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LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

14<sup>th</sup> Assembly

Committee of Privileges

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# Report on Conflicting Estimates Evidence

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September 2022





## LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

### 14<sup>th</sup> Assembly

#### Committee of Privileges

#### Report on Conflicting Estimates Evidence

##### Matter Referred

On 10 August 2021, the Assembly resolved:

That the Legislative Assembly agree that the following matter be referred to the Privileges Committee for inquiry and report:

1. That on 15 June 2021, Mr Ken Fleming QC, former Independent Commissioner Against Corruption gave evidence before the Estimates Committee;
2. In that evidence, Mr Fleming, made comments in relation to a staff member who made a complaint to the Inspector of the Independent Commissioner Against Corruption alleging that a conflict of interest between the Director of Investigations in the Office of the ICAC and an external contractor for the Office of the ICAC amounted to corrupt conduct under the ICAC Act;
3. On 23 June 2021, the individual who made the complaint, who is referred to as 'Witness B', supported by legal representation sought leave by the Estimates Committee to respond to the evidence claimed to adversely reflect on a person;
4. Under Standing Order 210, the presentation of evidence was allowed by the Estimates Committee;
5. On 24 June 2021, Witness B's legal representative gave evidence to the Estimates Committee via in camera hearing;
6. It is acknowledged that in doing so, both witnesses; Mr Fleming and Witness B made statements under parliamentary privilege; and
7. That, by virtue of the evidence of Mr Fleming and Witness B, the Estimates Committee was given conflicting evidence regarding the matter.

The reference outlines certain matters for inquiry and report, but does not specify any specific allegation. Nevertheless, the clear implication of the referral is that the Committee is to consider whether or not anyone breached the privileges of the Assembly by misleading the Assembly.

## Background

### Role of the Committee of Privileges and Scope of the Inquiry

Standing Order 174(1) sets out the role of the Committee of Privileges:

A Committee of Privileges must be appointed at the commencement of each Assembly to inquire into and report on complaints of breach of privilege which may be referred to it by the Assembly and act as the Committee of Members' Interests pursuant to s.3 of the *Legislative Assembly (Disclosure of Interests) Act 2008*.

The scope of the Committee's inquiry was therefore limited to the terms of that Standing Order and the referral from the Assembly.

Mr Fleming's evidence before the Estimates Committee became a matter of public controversy, including allegations that it breached provisions of the *Independent Commissioner Against Corruption Act 2017*. Some commentary suggested that, as the evidence was subject to parliamentary privilege, such allegations should be examined by the Committee of Privileges.

Such commentary misunderstands the purpose and operation of parliamentary privilege. Parliamentary privilege does not make the Parliament an alternative venue for prosecuting offences. Instead, it protects speech in Parliament from prosecution or civil suits. Privilege does, however, enable the Parliament to prosecute offences committed against it, such as abusing the privilege of free speech by misleading the Parliament.

The sole purpose of the Committee of Privileges is to inquire into and report on complaints of breach of privilege. It does not inquire into breaches of any other law. Nor does it seek to resolve the truth in any other dispute, matter of interest, or controversy.

The Assembly referred conflicting evidence before the Estimates Committee without making any specific allegation of contempt. The question before the Committee of Privileges is therefore whether anyone had breached privilege by deliberately misleading the Assembly or its committees.

The Committee has previously<sup>1</sup> adopted the three elements to the offence of misleading parliament described by David McGee:

1. The statement must, in fact, have been misleading;
2. It must be established that the person making the statement knew at the time the statement was made that it was inaccurate; and
3. In making the statement the person must have intended to mislead the House.<sup>2</sup>

The Committee therefore examined whether, in the course of giving apparently conflicting evidence, any person committed all three elements of this offence.

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<sup>1</sup> [\*Independent Commissioner Against Corruption Investigation into the conduct of the Speaker of the Legislative Assembly\*](#), June 2020; [\*Report on Referral regarding a statement by the Member for Blain, October 2021\*](#); [\*Report on a Referral Regarding the Member for Barkly\*](#), March 2022.

