

**REPORT
OF A
SELECT COMMITTEE
OF PRIVILEGE
ON A
FAILURE TO PRODUCE
DOCUMENTS UNDER SUMMONS**

SELECT COMMITTEE OF PRIVILEGE

Date appointed

December 16, 1998

Members of the Committee

Hon Bruce Donaldson MLC (Chairman)
Hon Kim Chance MLC
Hon Thomas Helm MLC
Hon Norm Kelly MLC
Hon Derrick Tomlinson MLC

Officers

Laurence Marquet, Clerk of the Legislative Council
Ian Allnutt, Deputy Clerk
Jan Paniperis, Clerk of the Committee

Terms of Reference

Minutes of Proceedings [LC 1998] Wednesday, December 16, 1998

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FAILURE TO PRODUCE DOCUMENTS UNDER SUMMONS

1 order of reference

By order made on Wednesday December 16 1998¹ the House appointed this Committee —

- (a) to consider the circumstances under which there was a failure by Dr Peter Murphy of the Department of Resources Development to produce documents under summons of the *Estimates and Financial Operations Committee* (the "**Estimates Committee**");
- (b) to report on the appropriateness of the penalty recommended by a previous select committee of Privilege² were Dr Murphy to be found in contempt for that failure.

2. the facts

The facts are stated succinctly in the previous committee's report (the **#1 Report**) —

" *The salient facts for this inquiry are that the Estimates Committee, having failed to obtain 2 documents from Dr Murphy by request, issued a summons ordering Dr Murphy to produce them on Tuesday September 29 1998. Under initially oral and later written direction from the Minister for Resources Development, Hon Colin Barnett MLA, Dr Murphy refused to produce the 2 documents sought.*

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3. this inquiry

The Committee took oral and written evidence from Dr Murphy⁴ and Mr P Kioses, both of DRD, and oral evidence from Hon Peter Foss QC MLC, Attorney General, and Dr D R Kelly, CEO of the DRD at the material time.

¹ **1. Select Committee of Privilege — Dr Peter Murphy**

The Leader of the House moved, without notice —

That —

- (1) A select committee of five members, a majority of whom constitute a quorum, is appointed to inquire into and report on the circumstances leading to the failure of Dr Peter Murphy of the Department of Resources Development to answer to a summons issued on September 29, 1998, and the appropriateness of the penalty recommended by a former select committee of privilege to be imposed on Dr Murphy were he to be adjudged guilty of a contempt.
- (2) The committee have power to send for persons, papers and records.
- (3) The committee report not later than Thursday, April 22, 1999.

Minutes of Proceedings [LC 1998] Wednesday December 16 1998.

² *Minutes of Proceedings* [LC 1998] #17 p 186.

³ #1 Report, p 3.

⁴ By consent of the Committee, Dr Murphy appeared with counsel, Mr N Douglas of Minter Ellison.

4. the circumstances under which there was a failure to produce

5 Dr Murphy and Mr Kioses did not dispute that there was a failure to produce the documents in answer to the summons. However, it was their contention, supported by documentary evidence, that all reasonable and proper steps were taken to ensure that the Clerk was made aware of the Minister's direction not to produce the documents before 4.30 pm, the time at which the summons required production.

10 Both this Committee and the witnesses understood that no finding as to whether a contempt had, or had not been committed, would result from this inquiry. The evidence was directed towards establishing facts, and the circumstances in which they arose.

15 DRD's written evidence chronicles what occurred within DRD, and in what sequence, once Dr Murphy received the summons. Although it gives greater detail of the sequence of events, it supports similar, but less detailed, information obtained by the previous committee.

20 What that evidence shows is that DRD, quite properly, sought legal advice as to its response to the summons. That advice was —

- produce the documents; or
- obtain a ministerial direction prohibiting production.

25 DRD chose the latter option, and the bulk of the evidence shows what occurred once that decision was made. There was nothing improper in DRD, on legal advice, opting to resist production. There was nothing improper, having made that decision, in pursuing it

30 The Committee was urged to give considerable weight to DRD telephone logs for September 29 1998 that showed a call being made to the Clerk's direct number⁵ and another to the Parliament House listed number 9222 7222. The log, so far as it relates to the latter call, contradicts a note written on a copy of the summons signed by Mr Kioses on September 29 1998 stating that he left a voicemail for Mr M Smyth, the Estimates Committee's advisory officer, indicating that DRD's response would be made between 5.30 and 6.30 pm that day. As it happens, Mr Smyth was not in Perth on September 29 and had altered his voicemail message accordingly. Moreover, the Parliament House telephone log shows that no calls were made that day to Mr Smyth's number.

