Parliamentary privilege and statutory office holders: some recent developments in Western Australia[1]

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There has been a number of recent instances in Western Australia (WA) where statutory office holders have resisted disclosing (or refused to disclose) information requested by the Legislative Council's Standing Committee on Public Administration (committee). This brings into focus a number of questions:

- what are the implications for the concept of parliamentary supremacy when this occurs?[2];
- what are the restrictions on parliamentary committees obtaining information from statutory office holders pursuant to their terms of reference?;
- should parliamentary committees have to rely on their rights of absolute privilege in their dealings with statutory office holders in order to properly discharge their functions?;
- what is the relationship between various provisions in legislation governing the role of statutory office holders and parliamentary privilege?;
- can legislation unintentionally restrict privilege?; and,
- how do statutory office holders view their place in the constitutional system of government?
- This article seeks to address these questions by examining the relationship between the committee and two statutory office holders in WA – the Auditor General and the Ombudsman.

INTRODUCTION

In WA, the principal source for defining the privileges, immunities and powers of the Legislative Council and Legislative Assembly is the *Parliamentary Privileges Act 1891* (WA) (PPA). Sections 4 and 5 of the PPA are the source of the parliament's power to summons. Erskine May provides the following definition of parliamentary privilege:

1 The author would like to thank Dr Colin Huntly, Advisory Officer, Standing Committee on Public Administration, Legislative Council of WA for his assistance in the preparation of this paper as well as other parliamentary staff colleagues from the Western Australian and other jurisdictions for their suggestions for various additions following the presentation of a version of this paper at the Australia and New Zealand Association of Clerks-At-The-Table Conference in Canberra on 23rd January 2013.

2 This refers to the parliament as a legislative body being supreme to all other arms of government.

> ...parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of parliament, and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.[3]

In the context of this article, the words '*without which they could not discharge their function*' are critical. It is argued that a committee – in its dealings with statutory office holders – that does not have the full benefit of parliamentary privilege, or is required to issue a summons to obtain information, cannot effectively discharge its function or is delayed in doing so. Subject to its terms of reference, the committee has as its primary function to inquire into and report to the parliament on the efficiency and effectiveness of the system of public administration. The committee's areas of interest cover a broad range of matters relating to the activities of state government. It may conduct self-initiated inquiries in addition to receiving referrals of bills and other matters from the Legislative Council and, as part of this, consults regularly with statutory office holders.

> The relationship between parliament and the two statutory office holders under discussion is defined as follows:
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> The Auditor General audits the finances and activities of the Western Australian public sector and scrutinises wastage, inefficiency and ineffectiveness and reports findings to the parliament.....Section 7 of the *Auditor General Act 2006* (WA) (AG Act) provides that the Auditor General is an independent officer of parliament, which includes each House of parliament and their members and committees as well as joint committees of both Houses of parliament.
>
> The Ombudsman (whose formal title is the Parliamentary Commissioner for Administrative Investigations) is an independent officer of parliament with responsibility to investigate the actions of public authorities including State Government departments, prisons, hospitals, schools and technical colleges, local governments and public universities.[4] The Ombudsman reports directly to, and is accountable to, the parliament and can only be suspended or removed from office by the Governor, on addresses by both Houses of parliament, pursuant to section 6 of the *Parliamentary Commissioner Act 1971* (WA) (PCA).

THE COMMITTEE'S RELATIONSHIP WITH THE AUDITOR GENERAL

In September 2009, the committee resolved to inquire into electricity transmission and distribution management by Western Power and Horizon Power. This involved examining:

3 Erskine May (1989) *The Law, Privileges, Proceedings and Usage of parliament*, 21st edition, Boulton C.J. (ed), Butterworth & Co. (Publishers) Ltd, London, p69.