<sup>2</sup> David McGee, *Parliamentary Practice in New Zealand*, 4th edn, pp 775-6



## **Publication of Evidence**

Allegations of a breach of privilege of the Assembly are a matter of public interest and, unless there are compelling reasons to the contrary, evidence should be heard in public. Consistent with this, Standing Order 232(7) provides:

Hearing of evidence by the Committee will be conducted in public session, except where:

- (a) the Committee accedes to a request by a witness that the evidence is heard in private session
- (b) the Committee determines that the interests of a witness would best be protected by hearing evidence in private session or
- (c) the Committee considers that circumstances are otherwise such as to warrant the hearing of evidence in private session.

The Committee was mindful that much of the controversy around the circumstances of this inquiry was that a private dispute between an employer and an employee was made public. The Committee did not wish to aggravate that situation by making further details public unnecessarily. The Committee has therefore decided to keep the evidence it has received confidential, except to the extent it considers necessary to provide public assurance as to the adequacy of its investigations and the reasons for its findings.

## **Conduct of the Inquiry**

The Committee considered the evidence published by the Estimates Committee, including Mr Fleming's public appearance before the Estimates Committee on 15 June 2021 and the written submissions and subsequent in camera appearance of Mr John Lawrence SC on behalf of Witness B.

While there were many points of disagreement within that evidence, most appeared to be different views of a similar set of facts as occurs in a dispute, and on their face did not appear to be matters likely to amount to the offence of misleading the Assembly.

There were, however, events in the timeline set out in Mr Fleming's oral evidence that were contradicted by documents submitted by Mr Lawrence. The essence of the conflict was that Mr Fleming had said he gave a notice that he intended to terminate Witness B's employment before Witness B made her complaint, but the written notice of termination provided by Witness B was dated after her complaint.

This led Mr Lawrence to state in his oral evidence:

I want to read this out; this needs to be placed on the record. This committee has to know the accuracy here:

That was the sort of material about which she complained. We gave her a notice that we intended to terminate her employment whilst still under probation at about the tenth month of her probation. She immediately made what she considered to be a protected communication to me.

That statement can be seen to everybody in this room to be false. The order is completely wrong, and him describing to this committee—whether he was on oath or not—what she considered to be a protected communication—you have exhibit A, which is him acknowledging it is a protected communication and she is a protected person.

He has either, being most Christian, made a mistake or he could have lied here. That in itself is an offence and it is pointed out in our submission.<sup>3</sup>

The Chair wrote to Mr Fleming seeking his response to this allegation that he could have lied to the Estimates Committee, noting that the timeline of events he gave in oral evidence conflicted with the dates on the documents provided by Witness B.

Mr Fleming advised that Witness B omitted the fact that prior to Witness B making her complaint she had been orally advised of the intention to terminate her employment. In support of this he provided a copy of an email from the Director of Investigations to Witness B following up on the conversation the previous day where the options of termination during her probation, or resignation from her current position and a non-ongoing role in a different position for 6 months completing a policy project were given.

Thus, according to the email provided by Mr Fleming, Witness B had been orally advised of the intention to terminate her employment on 9 March 2021, which was confirmed by the email of 10 March 2021, which was prior to her making a formal complaint on 17 March 2021.

On this explanation, it was Mr Lawrence's statement that Mr Fleming's statement was false that appeared misleading.

Subsequently, the Office of the Chief Minister forwarded to the Committee correspondence from Mr Bill Doogue to the Chief Minister on behalf of Witness B.

The Committee wrote to Mr Doogue seeking confirmation that he was representing Witness B, advising that Mr Fleming had provided a copy of an email purporting to provide evidence that Witness B was advised of an intention to terminate her employment on 9 March 2021, and seeking comment on the evidence given by Mr Lawrence in light of that detail.

Mr Michael Grove wrote to the Committee advising that he was now representing Witness B.

