context and the rationale behind it is to prevent comment and debate in Parliament from exerting an influence on judicial proceedings and thus potentially prejudicing the position of parties and witnesses in court proceedings.
42. In Queensland, the sub judice rule is no longer simply a convention but it is expressed in Standing Orders in SO 233 and has the effect of law. Simply stated, the objective of the rule as set out in the Standing Order is that, subject to the right of the House to legislate on any matter, matters awaiting adjudication in a court of law should not be brought forward in debate, motions or questions.
43. The committee also understands that the sub judice convention is underpinned by the principle of "comity". This principle is that of mutual respect and forbearance between the legislative and judicial branches, and it has been widely recognised by the courts as one of the foundations for the privileges (including the privilege of free speech) enjoyed by the House.
44. David McGee notes in *Parliamentary Practice in New Zealand*.<sup>3</sup>

*...members are required to exercise their privilege of free speech in Parliament responsibly and to respect the position of the judiciary in the judiciary's sphere of action, just as they would expect the judiciary to respect the privileges of Parliament.*
45. Clearly, SO 233 makes no mention of a "public interest" exception to the sub judice rule beyond the right of the House to legislate on any matter. In addition, the committee is not aware of the existence of any authority in Parliamentary Law for a "public interest" exception or defence to the sub judice rule, beyond the right of the House to legislate on any matter.
46. The committee notes that Mr Messenger's allegation of improper motivation behind the laying of criminal charges upon his constituent is a serious one, which, if supported by evidence, might involve a significant matter of privilege. Nonetheless, the committee is of the view that the allegation can have no bearing on the committee in performing its duty in the matter before it. That is, to consider the allegation of a breach of the sub judice rule by Mr Messenger and to apply the facts of the matter to the elements of the charge.
47. The committee also notes that Mr Messenger did not raise the allegations of improper motivation in the House nor in his first two submissions to the committee.
48. The committee encourages Mr Messenger, if he has evidence beyond his mere assertion of the allegation of improper motivation behind the laying of criminal charges upon his constituent, to follow the procedures as set out in the Standing Orders and write to the Speaker on the matter.
49. The committee also notes that there are ways that Mr Messenger could have raised the allegation of improper motivation in the House without necessarily offending the Standing Orders.

---

<sup>3</sup> McGee, D, 2005, *Parliamentary Practice in New Zealand*, 3<sup>rd</sup> Edition, Dunmore Publishing Limited, Wellington, 2005.

### **Argument that sub judice duty is discretionary**

50. In his written submissions, Mr Messenger sought to argue that a member may exercise their subjective judgment when deciding whether or not to comply with SO 233 and that adherence to the Standing Order was discretionary rather than mandatory. Mr Messenger stated:

*I also note that Standing Order 233 does not impose a mandatory obligation on Members to refrain from breaching the sub judice rule. ... Therefore, I submit that as Standing Order 233 does not impose a mandatory obligation on Members, then a Member may breach the sub judice rule when tabling documents and it would be a complete defence to exercise a discretion to do so.*

51. The committee is of the view that the application of the sub judice rule cannot be left to the discretion of each individual Member. The committee notes the following New Zealand Speaker's ruling of 27 August 2008, which clearly sets out the position on this issue:

*The sub judice rule is set out in the Standing Orders, and it is the Speaker who determines its application—Speaker's ruling 29/3. **It is not for individual members to waive the application of the rule.** The rule is not intended to inhibit discussion of the law in general. That is clear from Speaker's ruling 27/2. However, nothing said in the House should prejudice, however slightly, the decision of any court. That point is made in Speaker's ruling 28/5.*

*The purpose of the rule is to safeguard the interests of justice. The rationale behind the rule is important. **This is the implicit acknowledgment by the legislature, above all other institutions, that it should take extreme care not to undermine confidence in the judicial resolution of disputes by intruding its views in individual cases.** The House applies a more rigorous inhibitory standard on itself than applies to the media in reporting judicial proceedings. That is not anomalous, given the constitutional relationship between the House and the courts. The House and the news media are not in the same situation. I suggest that interested members refer to page 192 of David McGee's *Parliamentary Practice in New Zealand*. [Emphasis added]*

52. The committee notes Mr Messenger's argument that compliance with the Standing Order is somehow discretionary is at odds with his own prior statement in the tabled document in question (i.e. his letter to the Chair of the CMC of 27 August 2010) where he states:

*As you are aware now that police charges have been laid against X my advocacy and raising of the matter in Parliament is not permitted under SO 233 sub judice.*

53. Furthermore, the committee is of the view that to accede to Mr Messenger's argument would mean that any Member would be free to make a subjective determination to breach their duty to the House in relation to SO 233, at a whim. Accordingly, the committee rejects this argument as it would make a mockery of the Standing Orders.

