



LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON PRIVILEGES 2022

Mr Jeremy Hanson CSC MLA (Chair), Ms Jo Clay MLA (Deputy Chair),
Mr Michael Petterson MLA

Submission Cover Sheet

Inquiry into possible contempt of the Assembly:
Imposition of prohibition notice by WorkSafe ACT

Submission Number: 3.8

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Mr Jeremy Hanson MLA
Chair, Select Committee on Privileges 2022

By email: [REDACTED]

Dear Mr Hanson

SUBMISSIONS IN RESPONSE TO PROPOSED FINDINGS OF THE SELECT COMMITTEE ON PRIVILEGES 2022

Introduction

1. I refer to the extract of the draft report of the Select Committee on Privileges 2022 (the **Committee**), forwarded under cover of letter from Chair, Mr Jeremy Hanson MLA, dated 14 November 2022, and make the following submissions to be taken into account by the Committee before making its report to the Assembly.

Draft findings

2. On Monday, 15 August 2022, the Legislative Assembly passed a resolution to establish the Committee. The terms of the resolution, as amended, required the Committee, *inter alia*, to "examine whether there has been a breach of privilege relating to the actions of the Work Health and Safety Commissioner and any other person, and whether they have improperly interfered with the free exercise of the authority of the Select Committee on Estimates 2022-23 or breached any other privileges of the Assembly".
3. The findings contained in the extract of the draft report conclude that:
 - a. the first WorkSafe ACT prohibition notice improperly interfered with the free exercise of the Assembly and its committees; and
 - b. the second WorkSafe ACT prohibition notice may have improperly interfered with the free exercise of the Assembly or a committee.
4. The draft report recommends that no further action be taken against WorkSafe ACT.

Relevant factual circumstances surrounding the issue of the first prohibition notice



5. The first prohibition notice was issued on Friday, 12 August 2022, after a number of discussions between WorkSafe ACT inspectors and officers and workers at the Legislative Assembly. The direction was initially a verbal one (at approximately 3:38pm), with a written notice subsequently provided via email (pursuant to s195(3) of the *Work Health and Safety Act 2011* (ACT)).¹
6. The activity prohibited by the written notice was, "undertaking any hearings or committee meetings" at the Legislative Assembly. However, in all the circumstances, it is apparent that what was prohibited, and what was intended to be prohibited, was the conduct of hearings and committee meetings at which participants attended in person. Those circumstances were:
 - a. The content of discussions on 12 August 2022 between the inspector who issued the notice and others at the precincts of the Legislative Assembly;
 - b. The biological nature of the hazard, the risk from which could not materialise if the hearings were conducted remotely; and
 - c. The direction within the written notice concerning measures to remedy the risk, requiring the undertaking of a risk assessment in relation to face-to-face hearings only.
7. What was intended to be prohibited was further clarified by the issuing inspector following the issue of the written notice, and that intention was understood by those with whom the inspector communicated. In an email to Mr Andrew Braddock MLA, at 6:23pm on 12 August 2022, the issuing inspector advised that "undertaking this activity through virtual means would be considered adequate". Emails sent by the Speaker and the Clerk of the Legislative Assembly the following day, Saturday, 13 August 2022, confirm their understanding that the notice did not prohibit virtual meetings or sittings of the Legislative Assembly.
8. When read as a whole, it is open to conclude that the notice prohibited hearings occurring face-to-face, until such time as the notice had been complied with, and did not prohibit hearings outright. Further, it is beyond doubt from other communications that:
 - a. The issuing officer did not *intend* to prohibit hearings being conducted remotely, irrespective of the assessment of the consequence of the contents of the written notice; and
 - b. That intention was understood by others, including the Clerk and the Speaker of the Legislative Assembly.
9. It is clear there existed an ambiguity in the terms of the written notice, given the conflict between the broad terms of the prohibition on the one hand and the directions for compliance and communications of the issuing officer as to her intention on the other. Consequently, on 15 August 2022, the first prohibition notice was withdrawn by me, with that withdrawal being communicated at or before 10:15am on Monday, 15 August 2022.
10. The Committee was due to commence its hearings on or about the time the first notice was withdrawn and ceased to have effect.

¹ See page 1 of "Submission 3.4 – WHS - Timeline of events MOCConnor" and the handwritten notes at Annexure 5.



Relevant factual circumstances surrounding the issue of the second prohibition notice

11. The Speaker's statement in the Legislative Assembly in relation to the first prohibition notice matter commenced at 10:18am. It referred to the prohibition notice served on her on Friday, 12 August.² During that statement, the Speaker referred to the first notice not having been lifted by the Work Health and Safety Commissioner. Subsequently, at approximately 10:25am, Mr James Milligan MLA moved a resolution to establish the Committee, which passed (with some amendments) at approximately 10:35am.
12. The issuing inspector was in attendance at the Legislative Assembly between 9:35am and 10:21am on Monday, 15 August 2022. The inspector's notes reveal that she met with a number staff and officers of the Legislative Assembly during that visit, but did not speak directly to any members.
13. During that visit, the first prohibition notice was withdrawn at or before 10:15am. Shortly thereafter, the inspector issued a second prohibition notice, verbally, making clear that only hearings proposed to be conducted in person were prohibited. A written copy of the second prohibition notice was served upon the Speaker via email at 1:39pm.
14. It is apparent that the Speaker and the members of the Legislative Assembly were not aware the first prohibition notice had been withdrawn and the second notice issued, either at the time the resolution to establish the Committee was moved or at the time it was passed. It follows that the terms of reference of the Committee did not and, without amendment, could not, include consideration by the Committee of any conduct in respect of the issue of the second notice.