The Committee subsequently wrote to Mr Fleming and Mr Grove (representing Witness B) seeking affirmation of the information they had provided.

Mr Fleming replied with an affidavit swearing that to the best of his recollection and the documents he was provided the facts therein were true and correct. He further stated:

I remain of the view that the facts given to the Estimates Committee are correct. If I am wrong in that respect, I do not know of any error in what I said to the Estimates Committee and therefore could not have intended to mislead the Parliament.

Mr Grove replied advising that Witness B requests that they be allowed to represent her and affirms both Mr Lawrence SC's letter of 23 June 2021 and his oral submissions to the Estimates Committee on 24 June 2021.

The letter also explained 'the sequential dispute' as follows:

8. The central issue that the Committee of Privileges now seeks to resolve is the sequential issue concerning when Witness B was given a notice of intention to terminate employment and when Witness [B] made a complaint / report to the

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<sup>3</sup> Estimates Committee In Camera Hearing Transcript, 24 June 2021, p 4: [Submissions-to-the-Estimates-Committee-Responding-to-Evidence-Claimed-to-Adversely-Reflect-on-a-Person.pdf \(nt.gov.au\)](#)



former ICAC in relation to various issues within the O/ICAC. We note at this stage that the latter date is not in dispute.

9. A proper analysis of the circumstances needs to begin with what Mr Fleming asserted before the Estimates Committee on 15 June 2021. He said:

"We gave her a **notice that we intended to terminate her employment** whilst still under probation at about the tenth month of her probation. She **immediately made** what she considered to be a protected communication to me." (emphasis added)

10. The notice of an intention to terminate employment is a specific formal procedure and "term of art" governed, *inter alia*, by the powers in s 32(6) of the *Public Sector Employment & Management Act 1993* and the requirements in the OCPE's *Employment Instruction No. 3*.
11. What is clear on the evidence and the applicable law is that Mr Fleming did indeed issue a notice of his intention to terminate employment but on **13 April 2021** (being in about the *eleventh month* of Witness B's probation), which was tendered to the Estimates Committee by Mr Lawrence as **Attachment B** to his written submission of 23 June 2021. Equally clear is that Mr Fleming issued a notice of termination of Witness B's employment on **24 May 2021**, which was also tendered before the Estimates Committee by Mr Lawrence as **Attachment C** of the same submission. Moreover, as stated, what cannot and is not in dispute is that Witness B made her complaint / report to the then ICAC on **17 March 2021**. And this was expressly acknowledged by Mr Fleming in his letter of **29 March 2021**, wherein he refers to Witness B's complaint / report as a "protected communication" and declares Witness B a "protected person" for the purposes of the ICAC Act.
12. It is those facts, dates and applicable law that Witness B and her counsel relied upon in the submissions on behalf of Witness B to the Estimates Committee.

#### THE EMAIL OF 10 MARCH 2021

13. It appears now that Mr Fleming, with his submission which Witness B has not been permitted to consider, plus Ms Kelley's [sic] email of **10 March 2021**, are to be taken as at least inferring that the notice of an intention to terminate employment was given to Witness B on the date of the email, namely 10 March 2021. The fact is that Witness B was given ICAC's **only** notice of intention to terminate employment on **13 April 2021**.
14. What was happening between Ms Kelly, being the then Director of Investigations O/ICAC, and Witness B on 9 and 10 March 2021 can in no way be seen, taken or construed as a notice of an intention to terminate employment. The very wording of the email itself, and responses to it, reveal that these were discussions concerning "options" that were available to Witness B in relation to her employment situation.
15. Further critical evidence relevant to the real sequence of events for the Committee of Privileges to consider is to be seen in the five-page, fifteen-paragraph Memorandum of Ms Kathryn Clet, dated **7 April 2021**, headed "Notification of Termination While on Probation – Witness B" (copy at **Attachment A**). It seems that Mr Fleming did not provide a copy of this clearly pertinent document to the Committee of Privileges. It appears from that document that Ms Clet, being the then Business Manager O/ICAC, had been brought in sometime after the 10 March 2021 email to "facilitate a probation process" for Witness B. Ms Clet reviewed Witness B's employment with O/ICAC and, following a four-page analysis of Witness B's employment situation, recommended, at page 5, paragraph 15, that Mr Fleming sign the actual notice of Intention to terminate employment, which Mr Fleming duly did, and which was served upon Witness B on **13 April 2021**.
16. The Committee of Privileges' criteria for misleading the Estimates Committee is that the party asserting wrote or said something which was knowingly inaccurate