### **Conclusions**

54. On the information before the committee, the committee finds that Mr Messenger breached his duty to the House expressed in SO 233. Specifically, the committee finds that by tabling the document on 10 May 2011, Mr Messenger referred to in the House a matter awaiting adjudication in the District Court exercising criminal jurisdiction and in doing so breached his duty to the House not to do so.
55. Accordingly, the committee recommends that the House find the member guilty of contempt.

### **Penalty**

56. Section 270(5) of the Standing Orders sets out that the committee must, with its report, recommend the action that should be taken.

### **Finding of contempt for breach of duty in Standing Order 35**

57. In considering the issue of penalty for the breach of duty in SO 35, and in the absence of a submission on penalty from Mr Messenger, the committee took into account the following factors from Mr Messenger's other submissions:

- Mr Messenger's submissions of a lack of intent on his part;
- An apparent inconsistency in Mr Messenger's evidence as to how the failure to effectively redact the names occurred;
- Mr Messenger's submission that it was only one document of many where the redactions were ineffective;
- Mr Messenger's apology to the House; and
- Mr Messenger's indication of his willingness to take steps to minimise the recurrence of such a matter.

#### **Submissions of a lack of intent**

58. In Mr Messenger's submission to the committee of 22 July 2011, he submitted a lack of intent on his part as follows:

*There was no wilful attempt by me to expose the names of the parties.*

*I had done all that was reasonable to expunge the names of the parties.*

*At the time of expunging the names I had an honest and reasonable belief that the names had been effectively expunged.*

59. Mr Messenger's supplementary submission of 15 August 2011 also reiterated these submissions as follows:

*...I believe I had applied all reasonable steps to expunge the names...*

*...that it was my inability to see the ineffectiveness of the black ink that totally covered the names that is at issue.*

60. Mr Messenger's oral submission at the hearing of 10 October 2011 re-stated his belief that he had properly redacted the relevant names:

*...I was under the belief that the names were not readable and were redacted.*

*...When the documents left my hands, when I incorporated those documents as part of the bundle, those names were not visible to me.*

*...the ink dried allowing the names to be read on the original documents and, to compound that error, that document was subjected to strong light which then made it even more visible...*

61. The committee is satisfied that Mr Messenger intended that the redactions be effective, but finds that he did not exercise due care in ensuring that objective was achieved.

#### **Only one document of many**

62. In Mr Messenger's supplementary submission of 15 August 2011 he submitted that the ineffective redaction only occurred in one document of many documents tabled:

*...it was only one document of many in which the names appeared.*

63. The committee is of the view that the number of documents tabled does not reduce the duty to take due care in identifying children under SO 35, as the potential consequences of identification remains serious. It only takes a single ineffective redaction to identify the name of a child and in the view of the committee, that is one too many.

### Apology to the House

64. Following the Speaker's ruling on 26 May 2011, Mr Messenger stated in the House:

*Mr Speaker, I have listened to your ruling. If I have acted in a careless manner I apologise to the House.*

### Steps to minimise recurrence

65. In Mr Messenger's submission to the committee of 22 July 2011, he submitted a willingness to take steps to minimise the recurrence of such a matter as follows:

*I have taken positive steps to minimise a recurrence of the matters raised by The Speaker.*

### **Recommendation on penalty for contempt for breach of duty in Standing Order 35**

66. The committee considered the full range of penalty options available for a contempt of parliament from an apology through to the maximum fine of \$2000 and the various recommendations of its predecessor committees.

67. The committee considered the contempt was of a serious nature given the potential consequences of identifying a child subject to the protection of the *Child Protection Act 1999*. The committee considered the seriousness of the breach put it in the range of offence whereby suspension from the precincts of the House is the most appropriate form of penalty.