4 http://www.ombudsman.wa.gov.au/About_Us/Role.htm.

a. *the findings of a 2008 Distribution Wood Pole Audit Review of Western Power published by the Department of Commerce's EnergySafety Directorate (**EnergySafety**), there being an obvious public interest in considering if this review had implications for both Western Power and Horizon Power; and*

b. *what Western Power and Horizon Power and their regulators have been doing about the condition of the wooden power pole asset base since EnergySafety's Western Power's Wood Pole Management Systems: Regulatory Compliance Assessment Report, published in November 2006;*

and thereafter, report its findings to the Legislative Council.[5]

At the heart of the committee's concerns was the substantial risk to the safety of members of the public, together with emergency response and repair personnel, posed by unsafe wooden power poles remaining in service. These risks can arise from falling power poles, electric shocks and bushfires ignited by defective poles.[6] During the inquiry, the Auditor General provided evidence which led to the committee raising further concerns, namely:

a. that he did not see fit to carry out a performance audit on Western Power and had not done so since 2006 (which was when Energy*Safety* first handed down an adverse audit report into Western Power asset management systems, procedures and practices);[7] and

b. he gave unqualified audit opinions for Western Power since 2006, despite Western Power's demonstrated management system, practice and process failures.[8]

The committee went on to table two special reports on the conduct of the Auditor General following the inquiry. These indicated that the Auditor General owed the Parliament and the people of WA a plausible explanation about the concerns (above) raised. The Auditor General took issue with the committee about some paragraphs of its report[9] and sought to justify not proceeding with a performance audit of Western Power because of the committee's inquiry. At a hearing on 20 June 2012, the Auditor General was asked for information to assist the committee to clarify the issues. He told the committee he was unable to do so, on advice, under the confidentiality provisions of the AG Act requiring the Auditor General to keep confidential information that comes to the knowledge of employees of the Office of the Auditor General in the course of their employment.

5 WA, Legislative Council, Standing Committee on Public Administration, Report 14, *Unassisted Failure*, 20 January, pi.

6 WA, Legislative Council, Standing Committee on Public Administration, Report 15, *Omnibus Report*, 6 November 2012, p22.

7 See WA, Legislative Council, Standing Committee on Public Administration, *Special Report*, 27 June 2012; WA, Legislative Council, Standing Committee on Public Administration, *Special Report*, 23 October 2012 (accessible at www.parliament.wa.gov.au by clicking 'Committees' and then 'Standing Committee on Public Administration' and then 'Reports'). Performance audits are an integral part of the overall audit program of the Auditor General in WA. They seek to provide parliament with assessments of the effectiveness and efficiency of public sector programs and activities, and identify opportunities for improved performance (see section 15 of the *Auditor General Act 2006*).

8 WA, Legislative Council, Standing Committee on Public Administration, Report 14, *Unassisted Failure*, 20 January 2012, pp v and 32.

9 *op.cit*, n9, (Special Report, 23 October 2012), p2.

The Auditor General's advice received from the State Solicitor's Office (SSO), based on the wording of section 46 of the AG Act, was that he could only give information to, either, the Public Accounts Committee, the Estimates and Financial Operations Committee or the Joint Standing Committee on Audit (which did not exist at that stage but was established on 18 October 2012). The Auditor General refused the committee's request on at least 35 separate occasions during the hearing. It was argued that, given the prescriptive nature of section 46, the Auditor General could not give this information to the Legislative Council, even on request. This is despite section 23 of the AG Act giving the Auditor General significant powers of disclosure, namely:

(2) The Auditor General may provide advice or information to a person or body relating to the Auditor General's responsibilities if, in the Auditor General's opinion, the provision of the information or advice —

a. would be in the State's interests; and

b. would not compromise the Auditor General's independence.