35 Accordingly, the Committee finds the evidence on this point inconclusive, despite reasonable efforts on its part to obtain additional, technical information. The Committee makes no finding adverse to DRD on this matter.

40 It was also argued that the computer crash in DRD on September 29 played a significant part in the failure to notify the Clerk before 4.30 pm. The Committee has no reason to dispute that the crash occurred and that it delayed the production of the written, ministerial direction. However, DRD's own evidence shows that fax facilities were unaffected and that DRD knew the fax number for the Clerk; it was at the foot of the summons and had been circled at DRD on the copy bearing Mr Kioses voicemail note. In the circumstances, it was open to Dr Murphy to fax the Clerk a handwritten note. Apparently, this did not occur to Dr Murphy.

45 In his evidence, the Attorney General asked the Committee to reconsider 2 matters, apart from the fine, arising from the #1 Report. The first matter was the form of the summons, viz, whether the summons was

⁵ The witnesses agreed that the call was unsuccessful. The Clerk advised the Committee that he was at a meeting, in Parliament House at the time recorded, but not in his office.

in a proper form. On this issue, the Committee accepts the response from the Clerk —

" The form of summons used to order production of the 2 reports is the same as that used to order production of documents from the Aboriginal Legal Service in 1991-92. There, the validity of the Council's resolutions contained in the summons to produce documents was challenged by the ALS⁶, but no attack was made on the form of the summons itself. The PPA [*Parliamentary Privileges Act 1891*] does not mandate a particular form of summons whether to appear as a witness, or to produce documents, or both. Section 5 of PPA simply provides —

And in every such summons shall be stated the time and place when and where the person summoned is to attend, and the particular documents which he is required to produce.

The summons —

- was directed to Dr Murphy in person
- required Dr Murphy to attend at Parliament House, Perth not later than 4.30 pm on the day
- named the Clerk as the repository
- described the reports in the manner used both by the Estimates Committee and DRD
- stated the statutory authority, ie, s 5, under which the summons was issued.

In my opinion the summons complied in every respect with s 5 and I am not aware of any legal advice given to DRD after service of the summons which suggested that production could be resisted for want of form.

I should add that no objection was taken to the order to produce to the Clerk rather than to the committee. Given the Full Court's opinion in the ALS case⁷ it would be surprising were DRD's legal advisers to have impugned the summons on that ground.

Questions relating to who, apart from Dr Murphy in person, might have delivered the reports to the Clerk in answer to the summons are hypothetical and ought not to be answered unless or until such a situation arises. ⁸

The second point was that s 8 of the *Parliamentary Privileges Act 1891* could not apply to Dr Murphy in that the previous committee appeared to hold that the contempt was not a failure to produce documents, a contempt to which s 8 does apply, but rather Dr Murphy's failure to notify the Clerk in proper time that he had been directed not to comply which, if it was a contempt, is not one subject to s 8.

The Committee took the Attorney's request to mean no more than an examination of what had been said on the issue by the previous committee. Given its terms of reference, this Committee does no more than draw attention to what was said.

In §5 at p 6 of its report, the previous committee finds —

- (d) *The ministerial direction, although depriving Dr Murphy vis-a-vis the Minister of the power he otherwise had to produce the documents, did not affect the operation of the summons; because he failed to make known to the Clerk before 4.30 pm that he was unable to comply with its terms*
- (e) *Dr Murphy's failure to comply with the terms of the summons was a contempt of the Legislative Council, as so defined under s 8 of the PPA,.*

The point to be made is that —

1. the Minister's direction, whether or not it was communicated to the Clerk before 4.30 pm,

⁶ *ALS v WA* (1993) 9 WAR 297

⁷ *ibid*, p 314 per Nicholson J.

⁸ Memorandum of advice to the Committee, April 7 1999.

did not relieve Dr Murphy of his obligation to produce the documents at or before 4.30 pm;

- 5 2. Dr Murphy's failure to tell the Clerk of the direction rendered his contempt more than merely technical.

The previous committee found the contempt in the failure to produce the reports by the required time. The failure to produce, caused by the ministerial direction, it said, ought to have been communicated to the Clerk before 4.30 pm if Dr Murphy's contempt was to be treated as "unintended or technical".

10 It was not the failure to notify the Clerk that constituted the contempt but rather the failure to produce the reports. Any justification or explanation for that failure, as the previous committee pointed out, went to mitigation of penalty for the contempt.

15 The same misapprehension seems to have been in the minds of Dr Murphy and Mr Kioses, hence the detailed evidence about DRD's response before and after 4.30 pm.