68. The committee was also of the view that in terms of setting professional standards of members a breach of a duty to the House was most appropriately dealt with by removing the member from the privileges of the members seat in the House and access to its precincts.

69. In considering the penalty of suspension from the precinct the committee notes that previous Ethics Committees have recommended suspensions in calendar days. The committee was of the view that such sanctions were subject to the vagaries of the sitting program of the House. Accordingly, the committee considered that a suspension period of sitting days rather than calendar days is more appropriate and effective action.

70. The committee considered that the breach on its own was of sufficient seriousness to warrant suspension from the precinct for a period of three sitting days. However having taken into account all the mitigating factors identified above, the committee recommends the House suspend Mr Messenger from the precincts of the House for a period of two sitting days for the contempt of breach of Standing Order 35.

### **Finding of contempt for breach of Standing Order 233**

71. In considering the issue of penalty for contempt of the breach of duty in SO 233, again, the committee considered the full range of penalty options available for a contempt of parliament from an apology through to the maximum fine of \$2000 and the various recommendations of its predecessor committees.

72. In the absence of a submission on penalty from Mr Messenger, the committee considered that there were no mitigating factors put forward in the written or oral submissions of Mr Messenger on this charge.

73. The committee considered that the rationale behind the sub judice rule in maintaining the principal of comity between the legislative and judicial arms of government means that a breach of this duty is also of a serious nature which put it in the range of offence whereby suspension from the precincts of the House is the most appropriate form of penalty.

74. Again, the committee was also of the view that in terms of setting professional standards of members a breach of a duty to the House was most appropriately dealt with by removing the member from the privileges of the members seat in the House and access to its precincts.

75. The committee considered that Mr Messenger's own statement in the offending document, made some 9 months prior to him tabling, indicated that he was well aware that raising the matter in Parliament was not permitted under SO 233. Accordingly, the committee are of the view that in tabling the document was a deliberate and intentional breach by the Member.
76. The committee recommends, in the absence of mitigating factors that House suspend Mr Messenger from the precincts of the House for a period of three sitting days for the contempt of breach of Standing Order 35.
77. The committee recommends that the penalties for both breaches of duty be applied cumulatively such that the suspension be for the period spanning a total of five sitting days including the day that the House considers the committee's report and recommendations.

## **Other Issues**

### **Procedural Fairness**

78. In his submission of 19 October 2011, Mr Messenger raised a number of issues outlining his perception of a lack of procedural fairness or natural justice in the committee procedures.
79. The key points of Mr Messenger's submission were as follows:
  - *...the Ethics Committee's process would seem to presume my guilt by seeking submissions of mitigation prior to my defence and the decision of the House;*
  - *...the Ethics Committee should only recommend a penalty after the House has considered the Ethics Committee report; [Emphasis added]*
  - *...if the House is provided with a report by the Ethics Committee recommending that I be found guilty and the reasons for that guilty recommendation, but fails to incorporate my views on the Ethic (sic) Committee's reasoning and adverse findings, then quite clearly following best practise and principals of natural justice and procedural fairness, the report is tainted, incomplete and not balanced;*
  - *Your letter then goes on to explain inter alia that I may be imprisoned if I do not pay the fine. Again I think you and the Ethics Committee have exceeded your authority by making threats of imprisonment prior to the House making its decision;*
  - *That the Ethics Committee has breached procedural fairness and demonstrated bias;*
  - The committee should "immediately disqualify itself from further action in relation to the Speaker's referral because of bias and flawed process"; and
  - *The Speaker's referral be considered ab initio by another committee of Members to accord him procedural fairness free from bias.*
80. In response to Mr Messenger's points the committee makes the following observations.
81. With respect to this matter, the committee has upheld the Standing Orders and the established principles of parliamentary law and practice in Queensland and afforded every reasonable opportunity to Mr Messenger to be heard during its inquiry.
82. The committee provided Mr Messenger with the opportunity to make two written submissions firstly, in respect of the initial allegations and secondly, in with regard to the specified charges of contempt. In addition, the committee provided Mr Messenger with the opportunity of an oral hearing (including an extension of time to allow him to prepare for the hearing and approved his request to be accompanied by a legal adviser at that hearing) following every step as required in Schedule 3 of the Standing Orders (Instructions to Committees regarding witnesses). Furthermore, the committee provided Mr Messenger with an opportunity to make

an additional written submission with respect to penalty, an opportunity to which he chose not to avail himself.