The committee's first special report brought this to the attention of the Legislative Council and recommended an amendment to section 46(3) of the Act to 'restore the ancient privileges of the parliament and all of its Committees with respect to the Auditor General'.[10] In September 2012, the Legislative Council referred this matter to the Standing Committee on Procedure and Privileges which recommended it be included as a component of the Joint Standing Committee on Audit's comprehensive review of that Act.[11] This is now being undertaken by that committee.[12]

The committee's second special report gave detailed focus to the Auditor General's refusal to provide it with evidence to substantiate his concerns that the committee's report into Western Power contained inaccuracies and misunderstandings. It recommended that the Legislative Council require the Auditor General to provide detailed responses to the questions posed by the committee.[13] It also proposed the Auditor General could stand in a fiduciary relationship with the parliament.[14] If such a view were to be endorsed, it would underline the special significance of the relationship, it being accepted that a fiduciary duty is the highest standard of care at either equity or law. At the time of the last sitting of the Legislative Council in 2012, this matter had yet to be dealt with, however, the Auditor General has since announced he will conduct a performance audit of Western Power.

There has been a significant amount of debate on these special reports in the Legislative Council. The Hon. Jim Chown MLC, a member of the committee, pointed out the tension between sections 46 and 23:

10 WA, Legislative Council, Standing Committee on Public Administration, *Special Report*, 27 June 2012, p1.
11 WA, Legislative Council, Standing Committee of Procedure and Privileges, Report 25, *Reference from the House – Auditor General Act 2006*, 15 November 2012, p2.
12 WA, Legislative Council, Joint Standing Committee on Audit, Report 1, 8 August 2013.
13 *op.cit*., n9, (Special Report, 23 October 2012), piv.
14 *ibid*, p20.

> ...despite the fact that without parliamentary privilege, members of parliament could not successfully represent the people and interrogate and debate legislation and the mechanisms of government without fear of retribution, section 46 of the Auditor General Act prevented the Committee from fulfilling this crucial role when the Auditor General invoked that section of his act...given the Auditor General's position, the powers and privileges of this parliament have been irrefutably diminished...[and]...section 46, when invoked, in effect inhibits the Auditor General from fulfilling the mission statement of his own office in providing parliament with independent and impartial information regarding public sector accountability.[15]

There was also a reminder by the then Leader of the House, Hon Norman Moore MLC, that the parliament can – and does – pass laws that restrict its privilege:

> ...if that act is not a good piece of law, it needs to be fixed..... But let us not forget that this legislation was put in place by this parliament, and I think most of us were here when that was done. The fine words that are coming out today about parliamentary privilege were absent on that occasion, but I guess we did not know, or did not realise, the consequences of putting those provisions into the act.[16]

THE COMMITTEE'S RELATIONSHIP WITH THE OMBUDSMAN

In September 2009, the government sought a recommendation from the committee as to whether dual use of public drinking water source areas was reasonably tenable.[17] An impetus for this inquiry was to assist the Water Corporation into the future as it deals with diminishing surface water sources. Two key principles adopted by the committee during the inquiry were:

- public drinking water source areas should not be used for both recreation and drinking water supply and are best committed to the single purpose of providing safe drinking water; and
- source protection is the paramount consideration in water planning and overrides any recreational consideration.[18]

As part of its follow up to this inquiry, the committee examined the processes by which decisions are made by relevant government departments regarding the management of water use in the Kununurra area, located in the northern Kimberley region.[19] It requested documentation from the Ombudsman in relation to a complaint made by a business owner in Kununurra to assist it with this examination. The Ombudsman considered, on advice from

15 Hon. Jim Chown MLC, WA, Legislative Council, *parliamentary Debates (Hansard)*, 12 September 2012, pp 5634–5635.
16 *ibid*, p5638.
17 WA, Legislative Council, Standing Committee on Public Administration, Report 11, *Recreation Activities in Public Drinking Water Source Areas*, 23 September 2010, p1.
18 WA, Legislative Council, Standing Committee on Public Administration, Report 15, *Omnibus Report*, 6 November 2012, p8.
19 *ibid*, p39.

the SSO, that section 23 of the PCA[20], prevented him from disclosing information requested by the committee on the basis that:

- a request from the committee is not sufficient to override the PCA; and
- only the exercise of the committee's powers under section 4 of the PPA by summonsing the documents was sufficient to override the PCA.