Question of breach of privilege by the issue of the first prohibition notice

Requirement to consider the actions of the Commissioner and any other person

15. The terms of reference require the Committee to "examine whether there has been a breach of privilege **relating to the actions of the Work Health and Safety Commissioner and any other person**, and whether they have improperly interfered with the free exercise of the authority of the Select Committee on Estimates 2022-23 or breached any other privileges of the Assembly". That is, the Committee is to scrutinise the actions of individuals, including me in my role as the Commissioner, and to determine whether it is satisfied that, through those actions, any individual breached a privilege of the Legislative Assembly.
16. The proposed finding is that it is the **WorkSafe ACT prohibition notice** which improperly interfered with the free exercise of the Assembly and its committees. That is not a finding that is within the Committee's terms of reference. It is not a finding in relation to my actions or the actions of any other individual. The sole task of this Committee and of any other Committee considering an allegation of contempt of this kind is to determine the propriety of the conduct of individuals.

² Hansard for Debates on Monday, 15 August 2022



17. The capacity of the notice is irrelevant. If the Committee is not satisfied, for whatever reasons, that my actions, or the actions of any other individual, breached a privilege, it is incumbent upon it to make that finding in unequivocal terms.

Substantial interference

18. When one has regard to the factual matrix, the Committee could not conclude, in any event, that the first notice operated to substantially interfere with the free exercise of the function or authority of either the Select Committee on Estimates 2022-23 or the Assembly. Anything less than a finding of substantial interference, or a tendency to substantially interfere, is inadequate for a finding of contempt.
19. First, the Legislative Assembly sat on Monday 15 August 2022 for a number of purposes, including for the resolution establishing the Committee to be moved and passed. It is clear through the evidence of that sitting that its functions were not impeded by the first notice in any way.
20. Second, the terms of the first notice, read as a whole, together with the communications of the issuing inspector to various people at the precincts of the Legislative Assembly on 12 and 13 August 2022 leave open a finding that it was only committee hearings and meetings **in person** that were prohibited, despite the accepted ambiguity.
21. Any conclusion in that respect is, however, unnecessary in light of the fact the first prohibition notice was withdrawn at or about 10:15am on Monday 15 August, having been issued late on the preceding Friday. Absent evidence that the notice operated to impede the functions of the Select Committee on Estimates 2022-23 or the Legislative Assembly over the course of the weekend prior to its withdrawal, it is not open to the Committee to make a finding of interference, let alone improper interference. Any finding based solely on a tendency to interfere, which did not materialise in any substantial way, would be a trivial breach of the kind that could not support a finding of contempt.

Lawfulness and culpable intention of issuing officer

22. The only individuals whose conduct was scrutinised in the hearings of the Committee were me and Minister Gentleman. Absent affording the issuing inspector procedural fairness, no adverse finding can be made in respect of any actions of that officer. Nevertheless, it is the first prohibition notice, or the effect of that notice, issued by the inspector that is the subject of the draft findings of the Committee. It follows that is necessary to consider the lawfulness of that action and the intention of the issuing inspector.
23. In determining whether a contempt has been committed, in accordance with their agreed resolutions, the Australian Senate is to consider the following criteria:³
 - (a) the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for Senators against improper acts tending substantially to obstruct them in the performance of their functions, and should

³ Parliamentary Privilege: Resolutions agreed to by the Senate on 25 February 1988; resolution 3.



not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate;

- (b) the existence of any remedy other than that power for any act which may be held to be a contempt; and
- (c) whether a person who committed any act which may be held to be a contempt:
 - (i) knowingly committed that act, or
 - (ii) had any reasonable excuse for the commission of that act.

24. In an analysis of the reports of the Privileges Committee in the Australian Senate, and the actions taken by them, Odgers notes that where the committee concluded that contempts had not been committed, this was "often because of a lack of a culpable intention on the part of the persons concerned".⁴ Odgers continues to say that the "Privileges Committee now regards a culpable intention on the part of the person concerned as essential for the establishment of a contempt".
25. It is accepted that in determining whether a contempt has been committed, "the matters to be examined are the tendency, effect and intention of the act in question" rather than the "lawfulness of the act or whether there is otherwise a legal right to perform the act".⁵ Whilst the legality of the conduct is not determinative, it is certainly a relevant consideration and should inform conclusions as to whether there was any culpable intention on the part of the issuing inspector and, consequently, whether the interference was 'improper'. There is no suggestion that, at the relevant time, the issuing inspector knew or believed that the conduct was unlawful. Moreover, the legality of the issue of such a notice in the circumstances remains a point of contention.⁶
26. It is submitted that the intention of the issuing inspector in requiring hearings to be conducted remotely, until such time as the notice had been complied with, cannot amount to an *improper* interference, in circumstances where the inspector was acting on the belief that they were empowered to do so, and may in fact be so empowered. The actions in question lack culpable intent and did not seek to prevent or obstruct the Select Committee on Estimates 2022-23, or the Assembly, from performing their functions via virtual means.