83. It has long been recognised in Westminster Parliaments that each House has the privilege or power to regulate its own proceedings and does so by way of the Standing Rules and Orders which have the force of law.
84. Article 9 of the Bill of Rights 1688 of which is now as enshrined in Queensland Law by section 8 of the POQA, means that the proceedings of the House cannot be impeached or questioned in any court or place outside the Assembly. This means that general law as applied by the courts in relation to procedural fairness cannot be applied to parliamentary proceedings.
85. In recognition of the above, and in regulating its own proceedings, the Queensland Parliament has adopted the principles of procedural fairness and included them in Chapters 45 and 46 and Schedule 3 of the Standing Orders (Instructions to Committees regarding witnesses).
86. The Ethics Committee is tasked under S104B of the POQA to deal with alleged breaches of parliamentary privilege by a member of the Assembly that are referred to it. Under Standing Order 270 the committee is duty bound to investigate each allegation referred to it and to report to the House on the matter.
87. As noted above, under Standing Order 270(5), the committee must with its report, recommend the action that should be taken. That is why the Ethics Committee has established the practice of inviting a submission on penalty when it has made a preliminary finding on the issue of contempt. Once the committee has reported on the matter it is a matter for the House. The committee has no further jurisdiction to deal with the matter once it reports.
88. In this case, the committee has not made a presumption of guilt but rather a preliminary finding of contempt based on the evidence before it.
89. Ultimately, the determination of guilt or otherwise and penalty is a matter for the House based on the committee's recommendations. This determination is made by way of a motion in the House where there is an opportunity for all Members, including the Member the subject of the report, to debate the committee's recommendations.
90. In response to Mr Messenger's allegation that it made threats of imprisonment the committee is of the view that no reasonable person could interpret the committee's letter in that way. The letter clearly sought to advise the Member of the range of penalties available to the House with respect to contempt and the content of Standing Order 277(1) which sets out the maximum limit and the steps involved for payment or non payment of a fine.
91. With respect to the suggestion of bias, the committee notes that in the law of procedural fairness as applied in the courts, bias is determined by an objective test that a fair minded observer might reasonably apprehend that the decision maker would not bring an impartial mind to the resolution of the matter. The committee finds Mr Messenger's suggestion offensive and rejects it out of hand. The committee notes that Mr Messenger does not present any evidence which might support such an apprehension other than his assertion.
92. In his letter to the committee of 19 October 2011, Mr Messenger indicated that he would seek to table that letter and other inquiry material in the House. The committee has resolved to authorise Mr Messenger to publish all documents relating to this inquiry in his possession subsequent to the tabling of this report and advised Mr Messenger of the same.
93. Also in his letter of 19 October 2011, Mr Messenger requests "that the Ethics Committee recommends that some days be given between the tabling of the report to the debate of the motion, so that I might properly consider and prepare my defence before the House".
94. The committee notes that the timing of the debate on the committee's recommendations is entirely a matter for the Leader of the House. The committee brings Mr Messenger's request to the Leader of the House's attention in the recommendations of this report.

### **Conclusion 1**

The committee finds that on 10 May 2011, Mr Robert Messenger MP tabled a document in the Assembly which became identified as Tabled Paper No. 5311T4395. The form in which that document was tabled allowed the identification of a child subject to the *Child Protection Act 1999*. The committee finds that Mr Messenger MP breached a duty to the House expressed in Standing Order 35 by failing to ensure documents concerning a child in relation to the relevant Act, were tabled in a non-identifying manner.

### **Conclusion 2**

The committee notes that this matter further highlights the requirement for members to exercise due care when redacting identifying details on documents as per Speaker Mickel's previous statement in the House on 16 September 2010 that:

*... members who wish to protect the identity of constituents or others need to be very careful to ensure that their efforts to redact information are actually effective. Oftentimes simply using a black texta to black out an identifying feature is insufficient to ensure that the original words cannot be viewed in a copy or electronic version.*

### **Conclusion 3**

The committee finds that on 10 May 2011, Mr Robert Messenger MP tabled a document in the Assembly which became identified as Tabled Paper No. 5311T4395. That document included a copy of Mr Messenger's letter of 27 August 2010 to the Chairperson of the CMC wherein Mr Messenger passed comment on a matter that was under consideration by a court exercising criminal jurisdiction. The committee finds that by tabling the document Mr Messenger breached his duty to the House expressed in Standing Order 233.

