



ETHICS COMMITTEE

REPORT NO. 164

MATTER OF PRIVILEGE REFERRED BY THE SPEAKER ON 11 NOVEMBER 2015 RELATING TO AN ALLEGED DELIBERATE MISLEADING OF THE HOUSE

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 an allegation that the Minister for Main Roads, Road Safety and Ports and Minister for Energy, Biofuels and Water Supply, Hon Mark Bailey MP (Member for Yeerongpilly), deliberately misled the Speaker in making certain assurances to the House and the Speaker that his Private Members' Statement regarding the ethanol industry was not related to the biofuels bill before the House.
4. The Member for Yeerongpilly's Private Members' Statement concerned public consultation on possible pathways for increasing ethanol and bio-based diesel mandates over time.
5. The Leader of Opposition Business rose twice on the same point of order during the statement, claiming that there was a biofuels bill before the House and the statement related to the bill to be debated in the House.

¹ *Parliament of Queensland Act 2001*, section 104B.

6. At each point of order the Speaker advised the Member for Yeerongpilly it was not appropriate for the Member for Yeerongpilly to refer to a bill before the House. In particular, the Speaker advised the Member for Yeerongpilly:

Minister, I have not studied the bill. I am being guided by your advice that this is not contained in the bill that is currently before the House. If it is contained in the bill that is currently before the House, you do run the risk of –

7. In response the Member for Yeerongpilly said “I can assure you, Mr Speaker, that this is separate to the bill”.
8. Following this exchange and the Member for Yeerongpilly continuing with his statement, the Member for Glass House rose on a point of order stating:

This is consistent with the bill that is before the House. The minister is referring to elements of the public committee hearing that was held during the last sitting on the Wednesday, including discussions about where the mandate that is in the bill will be trending over the coming years. He is referring to the bill that is before the House.

9. After again being advised by the Speaker that it was not appropriate for the Member for Yeerongpilly to refer to a bill before the House, the Member for Yeerongpilly stated:

Mr Speaker, I am speaking about a discussion paper that is launching today for public comment and input over the next four weeks. That clearly goes beyond the time frame of the bill. It is a very simple matter for the opposition to understand and it is separate from the bill in that it is asking for pathways.

10. The Member for Clayfield then rose twice on the same point of order, suggesting that the Speaker should make a ruling in relation to the Standing Order, and stating:

It is about the anticipation of the debate of a matter that is on the Notice Paper that is likely to be debated in the very near future. The Notice Paper clearly has on it a bill in relation to the ethanol mandate. The minister is clearly speaking about ethanol mandates. It is a matter that is reasonably likely to be discussed in the near future with respect to the matter on the Notice Paper. With respect, Mr Speaker, it is not up to the minister to say what is in the bill; it is in fact obviously within your realm to make that particular call. Even though you may not have yet studied the bill, it is reasonable to anticipate that the minister—

11. The Member for Yeerongpilly claimed at each of the points of order raised during his Private Members’ Statement that his statement was not about the Bill.
12. Later that day the Member for Yeerongpilly made an apology via a Ministerial Statement, saying:

Today in question time there was some consternation that I may have been contravening standing orders when it came to talking about the pathways options paper that the government is proposing. It certainly was not my intention in any way to contravene the standing orders. I offer my apologies to the chair if in any way I may have contravened the standing orders in question.

The referral

13. On 11 November 2015, the Speaker of the Legislative Assembly, Hon Peter Wellington MP, made the following statement in the House:

I refer to the statement made by the Minister for Main Roads, Road Safety and Ports and Minister for Energy and Water Supply this morning on the ethanol industry. During the minister’s statement the Leader of Opposition Business rose to complain that the minister’s speech was anticipating a bill before the House in contravention of standing order 231. The minister gave me an assurance that the matter being canvassed by the statement was

separate to the bill. Later the member for Clayfield took a further objection on the grounds that the minister's speech was anticipating a bill before the House in contravention of standing order 231. Again I relied on the minister's earlier assurance to me. I have now had the opportunity to study the bill and read the Record of Proceedings. The bill seeks to establish an ethanol mandate. The bill also establishes a mechanism, by regulation, to increase the mandate. The minister's statement was about possible pathways for increasing the mandate. It appears to me that the minister's statement can be described as anticipatory of the bill. Without the bill passing there is no mandate. Without the mandate there is no need for a pathway.

I am very disturbed by the minister ignoring standing order 231, but I am gravely concerned that the minister led the chair into error. The chair must be able to rely on the undertakings given by ministers. As I explained earlier today, the chair is not all knowing and must be able to ask and rely upon members' assurances as to whether a matter is sub judice, anticipatory, before the Ethics Committee or otherwise in breach of standing orders. I also note the minister's apology provided half an hour ago. The minister may not have fully understood the rule in standing order 231 and may not have deliberately intended to give an assurance that has led the chair into error, but I think that the minister should explain his conduct to the Ethics Committee. I therefore refer the minister under standing order 268 to the Ethics Committee for giving an assurance to the chair that the statement did not offend standing order 231 when it in fact did.

Committee proceedings

14. 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.