5. **the penalty previously recommended**

20 This Committee is not asked to recommend a penalty. It is asked to consider the appropriateness of the \$1500 fine recommended by the previous committee were Dr Murphy to be held in contempt.

There are 2 aspects to the reference —

- 25 1. was it "appropriate", under the circumstances, to recommend a fine rather than a lesser penalty, or no penalty at all⁹;
2. if "yes" to 1., was the quantum of the fine appropriate, eg, the fine recommended might have been 10¢.

30 Given the common membership of the 2 committees on this matter, it would strain credulity and common sense for this committee to disavow any knowledge of the basis on which the previous committee reached its conclusion and recommendation.

35 The previous committee found that the failure to produce the documents was a contempt to which s 8 of the PPA applied, ie, a contempt for which a fine could be imposed. It also held that Dr Murphy's failure to provide an answer before the time for production stated in the summons rendered the contempt more than technical or unintended.

40 The evidence given to the previous committee, supplemented by that given to this Committee, discloses that once the summons was served, DRD's efforts were directed towards obtaining the Minister's direction, admittedly under unexpected circumstances arising from the computer system's crash. Even allowing for that, DRD's own evidence suggests that little weight was attached to the significance of the 4.30 pm deadline. The previous committee was not made aware of the 2 phone calls made by DRD to Parliament House but, as this Committee points out, other avenues of communication available at the time, were either not tried or not considered. What the evidence shows is that there was ample time between the Minister giving the direction and 4.30 pm within which oral or written notification of the intended response to the summons could have been given.

⁹ Imprisonment was never considered by the previous committee as an appropriate penalty and was not in issue before this Committee.

It should also be remembered that DRD's legal advice indicated that the summons was not a polite request but a demand which required strict compliance with all of its terms unless the Minister intervened.

5 The additional evidence given to this Committee supports the previous committee's conclusion that the course of dealing between the Estimates Committee and Dr Murphy justified its belief that he was the proper person from whom to request the documents and when that failed, to order their production from him. Dr Murphy agreed that once he had declined the Estimates Committee's request, he expected that a summons would issue although not as swiftly as it did. The fact remains that Dr Murphy was in a position to produce the documents but failed to do so within the prescribed time. The attempt to explain why production would not be made is less than impressive.

10 The Committee appreciates the Attorney General's submission, and understands why he argued that the fine, and its quantum, were inappropriate, if only because the opprobrium that might be said to have attached to Dr Murphy, once the House made the initial decision to refer the matter to the previous committee, was punishment enough.

15 However, the members of both committees have had the advantage of hearing the witnesses in person. Dr Murphy's attitude towards this Committee, although not obstructive, was not conciliatory and, on some issues, was seen as combative. This Committee was left with the clear impression that Dr Murphy saw himself cast in the role of scapegoat and resented the proceedings of both committees.

20 However that may be, this Committee has concluded that the previous committee was entitled to treat the failure to meet the 4.30 pm deadline as an aggravating factor meriting more than a simple reprimand or censure. A fine was not recommended by way of a general purpose deterrent; it was recommended because of the particular circumstances of the case.

25 Opinions will differ about the appropriateness of the \$1500 fine recommended. The previous committee's recommendation was simply that - a recommendation. It is for the House to accept, reject, or modify that recommendation. The #1 Report indicates the previous committee's opinion that it considered \$1500 appropriate.

30 This Committee has concluded that there were reasonable grounds on which the previous committee recommended a fine as being appropriate. Should this matter proceed, decisions whether to accept that recommendation and what the amount should be, ought properly be left to the House.

35 **6. the "1987 Guidelines"**

40 The Clerk, as a result of this case, is preparing administrative instructions to Committee Office staff dealing with the procedure to be followed when a committee is proposing to issue a summons and when it resolves to issue a summons. Because a committee summons must be signed by the Clerk, he has also indicated to this Committee that he will satisfy himself that all preliminary steps have been followed before he is asked to sign it. This may involve discussions with the relevant committee.

45 Dr Kelly confirmed Dr Murphy's evidence that the Guidelines issued to public servants in 1987 by Premier Burke about their conduct before parliamentary committees have dropped from DRD's corporate memory. If a repeat of what happened on September 29 last year is to be avoided, public servants dealing with parliamentary committees need to know and understand what their rights and responsibilities are and how to assert those rights and perform their responsibilities.

50 The Committee understands that the Guidelines are under active revision. It is desirable that the revised draft be provided to the Clerk for comment before new Guidelines are published.

The Committee **recommends** that the 1987 Guidelines be revised and issued with an appropriate degree of publicity within the public sector.

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Bruce Donaldson MLC
Chairman