in order to mislead the Estimates Committee. Witness B contends that everything written and said by Mr Lawrence on behalf of Witness B was accurate. Witness [B] further asserts however that Mr Fleming's claims regarding when the notice of intention to terminate was given are clearly inaccurate. Similarly, his assertion that "she **immediately** made what she considered to be a protected communication" (made on 17 March 2021) is also inaccurate. If Mr Fleming's claim now is that the requisite notice of intention to terminate was given by the email of 10 March 2021, the fact that Witness B hand-delivered her complaint / report to the O/ICAC seven days later is hardly made "immediately" after. Ms Clet's memorandum clearly establishes the accurate chronology of the relevant circumstances. Having been engaged to give advice in relation to the probation situation, which still existed during March and April 2021, Ms Clet ultimately gave the advice, accepted by Mr Fleming, to sign the **only** notice of intention to terminate employment on **7 April 2021** (about 4 weeks after the 10 March 2021 email).

The memorandum attached to Mr Grove's letter was consistent with this commentary.

The Committee then agreed to preliminary findings and, notwithstanding that it did not propose an adverse finding regarding any person, forwarded its draft report to Mr Fleming, Mr Grove representing Witness B, and Mr Lawrence to invite submissions.

On the subsequent request of Mr Grove, the Committee forwarded him Mr Fleming's submissions in confidence.

Mr Grove replied with further arguments as to why the communication on 9 and 10 March 2021 could not comprise a formal notice of intention to terminate employment. Witness B did not accept the conclusions the Committee drew in its draft report. On consideration of the submission, the Committee did not materially change its findings.

## Consideration by the Committee

Having examined the evidence before the Estimates Committee and the written submissions of Mr Fleming and Mr Grove (representing Witness B) in response to questions raised by the Committee, the Committee considered that the key point of conflict in the evidence before the Estimates Committee was Mr Fleming's statement:

We gave her a notice that we intended to terminate her employment whilst still under probation at about the tenth month of her probation. She immediately made what she considered to be a protected communication to me.

On one reading, this statement was misleading as formal notice of an intention to terminate was not given to Witness B until 13 April 2021 and Witness B made her complaint on 17 March 2021. The Committee does not consider that the facts behind this reading to be in dispute.

On another reading, this statement was not misleading because Witness B had been advised that her ongoing employment as an investigator was to be terminated and consideration was being given to alternatives to her continuing in that role prior to her making her complaint on 17 March 2021, and this was confirmed by email on 10 March 2021. The Committee does not consider that facts behind this reading to be in dispute.

The Committee considers that a narrow consideration of the words used favours the first reading. "A notice that we intended to terminate" suggests a formal notice as part of a termination process rather than simply advice of an intention.



This reading is not as compelling in the wider context, where a response was being given to a question without notice at a hearing, and the apparent intention of the answer was to indicate that the complaint was submitted subsequent to the person being informed that their employment in their position was to be terminated one way or another.

Having regard to the elements of an offence of deliberately misleading the Assembly, the Committee does not consider that this statement gives rise to an allegation that Mr Fleming deliberately misled the Committee which warrants further investigation.

## Findings

The Committee did not find that the conflicting evidence before the Estimates Committee arose from any person deliberately misleading that Committee.

A handwritten signature in black ink, appearing to read 'Eva Lawler', with a stylized, cursive script.

Hon Eva Lawler MLA

Chair