### **Recommendation 1**

The committee unanimously recommends that the Assembly finds Mr Messenger guilty of contempt by breaching the duty to the House expressed in Standing Order 35 and recommends that the House suspend the Member for Burnett from the precincts of the House for two sitting days from the day the motion is passed, for that contempt.

### **Recommendation 2**

The committee reminds all members of the need to exercise the utmost care when redacting identifying details on documents particularly when they relate to the identity of children and to follow the proper processes as detailed in Standing Order 35.

### **Recommendation 3**

The committee unanimously recommends that the Assembly finds Mr Messenger guilty of contempt by breaching the duty to the House expressed in Standing Order 233 and recommends that the House suspend the Member for Burnett from the precincts of the House for three sitting days from the day the motion is passed, for that contempt.

### **Recommendation 4**

The committee recommends that the penalties for both breaches of duty be applied cumulatively such that the suspension be for the period spanning a total of five sitting days including the day that the House considers the committee's report and recommendations.

### **Recommendation 5**

The committee draws to the attention of the Leader of the House Mr Messenger's request that some days be given between the tabling of the report and the debate of the motion so that he might properly consider and prepare his defence before the House.

## THE SECOND MATTER

### *The referral*

95. On 18 August 2011, the Speaker wrote to the committee about correspondence received by the Speaker from the Member for Burdekin, Mrs Rosemary Menkens MP.
96. The correspondence from the Member for Burdekin relates to a letter by the Member for Burnett reported in the Bundaberg News Mail on Saturday 25 June 2011. Mrs Menken's suggested that the contents of the Member of Burnett's letter could be conceived as being a reflection on the Speaker, the Parliament and on the Committee.
97. Speaker Mickel stated the following in relation to the printed letter:
- If the reported letter is correct, it appears to me that the member may have committed a contempt by unnecessarily and improperly impugning the Assembly's ethics processes and by pre-judging an inquiry outcome arguably impugning the committee's processes and deliberations.*
98. The Speaker noted the correspondence related to the first matter which was an ongoing matter before the committee and accordingly referred the matter for the committee's consideration.

### **Committee Procedures**

99. The committee follows 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 Chapter 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.
100. With respect to the second matter, in accordance with procedures under Standing Order 270, the committee invited Mr Messenger to provide a written submission on the referral. On 29 September 2011, the committee received a submission from Mr Messenger.
101. The committee subsequently considered this submission and determined that it had sufficient material before it to determine the matter.

### **Contempt**

#### **Definition of contempt**

102. 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.
103. The term 'contempt of parliament' may include any offence to the dignity of the House or interference with its processes where no established privilege has previously existed. As detailed in Erskine May's Parliamentary Practice:

Each House also claims the right to punish as contempts actions which, while not breaches of any specific privilege, obstruct or impede it in the performance of its functions, or are offences against its

authority or dignity, such as disobedience to its legitimate commands or libels upon itself, its Members or its officers...<sup>4</sup>

104. Accordingly, a contempt may be committed if it amounts to an act or an omission that offends the authority or dignity of the House or indeed a breach of a duty legitimately imposed by the House upon its Members.

***Alleged impugning the Assembly's ethics processes and pre-judging an inquiry outcome impugning the Ethics Committee's processes and deliberations***

105. The following two comments made by Mr Messenger in the letter reported in the Bundaberg News Mail were considered by the committee:

(a) *'If you sit quietly, don't have a go and don't offend the Premier or the Opposition, then you wont get referred.'*; and

(in the context of a previous Ethics Committee report on a matter relating to Mr Messenger and the current matter before the committee)—

(b) *'...after that ethics committee referral failed to stop my "crusading" and advocacy. The same outcome will eventually occur after this referral.'*

106. Standing Order 271 (SO 271) of the Legislative Assembly's Standing Rules and Orders provides—

**Restriction on debating matter in the House**

A matter referred to the ethics committee must not be debated in the House until such time as the ethics committee has reported on the matter, if in the opinion of the Speaker, such debate could prejudice the matter.

