

THE ISSUING OF SUMMONSES BY PARLIAMENTARY COMMITTEES – PROCEDURAL ISSUES AND RISKS: A CASE STUDY FROM WESTERN AUSTRALIA

ALEX HICKMAN

While the power of a parliamentary committee to order the attendance of persons or the production of papers by summons is important to facilitate the undertaking of inquiries, the exercise of this power is subject to a number of procedural issues and risks. These will be explored in this paper utilising a case study of an inquiry carried out by a Western Australian parliamentary committee into the Peel Health Campus in 2012.

I would like to dedicate this article to the memory of Dr Peter Johnston. Like many others, I was fortunate enough to have been a student of Dr Johnston at the Law School of the University of Western Australia (lecturing on administrative law and tutoring on constitutional law). I was always struck by his extensive knowledge, patience and generosity. I was also fortunate enough to become reacquainted with him recently, after many years, at a presentation he gave at the Constitutional Centre of Western Australia and again experience his many admirable qualities.

I INTRODUCTION

The power of a parliamentary committee to issue a summons for attendance of a witness or the production of documents is tempered by the risk that the committee may not be supported by Parliament in its view that any non-compliance constitutes a contempt of Parliament.

There are various procedural issues a committee may encounter which may result in this risk being realised, including:

- a delay in, or non-compliance with, the summons;
- objections to compliance with the summons; and
- the way in which documentation the committee requires is described in the summons.

The issuing of a summons can also present the following additional procedural issues and risks.

- The witness is located outside of the jurisdiction of the summoning committee.
- The choice of whom to summons if the integrity or reputation of that person is subsequently called into question.

This paper will highlight these issues and risks in the context of a case study of an inquiry undertaken in 2012 by the Standing Committee on Estimates and Financial Operations of the Legislative Council of Western Australia (Committee) and serves as a reminder of the need to take them into account when issuing summonses.

II POWER OF A COMMITTEE TO SUMMONS

In Western Australia, the statutory source of power for a parliamentary committee to summons is sections 4 and 5 of the *Parliamentary Privileges Act 1891* (WA) (PPA). The Parliament or its committees may order the attendance of persons or the production of papers (section 4) which shall be notified by summons to the relevant person under the hand of the Clerk and authorised by the Chair of the committee (section 5).

Standing Order 192 of the Standing Orders of the Legislative Council (Standing Orders) provides witnesses shall be ordered to attend before and provide evidence to a committee by summons under the hand of the Clerk (which is also authorised by the Chair by their signature).

An objection may be raised to complying with a summons. Section 7 of the PPA states:

7 Objection to answer questions or produce documents to be reported to the House

If any person ordered to attend or produce any paper, book, record, or other document to either House, or to any Committee of either House, shall object to answer any question that may be put to him, or to produce any such paper, book, record, or other document on the ground that the same is of a private nature and does not affect the subject of inquiry, the President, or Speaker, or Chairman of the Committee, as the case may be, shall report such refusal, with the reason thereof, to the House, who shall thereupon excuse the answering of such question, or the production of such paper, book, record, or other document, or order the answering or production thereof, as the circumstances of the case may require.

III THE INQUIRY INTO PEELHEALTH CAMPUS PAYMENTS

A Summary of inquiry

The inquiry by the Committee arose out of evidence it received from the Department of Health at an Annual Report hearing on 4th October 2012. This included details of a scheme in operation at Peel Health Campus (PHC) whereby Health Solutions (WA) Pty Ltd (HSWA), the company operating the PHC at that time, would pay \$200 to each doctor in the PHC's emergency department for an admission into the hospital. This admission generated a payment from the State. Part of this scheme involved the creation of a Clinical Decisions Unit (CDU), a short stay unit operating as an extension of the emergency department.

The \$200 payment was in addition to any normal remuneration received by the doctor from PHC. The scheme came under scrutiny when it became apparent that doctors had admitted patients into the hospital in a manner which did not qualify them for payment from the Department of Health.¹ This required HSWA to refund the Department of Health \$1.8m in overpayments.

The inquiry was conducted in the lead up to the prorogation of Parliament and the 2013 State Election. Accordingly, not only was time of the essence to the Committee (which would have been a factor in its decision to issue summonses) to enable it to complete the inquiry but the political environment was acute.²

B *Summonses issued by the Committee*

During the inquiry the Committee issued a number of summonses for the attendance of witnesses and production of documents. Three summonses to produce documents and two to attend as a witness illustrate the procedural issues and risks referred to above.