Definition of contempt

15. 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.

Standing Order 231 – Anticipating discussion of any subject appearing on the Notice Paper

16. Standing Order 231 provides that:
 - (1) A member may not anticipate the discussion of any subject which appears on the Notice Paper.
 - (2) The Speaker when determining whether a discussion is out of order on the ground of anticipation, shall have regard to the probability of the matter anticipated being brought before the House within a reasonable time and the degree to which debate of that matter is likely to be anticipated.
 - (3) This rule shall not apply to prevent questions or debate which anticipate debate of the annual Appropriations Bill.²

² Standing Order 231, Standing Rules and Orders of the Legislative Assembly, available at <http://www.parliament.qld.gov.au/work-of-assembly/procedures>

17. The committee found that the Member for Yeerongpilly could not have committed a contempt by failing to comply with Standing Order 231 (anticipating discussion in the House of a bill) in the absence of a ruling from the Speaker at the time he made his Private Members' Statement.
18. However, the committee considered that the Member for Yeerongpilly's conduct in making certain assurances to the House and the Speaker could be examined by the committee as to whether they amounted to the contempt of deliberately misleading the House as under Standing Order 266.
19. The committee invited Mr Bailey to provide further information on the alleged contempt of deliberately misleading the House. The Member responded on 15 January 2016.
20. The committee then found that it had sufficient material before it to deliberate on the allegation.

Nature of the contempt of deliberately misleading the House.

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

Deliberately misleading the House or a committee (by way of submission, statement, evidence or petition).³

22. Previous ethics committees, and David McGee in Parliamentary Practice in New Zealand, 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
23. 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
24. There are 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

³ Standing Order 266(2), Standing Rules and Orders of the Legislative Assembly, available at <http://www.parliament.qld.gov.au/work-of-assembly/procedures>

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.

Were the Member for Yeerongpilly's statements misleading?

25. The first limb of this element is whether the person's statement contained factually or apparently incorrect material.
26. The Speaker's ruling on this matter clarified that:
- The bill seeks to establish an ethanol mandate. The bill also establishes a mechanism, by regulation, to increase the mandate. The minister's statement was about possible pathways for increasing the mandate. It appears to me that the minister's statement can be described as anticipatory of the bill. Without the bill passing there is no mandate. Without the mandate there is no need for a pathway.*
27. On the evidence before the committee, the committee concurred with the ruling by the Speaker that the Member for Yeerongpilly's statement and the bill were related, and consequently the Member for Yeerongpilly's statement was anticipatory of the bill.
28. Therefore, the committee considered that the Member for Yeerongpilly's declarations that his statement was not related to the biofuels bill were factually incorrect.
29. The second limb of this element is whether the statement itself was misleading. The committee considered that a reasonable person may have been misled by the Member for Yeerongpilly's declarations that his statement was not related to the bill. This was evidenced by the Speaker referring to the Member for Yeerongpilly as leading the Chair into error due to the Member for Yeerongpilly's assurances when referring the matter to the committee.

Consideration

30. The committee considered that the Member for Yeerongpilly's declarations appear to have been factually incorrect as the Member for Yeerongpilly's statement was related to the bill, and therefore the statement was anticipatory of the bill.
31. The committee also considered that the Member for Yeerongpilly's declarations were misleading.
32. Accordingly, the committee found that the first element has been established.

Did the Member for Yeerongpilly know at the time he made the statements they were misleading?

33. In his referral to the committee, the Speaker stated the Member for Yeerongpilly "may not have fully understood the rule in Standing Order 231 and may not have deliberately intended to give an assurance that has led the chair into error".
34. The Member for Yeerongpilly contended in his submission that he thought Standing Order 231 referred to the prohibition of debating specific elements of a bill. He stated that:

At the time, my understanding of Standing Order 231 at the time was that it prevented me from debating the specific elements of the bill until it returned from the committee process...My speech was intended to announce an "options paper" that would seek public and industry feedback on potential longer term pathways forward in relation to a higher ethanol mandate.

...

My thought processes at the time I gave my speech to Parliament on 11 November 2015 was that the options paper was not the subject matter of that which was within the bill, but rather that it was about discussing the level of a mandate after the bill became law. To my mind, that was separate to the provisions of the bill that was before the House, and thus it was

something that was the proper subject of discussion in Parliament at that time. My genuinely held belief was that the options paper was about the future, that is, post the bill becoming law, and not something which Standing Order 231 prevented discussion about. When I said that what I was speaking of was "not about the bill", "not part of the bill", "separate to the bill", I genuinely believed that to be correct.

...

At the time I made the statements to the House, and gave my assurance to the Speaker, it did not occur to me that the existence of a mechanism to increase the mandate by regulation was something which would prevent discussion in the House about the release of an options paper for future pathways based on submission from the community. Had I believed that to be so, or had it occurred to me that that was a possibility, I would not have made the statements to the House.