The committee considered that its power to summons should only be used as a last resort and not as a standard process to obtain information. Further, that it should not be unnecessarily delayed in carrying out its functions under its terms of reference when parliamentary privilege clearly overrides restrictions on disclosure in other legislation. It recommended that '...section 23 of the PCA be amended to restore the ancient privileges of the parliament and all of its Committees with respect to the Ombudsman'[21] which was referred to the Standing Committee on Procedure and Privileges for report back to the Legislative Council.

On 15 August 2013, the Standing Committee on Procedure and Privileges tabled its report in the Legislative Council, in which it stated an amendment to section 23 of the PCA was unnecessary. This is because, while the use of a summons to obtain information from an officer of Parliament may delay the timeliness of an inquiry, neither the Parliament nor its committees was unduly obstructed in carrying out their functions in using a summons.[22] While this provides some finality of this issue in WA, it remains an example of a lack of clarity in respect of the interaction between certain provisions of a statutory officer's governing legislation and parliamentary privilege. As with the Auditor General, the Ombudsman has a discretion to disclose otherwise secret information where it is, in their opinion, in the public interest to do so. Though this applies to 'any person, or to the public, or to a section of the public'[23],it is debatable whether this encompasses a parliamentary committee. Unlike the case with the Auditor General, there are no express or implied restrictions on parliamentary privilege contained in the PCA and the committee was able to discharge its function by issuing a summons to the Ombudsman to provide the information. Nonetheless, the critical question remains – should it be necessary for committees to assert their rights under parliamentary privilege by issuing a summons, especially where the terms of reference give it the power to inquire?

20 Section 23 provides for the non-disclosure of information obtain by the Ombudsman during the course of investigations.

21 WA, Legislative Council, Standing Committee on Public Administration, Report 15, *Omnibus Report*, 6 November 2012, pp 39–40.

22 WA, Legislative Council, Standing Committee on Procedure and Privileges, Report 27, *Section 23 of the Parliamentary Commissioner Act 1971*, 15 August 2013, pp 2–3.

23 Section 23(1b) of the *Parliamentary Commissioner Act 1971* (WA).

HOW STATUTORY OFFICER HOLDERS VIEW THEIR PLACE IN THE CONSTITUTIONAL SYSTEM OF GOVERNMENT

There are a number of references by statutory office holders in WA to being a 'fourth branch/arm of government'. In a public hearing before the committee, the Ombudsman stated:

> We probably would also see ourselves as having now a broader role of integrity promotion, and that goes to that both broadening and deepening understanding that lots of commentators now have about this idea. Of course we have three branches of government—the executive, judicial, and legislative—and this is the so-called fourth branch of government, which is an integrity branch of government. Notionally you put those agencies within the executive, but there is this idea of the fourth branch of government, the integrity branch of government, where you would have offices like the Auditor General and the Ombudsman. We certainly see ourselves as independent of the executive of the day and, critically, an agent serving the parliament.[24]

While the 'fourth branch of government' has no official status within the constitutional system of government under which we operate, the question may be put as whether the checks and balances that apply within the three recognised branches of government would also apply with similar rigour to any so-called 'fourth branch'. Great care needs to be taken in analysing the relationship between statutory office holders and parliament to ensure questions about parliamentary oversight and accountability are routinely asked.[25] For example, the committee recently raised concerns about the role of the Integrity Coordinating Group (ICG) in WA[26], namely:

- There is no oversight of the activities of the ICG by either the parliament, an independent inspector, or a responsible Minister and there is no clear accountability to parliament.
- The ICG does not operate under any legislative instrument or administrative Order.
- As independent statutory agencies, the perception of independence for each agency appears to this Committee to be at risk by means of such informal and unstructured interrelations between the agencies.
- The possibility of meetings of the ICG changing the functions of its members without any legislative change.
- The lack of a formal communications agreement.
- The inability of any concerned person to obtain copies of the minutes of the ICG or its senior officers meetings due to the exempt status of the agencies.[27]

24 Mr Chris Field, WA Ombudsman, *Transcript of Evidence*, 16 May 2012, p2.

25 See the remarks of the Chief Justice of Western Australia in "Public sector head 'not accountable', The West Australian, 2 August 2013, p18 (accessible at http://au.news.yahoo.com/thewest/a/-/breaking/18297204/public-sector-head-not-accountable/).