107. While SO 271 does not expressly prohibit debate on a matter outside of the House, it could be seen, in certain instances, that debating a matter in a forum outside of the House might be against the spirit of that Standing Order. The principle behind the Standing Order is to prevent discussion of a matter before the Ethics Committee and therefore to prevent any attempt to influence the proceedings from outside the committee's own processes.

108. In respect to comment (a) Mr Messenger's submission of 29 September 2011 denied any intention to reflect on the Speaker, Parliament, Committees or Members:

*The words I used were not intended as a reflection of the Speaker, Parliament, Committees or Members and I submit that an objective person reading the letter would draw the same conclusion.*

109. In respect to comment (b) Mr Messenger's submission of 29 September 2011 also denied that his statements were pre-empting a decision of the Ethics Committee. Mr Messenger states that:

*My letter to the editor was not intended to reflect on the Speaker or the Ethics Committee...*

*I was merely responding to a political attack on me as the Member for Burnett. The issue addressed in Mr Campbell's letter and my response are grave and emotional and I strongly believe a government agency has wrongly removed a child from his mother in circumstances that I believe demand an independent inquiry. I will continue to pursue this matter vigorously.*

110. Mr Messenger also raised in his submission the difficulty faced by a member if political opponents choose to raise matters in relation to a referral but the person subject to the referral is denied an opportunity to respond in their electorate:

---

<sup>4</sup> CJ Boulton (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and usages of Parliament*, 22<sup>nd</sup> edition, Butterworths, London , 1997, at 65

*I submit that it would be an improper interference with the free performance of my duties as a Member to allow political opponents to raise matters about a referral but I am denied an opportunity to respond.*

## **Conclusion**

111. In relation to Mr Messenger's letter reported in the Bundaberg News Mail on Saturday 25 June 2011 the committee finds that Mr Messenger was not intending to reflect on the Speaker or the Ethics Committee and its processes nor seeking to pre-empt the outcome of the committee's investigation or attempting to impugn the committee's processes.
112. In conclusion, the committee finds no prima facie case of contempt in relation to these allegations.
113. However, the committee wishes to remind all Members of the Assembly and members of the public that once a matter is referred to the Ethics Committee for investigation that the Ethics Committee's processes and deliberations are best served if persons refrain from debating the matter in forums outside of the House until such time as the Ethics Committee completes its investigation and publishes its report.

### **Conclusion 4**

**In relation to statements made by Mr Messenger in the letter reported in the Bundaberg News Mail on Saturday 25 June 2011, the committee is satisfied with Mr Messenger's explanation that he was not intending to reflect on the Speaker or the Ethics Committee and its processes nor seeking to pre-empt the outcome of the committee's investigation or attempting to impugn the committee's processes. The committee finds no prima facie case of contempt in relation to these allegations.**

### **Recommendation 6**

**The committee recommends the House take no further action in relation to the matter.**

### **Recommendation 7**

**The committee reminds all Members of the Assembly and members of the public that once a matter is referred to the Ethics Committee for investigation that the Ethics Committee's processes and deliberations are best served if persons refrain from debating the matter in forums outside of the House until such time as the Ethics Committee completes its investigation and publishes its report**

Mr Evan Moorhead MP

## **Chair**

October 2011

**Membership — 53rd Parliament**

Mr Evan Moorhead MP, Chair, *Member for Waterford*

Dr Alex Douglas MP, Deputy Chair, *Member for Gaven*

Ms Grace Grace MP, *Member for Brisbane Central*

Mr Vaughan Johnson MP, *Member for Gregory*

Mr Mark Ryan MP, *Member for Morayfield*

Mr Peter Wellington MP, *Member for Nicklin*

**Secretariat**

Mr Michael Ries, *Research Director*

Ms Kellie Moule, *Principal Research Officer (until 14 October 2011)*

Ms Erin Pasley, *Principal Research Officer (from 10 October 2011)*

Ms Andrea Musch, *Executive Secretary*

**Contact**

Telephone: 07 3406 7586

Facsimile: 07 3406 7691

E-mail: [Ethics@parliament.qld.gov.au](mailto:Ethics@parliament.qld.gov.au)

Internet: <http://www.parliament.qld.gov.au/work-of-committees/committees/ETHICS>