35. The Member for Yeerongpilly contended in his submission that his inexperience within the Queensland Parliament may have affected his understanding of Standing Order 231:

As a new Minister, this Bill was only my second, and my first bill had been a very straight forward and uncontentious bill, namely the Energy and Water Ombudsman Bill 2015. My time with the Brisbane City Council did not expose me in any significant way to an analogue procedural rule. Thus, as indicated above, my understanding of the interpretation of Standing Order 231 was that it prevented discussion about specific elements of the bill.

36. Subsequently, in his submission, the Member for Yeerongpilly contended that:

...the statements which I made to the House on 11 November 2015 were statements made by me in an honest belief that they were correct. I did not know them to be incorrect at the time that I made them.

Consideration

37. The committee considered that, while the Member for Yeerongpilly's declarations were misleading, there was no evidence before the committee to indicate the member knew they were misleading at the time he made them.

If yes, did the Member for Yeerongpilly intend to mislead the House?

38. 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 some formality (for example, by way of personal explanation), a presumption of an intention to mislead the House will more readily arise.⁷

39. The Member for Yeerongpilly's speech was a Private Members' Statement regarding the ethanol industry. Given the Member for Yeerongpilly made a pre-prepared statement, the committee considered it possible to infer that the Member for Yeerongpilly had personal knowledge of the stated facts in his Private Member's Statement.

⁷ McGee, David, *Parliamentary Privilege in New Zealand*, Third Edition, Dunmore Publishing Ltd, Wellington, 2005, p.654.

40. However, the Member for Yeerongpilly contended that he believed the content of his statement was not related to the specifics of the bill as per Standing Order 231, hence his assurances to the Speaker.

41. In his submission, the Member for Yeerongpilly stated that "at no stage did I intend to mislead the Parliament in any way in any of my statements on 11 November 2015". He went on to state that:

...it was my sincere belief that the matter was separate and optional to the bill, and thus, in face of Opposition objection, I defended my perspective vigorously. I genuinely held the view that the matter was separate to the Bill, and was not in any sense a breach of the Standing Order. Had I believed otherwise, I would not have spoken on the topic. Had I had any doubt in my mind at the time as to the correctness of my understanding of how Standing Order 231 operated, and/or whether the matter I was speaking of was a matter within the Bill, I would not have given the assurance to the Speaker as I did. When it became apparent to me that my actions may have contravened the order, I apologised to the House.

42. In his apology the Member for Yeerongpilly advised that it was not his intention to contravene the Standing Orders, and he offered his apologies to the Chair (Speaker) if he had contravened the relevant standing orders.

43. The Member for Yeerongpilly also argued in his submission that:

...a consideration of the objective circumstances of the making of the statement belies the notion that the statement could be made with any prospect of misleading the House. This is distinct from a circumstance where the truth or falsity of a statement is solely within the knowledge of the person at the time of making the statement (for example, a factual statement about an individual's affairs) and thus difficult or impossible to establish the truth or falsity of the statement. By contrast, the contents of the bill were public, others within the House were fully across the bill, and that the veracity of my statements were able to be ascertained by analysis of documents which were accessible... It would be a sheer act of foolishness by someone minded to try to mislead the House (which was most certainly not the case), to make or press on with "false" statements in such circumstances, particularly in light it [sic] being perfectly obvious that those statements would be scrutinised with a fine tooth comb. It is not a circumstance in which, realistically, if one were so minded to mislead (which I was not), that could be achieved.

If I had been of the belief that my statements breached the standing orders, I would not have attempted the speech in the first place. That I maintained that what I was discussing was separate from the bill against objection from the Opposition was because I truly believed that to be the case.

Consideration

44. On the information before the committee, the committee considered that there was no evidence to indicate that the Member for Yeerongpilly intended to mislead the House or the Speaker.

45. In the absence of evidence in relation to the second and third elements, the committee could not find contempt in relation to this matter.

46. The committee notes that in hindsight, had the Member for Yeerongpilly's statement been put on hold until the Speaker could give a ruling on the matter of anticipating debate, the matter may not have progressed to a referral to the Ethics Committee.

Conclusion

47. On the matter of the Member for Yeerongpilly deliberately misleading the House and the Speaker, the committee finds that there was no evidence that the member was aware that his statements were misleading at the time due to his interpretation of the meaning of Standing Order 231, and therefore he did not intend to mislead the House or the Speaker.

Conclusion 1

The committee finds that the Member for Yeerongpilly could not have committed a contempt by failing to comply with Standing Order 231 (anticipating discussion) in the absence of a ruling from the Speaker that it was anticipatory at the time of making his Private Members' Statement on 11 November 2015.

The committee notes that in hindsight, had the Member for Yeerongpilly's statement been put on hold until the Speaker could give a ruling on the matter of anticipating debate, the matter may not have progressed to a referral to the Ethics Committee.

Conclusion 2

On the information before the committee, it finds that there is no evidence that the Member for Yeerongpilly was aware that his statements were misleading at the time or that he intended to mislead the House or the Speaker.

Recommendation

The committee recommends no finding of contempt be made against the Member for Yeerongpilly.



Don Brown MP
Chair

17 March 2016

Membership — 55th Parliament

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Member for Capalaba

Mr Glen Elmes MP, Deputy Chair
Member for Noosa

Ms Ros Bates MP
Member for Mudgeeraba

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