1 *Three summonses to HSWA to produce documents*

The Committee issued these summonses to HSWA to obtain an extensive amount of documentation, which included correspondence related to the creation of the CDU as well as minutes of any meeting of the Board of HSWA

¹ Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, Report 40, *Inquiry Into Peel Health Campus Payments Report*, 30 November 2012, pp.ii-iii ('Committee Report').

² The subject matter of the inquiry attracted a great deal of political and media interest. A subsequent inquiry by the Government found no evidence of fraud or clinically improper admissions by PHC, though it did make other adverse findings about a number of matters, including the fact that the CDU was a flawed and inadequate system and that the \$200 payment was inappropriate due to the failure to apply clear criteria for qualification for the payment. A copy of the inquiry report can be found at: http://www.publicsector.wa.gov.au/sites/default/files/documents/peel_health_campus_inquiry.pdf.

covering any payment, bonus or remuneration to doctors.

The time given to comply with the summonses was quite short (for instance, 2 days from the date of issuance for the first summons, which amounted to approximately 24 hours, taking into account time for service and communication to the relevant staff at HSWA).

2 *Summons to Mr Jonathan Fogarty to attend as a witness*

Mr Fogarty had a central role in the matters the Committee was inquiring into, in his capacity as Chairman of the Board of HSWA and its majority shareholder. The Committee regarded him as vital to the inquiry.³

At the time he was summonsed to appear before the Committee on 30th October 2012, Mr Fogarty's legal representatives advised the Committee he was in Singapore, where he was resident. Accordingly, not having been served with the summons and being located outside of the Committee's jurisdiction, the Committee was unable to compel Mr Fogarty to attend as a witness.

The Committee was also advised he was not available to attend on the alternative dates made available by the Committee. The Committee's report referred to evidence that Mr Fogarty visited Peel Health Campus in his capacity as Chairman of HSWA.⁴

The inability of the Committee to compel Mr Fogarty to attend as a witness deprived it of the benefit of a hearing with him to obtain direct evidence on his role. Also, by not attending, Mr Fogarty did not avail himself of the opportunity to personally respond to allegations made against him.

3 *Summons to Ashton Foley to attend as a witness*

Mrs Foley was summonsed to attend a public hearing on 30th October 2012 where she made a number of allegations against HSWA regarding the operation of PHC. The Committee described Mrs Foley as its key witness in bringing many of the issues covered by the inquiry to its attention.⁵

Subsequent to the inquiry, Mrs Foley herself had a number of allegations made against her, including fraud and extortion. There were suggestions these tainted the evidence she gave to the Committee and discredited her as a witness.⁶

³ Committee Report, above n 1, at 2.

⁴ Ibid at 34.

⁵ Ibid at i. While Mrs Foley volunteered to give evidence, she was issued with a summons due to there being legal action against her by HSWA at the time.

⁶ There was significant media coverage of these allegations, such as at

It is clearly open for there to be a negative perception about the evidence Mrs Foley gave to the Committee. However, the author believes this should remain, at most, a perception as it is not necessarily the case that subsequent developments which call into question the integrity of a witness are fatal to the value of their evidence to a committee inquiry.

One of the main reasons why the evidence of Mrs Foley may still be viewed as cogent and reliable is that a number of other witnesses corroborated and supported her evidence, as did documentation obtained by the Committee.

C *Committee report - possible contempt*

The Committee reported numerous failures to comply with the three summonses for the production of documents by HSWA.⁷

The failures cited were as follows.

- Not providing all the documentation specified in the summons, either on time or at all.
- Objecting on the grounds that documents were:
 - (a) outside the Committee's Terms of Reference, when this is a matter for the Committee to determine; and
 - (b) of a private nature, when the Committee was not able to determine whether redacted text in documentation supported this contention.

The Committee also alleged the failure to comply with the summonses constituted contempt of the Legislative Council as it was substantially obstructed by HSWA by being prevented from examining all documentation it regarded as relevant to the inquiry. It recommended the question of whether HSWA was in contempt be referred to the Standing Committee on Procedure and Privileges of the Legislative Council (PPC).⁸

D *Procedure and Privileges Committee report*

The President of the Legislative Council referred the matter to the PPC, which conducted an inquiry and handed down its report on the same day as

<http://www.mandurahmail.com.au/story/1443978/health-minister-calls-ashton-foley-a-proven-fraudster/>.

⁷ Western Australia, Legislative Council, Standing Committee on Estimates and Financial Operations, Report 37, *Report in relation to a possible contempt regarding summonses to produce documents issued pursuant to section 5 of the Parliamentary Privileges Act 1891*, 27 November 2012.

⁸ *Ibid*, at 7-8.