26 WA, Legislative Council, Standing Committee on Public Administration, Report 15, *Omnibus Report*, 6 November 2012, pp 41–43.

27 Such as those with responsibility for oversight of a statutory office Holder or inquiring into subject matters for which the Auditor General has responsibility.

As mentioned earlier, the Auditor General and Ombudsman sought advice from the SSO on matters pertaining to the inquiries carried out by the committee. Indeed, section 30 of the AG Act states that the Auditor General is entitled to submit to the SSO a question concerning the functions of the Auditor General or a question of law relating to an audit and the SSO is to give a written opinion on the matter. The PCA does not contain an equivalent provision. In the committee's second special report it stated:

> The Auditor General took the written questions we provided in advance to the legal advisor to the Government, the State Solicitor's office, to obtain legal advice. We question whether seeking advice from the Government's legal advisor about how to answer questions from the parliament as his client, is consistent with the statutory independence of the office of Auditor General. Other sources of advice were available to the Auditor General. For example, advice could have been sought from the Clerk of the Legislative Council and Clerk of the parliaments, or from any of the suitably qualified legal professionals operating in the private sector.[28]

It is interesting to note this issue was never raised during the debate on the Auditor General Bill 2006 in either house. As can occur from time to time, the benefit of hindsight and practical experience has resulted in feedback on the operation of legislation that may not have been anticipated before it was passed by parliament.

THE CORRUPTION AND CRIME COMMISSION AMENDMENT BILL 2012 (WA)

A recent legislative initiative that, arguably, sought to change the relationship between statutory office holders and parliament was the Corruption and Crime Commission Amendment Bill 2012 (WA) (CCC Bill). One of the purposes of the CCC Bill was to transfer oversight of minor misconduct by public officers (as well as the Commission's corruption prevention and education functions) to the Public Sector Commissioner. Some features of this Bill should have raised questions about the relationship between the parliament and statutory office holders. That is, the proposed section 45A(4) which provides for the Public Sector Commissioner, in performing an education and prevention function, to be supported by the Corruption and Crime Commission (CCC), 'other independent agencies and appropriate authorities'. Also, the proposed section 45B(2)(d) providing for the Public Sector Commissioner to 'Monitor the way in which other independent agencies and appropriate authorities take action in relation to allegations and matters that are referred to them by the Public Sector Commissioner'. These could suggest a hierarchical relationship between the CCC and the other independent agencies in that the latter may be answerable to the former for a number of functions, rather than directly to parliament, thus having repercussions for the concept of the supremacy of parliament. After the Bill was introduced in the Legislative Assembly on 21 June 2012, it did not proceed as the government could not gather the necessary support.

28 *op.cit.*, n9, (Special Report, 23 October 2012), pii.

THE SENATE COMMITTEE OF PRIVILEGES REPORT ON STATUTORY SECRECY PROVISIONS AND PARLIAMENTARY PRIVILEGE

An example of a legislative attempt to place conditions on the access by parliamentary committees to information was the subject of the 144th report of the Senate's Committee of Privileges (Privileges Committee), which arose out of a referral by the Senate to the Privileges Committee of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 (Tax Laws Bill). At issue were provisions relating to the disclosure of taxpayer information to parliamentary committees and the conflict these provisions may have with the *Parliamentary Privileges Act 1987* (Commonwealth).[29] The Tax Laws Bill sought to enforce the placing of conditions on the access by parliamentary committees to information by imposing criminal sanctions on certain persons providing this information, including to a parliamentary committee, other than in prescribed terms. This would override parliamentary privilege and make committee operations justiciable.

The Privileges Committee made the following observations:

1. It is only in the rarest and most extraordinary of cases that the Parliament would decide to set some limit on its own operations and legislate so as to limit itself in some way.[30]
2. It has long been acknowledged that statutory secrecy provisions have no application to the operations of the Houses of Parliament or their committees unless there are express words to the contrary.[31]
3. It being a fundamental principle essential to the rule of law that legislation should be clearly drafted and able to be understood by those subject to it, the relevant provisions of the Tax Laws Bill are complex, poorly drafted, very difficult to understand and fail to pass this basic test.[32]
4. The idea that a person might be punished for providing evidence to a committee runs counter to the whole thrust of the law of parliamentary privilege for the past three and a half centuries.[33]
5. It is the committee's firm view that the use of an offence provision to limit the relationship between parliamentary committees and their witnesses is unacceptable in principle and offensive to the separation of powers.[34]

29 Commonwealth of Australia, Senate, Committee of Privileges, *Statutory secrecy provisions and parliamentary privilege – an examination of certain provisions of the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 (referred 18 March 2010)*, June 2011.
30 *ibid,* p5.
31 *ibid*
32 *ibid,* p12.
33 *ibid*
34 *ibid*, p14.

6. Effectively prescribing the manner in which parliamentary committees must receive evidence is an interference in the operations of the parliament and its committees which is wrong in principle.[35]
7. There are well established procedures in the Senate to deal with requests for confidentiality.[36]

This was a particularly scathing assessment by the Privileges Committee of proposed legislation which would be at such odds with the accepted principles of parliamentary privilege. Suggestions for amendments proposed by the Privileges Committee were:

- removing the application of the offence provisions to dealings between taxation officers and Parliamentary committees; and
- providing guidance to taxation officers in their dealings with Parliamentary committees and declare that disclosures to Parliament and its committees are not affected by the Bill.[37]

These were taken up by the executive by way of amendments to the Bill which are now reflected in the final legislation.

Perhaps the most salient observation by the Privileges Committee is as follows (emphasis added).

> It is on the last question, dealing with the principle of the provisions and the potential they have to set a bad precedent for inroads into the powers of the Parliament and its committees that the committee has the greatest concern. To have statutory provisions interfering in the powers and operations of the Parliament is obnoxious in principle. In view of the very large number of statutory secrecy provisions already enacted at the Commonwealth level, *the committee draws the attention of senators to the real danger of a creeping reduction in the areas of Parliamentary inquiry as one area after another of Commonwealth government activity seeks exemptions for itself from providing information to Parliamentary committees*.[38]

Instances of attempts to restrict parliamentary committees from performing their duties under their terms of reference by the use of statutory secrecy/confidentiality provisions require close monitoring. A correct balance must be achieved between justified claims of confidentiality and the right of parliament and its committees to access all necessary information required to perform their duty in the interests of the wider public. It is hoped this balance will be achieved without legislation being proposed of the type the Privileges Committee inquired into.

35 *ibid*, p27
36 *ibid*, p18.
37 *ibid,* p31.
38 *ibid*, p29.

CONCLUSION

Having approached the issue of the relationship between statutory office holders and parliament from the WA perspective, using the two case studies, I would welcome those in other common law jurisdictions sharing information on the following.

- Any similar instances of parliament legislating to restrict its own privileges which might be categorised as unintended, with respect to statutory office holders or public servants?
- References made to statutory office holders as the 'fourth branch/arm of government' and any commentary on this?
- Bodies similar to the ICG in other jurisdictions and how do they operate – are minutes of their meetings available to parliament and the public?
- Should the PPA require enforcement by summons?
- Do statutory office holders always seek the advice of the government solicitor or its equivalent?
- While it is one thing for a parliamentary committee to issue a summons to produce documents to, say, a private company as part of an inquiry, it is quite another to issue one to a statutory office Holder whose one and only client is the parliament.
  a. Is the issuing of a summons to a statutory office Holder inconsistent with the relationship between them and the parliament as their client?
  b. Is this a sustainable practice for parliamentary committees or does it interfere with the discharge of their functions?
  c. Has the concept of parliamentary supremacy been undermined by the matters I have raised?