Parliament was prorogued, on 14 December 2012, in advance of the State Election held in March 2013.⁹

The inquiry of the PPC focussed on whether the actions of HSWA satisfied the criteria set out in Schedule 4 of the Standing Orders, which must be taken into account in determining whether a contempt has occurred.¹⁰ These serve as an important benchmark to ensure that, in practice, only serious and wilful actions will constitute contempt. The level of seriousness will determine whether any penalty is imposed by the Legislative Council.¹¹

In summary, the PPC:

- considered an allegation by the Committee that it was obstructed by actions of HSWA, by itself, without further evidence to substantiate it, inadequate to support a claim of contempt;
- regarded the timeframes within which HSWA was required to satisfy the summonses as inadequate;
- was not satisfied HSWA set out to deliberately obstruct the Committee.

While the PPC did find that a breach of parliamentary privilege had occurred by HSWA not providing documents sought by one of the summonses and not lodging a formal objection to doing so, it also found there was insufficient evidence to support an allegation of contempt.¹²

The PPC made reference to several issues (including possible guidance to committees on issuing a summons) that it will consider in the future. It is anticipated that any such guidance will be directed towards assisting committees in addressing some of the procedural issues and risks identified above.

While the Parliament did not have the opportunity to consider the PPC report due to its prorogation, the author believes it is very likely it would have supported the position taken by the PPC.

⁹ Western Australia, Legislative Council, Standing Committee on Procedure and Privileges, Report 26, *Reference from the President – Possible Contempt: Report No.37, Standing Committee on Estimates and Financial Operations*, 14 December 2012.

¹⁰ Schedule 4 identifies the criteria as improper acts that tend to substantially obstruct the Council and its members in the performance of their functions and whether a person knowingly and had any reasonable excuse for the commission of an act which may be held to be a contempt. Schedule 4 also identifies a number of acts, by way of guidance, that may be treated as a contempt, which includes a person, without a reasonable excuse, refusing or failing to appear before, or produce documents to, a committee when ordered to do so.

¹¹ Pursuant to Standing Order 94 the Parliament may impose a fine and order the imprisonment of the offender until the fine is paid or at the expiration of “*the then existing session or a lesser period as ordered by the Council*”.

¹² Op.cit., n9, at 5-6.

E *An additional risk*

Even if the PPC had, in this case, agreed that the non-compliance by HSWA had constituted a contempt and the Parliament had subsequently endorsed this, the penalties available to the Parliament (such as a fine) have been rarely imposed in Western Australia and would probably not have compelled HSWA to produce any documentation it had failed to produce (on the assumption it existed in the first place).¹³

Furthermore, as the Parliament was prorogued on the same day as the report of the PPC was handed down, the period within which any fine may have been payable (the 38th Parliament) had come to an end.¹⁴

IV SECTION 59 OF THE CRIMINAL CODE

This provision makes it a simple offence, punishable by imprisonment for 2 years and a fine of \$24,000, for a witness to refuse or neglect to attend or produce anything they are summonsed to produce by either House of Parliament or a parliamentary committee without lawful excuse, which is relevant and proper to be produced.

This underlines the potential seriousness of not complying with a summons without a lawful excuse. The use of the term 'lawful' suggests it may be the Court, not the Parliament that would determine this question, which raises enforcement issues that are outside the scope of this paper.¹⁵

V CONCLUSION

While a summons can be an effective means to obtain evidence essential to conducting an inquiry, it is not without its limitations. Although some procedural issues and risks may not be capable of being foreseen (such as a delay in or complete non-compliance with a summons or questions over the integrity of a witness raised after they have given evidence), there are steps a

¹³ The last time the Parliament of Western Australia imposed a fine arising out of non-compliance with a summons was on 24 June 1999.

¹⁴ Of course, the matter could not be revisited in the current Parliament.

¹⁵ But see Western Australia, Legislative Council, Report 1, *Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament*, 7 May 2009, pp16-19, where the committee draws attention to issues of concurrent parliamentary and judicial jurisdiction and recommends the repeal of several sections of the Criminal Code, including section 59 as well as Western Australia, Legislative Council, Standing Committee on Procedure and Privileges, Report 29, *Review of the Report of the Select Committee into the Appropriateness of Powers and Penalties for Breaches of Parliamentary Privilege and Contempts of Parliament*, 15 May 2014.

committee might take in mitigating them, such as:

- providing an adequate period of time for compliance with summons to produce documents, especially when a large volume of documentation is requested which may take time to collate;
- being as specific as possible in the description of documentation sought; and
- providing the Parliament with as much evidence as possible to satisfy the criteria to support an allegation of contempt.