Question of potential breach of privilege by the issue of the second prohibition notice

27. In the draft report, the Committee concludes that "the second WorkSafe ACT prohibition notice *may* have improperly interfered with the free exercise of the Assembly or a committee". (emphasis added)
28. Any finding in respect of the second notice, including any equivocal finding of the kind proposed to be made, falls outside the terms of reference of the Committee where the resolution was moved and passed by members who had no knowledge of the issue of the second notice, which was not confirmed in writing until well after the motion was

⁴ Odgers, J. R. (2016). *Odgers' Australian Senate Practice* (14th ed.). Commonwealth of Australia, at page 88.

⁵ Advice of the former Clerk of the Senate to the Committee of Privileges, 6 March 1989; published by the committee with its 18th Report.

⁶ Note the competing advice received on the issue from Bret Walker SC with Jackson Wherrett and Saul Holt KC with Katharine Brown.



passed. The terms of reference were not amended thereafter to permit consideration of any conduct surrounding that notice.

29. The Select Committee on Estimates 2022-23 elected to delay the commencement of hearings, rather than to proceed according to the schedule by virtual means. Irrespective of whether it could be said that the delay was substantially caused by the issue of the second notice, there was not, ultimately, any substantial interference in the performance of that committee's functions.
30. In the hearings of the Committee, the Chair of the Select Committee on Estimates 2022-23, Mr James Milligan MLA, was asked by the Deputy Chair of the Committee, Ms Joanne Clay MLA, whether he thought the issuing of the prohibition notices "had an impact on scrutiny", that is, whether it in fact obstructed or interfered with the performance of the functions of the committee. Mr Milligan responded:⁷

... I think the estimates committee ran efficiently and effectively. I think the budget was well scrutinised. We had great attendance. We had a lot of officials there. I thought it was run efficiently and effectively; probably more effectively than it has done in the past, just quietly.

I think the setting in the chamber worked really well for us. There was less interruption in between witnesses speaking. There were more witnesses present. I thought that allowing a whole section of the directorate to be asked questions, not just single output classes, enabled more efficient and effective asking of questions, without too much interference.

31. For the reasons set out above, it is submitted the terms of reference do not permit consideration of the actions in respect of the second notice; however, the proposed findings are in respect of the potential impact of the notice itself. The findings are not in respect of the actions of the Commissioner or any other person. I repeat and rely upon the submissions above at [15] to [17] in that respect, and further submit that, if no contempt has been found by any individual, the Committee is bound as matter of fairness to articulate such findings in its report.

Conclusion

32. The Committee is to reach a determination in accordance with the terms of reference, which do not extend beyond actions (and not omissions) in respect of the first notice.
33. Putting aside that limitation, the second notice did not prohibit the Select Committee on Estimates 2022-23 from conducting its business via virtual means. Ultimately, at least in the view of the Chair of the Select Committee on Estimates 2022-23, that committee was able to conduct its business better than it had previously, once the hearings were moved to the main chamber, where that move was a control measure in response to the

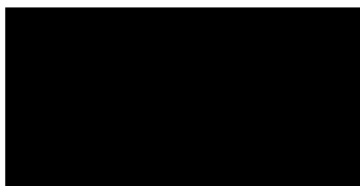
⁷ Australian Capital Territory, Proof Transcript of Evidence, Select Committee on Privileges 2022, 24 October 2022, p36, <https://www.hansard.act.gov.au/Hansard/10th-assembly/Committee-transcripts/priv01.pdf>



second notice. It cannot be said for those reasons that the second notice had the effect of substantially interfering with any function of the Legislative Assembly.

34. It is the actions of individuals in respect of the first notice which is the subject of the Committee's enquiry. The draft report makes clear no finding of contempt or any other finding of impropriety is proposed to be made against me or any officers of my office. It is incumbent upon the Committee to make clear is not satisfied that any actions of me or my staff constituted contempt of a privilege of the Legislative Assembly.
35. Arguably, the first notice by its terms did not prohibit virtual hearings, where for two years prior the hearing had effectively been conducted in that manner and were still permitted by the standing orders to be conducted in that way. The issuing inspector did not intend to prohibit virtual meetings and communicated that intention to members of the Legislative Assembly, who understood that intention. In any event, the first notice operated over the course of a weekend where there is no evidence before the Committee of scheduled meetings or hearings which could not proceed. It was promptly withdrawn at or about the time the Select Committee on Estimates 2022-23 was to commence its hearings.
36. It is also arguable that the issue of the notice was not unlawful. Certainly, there is no clear authority in that respect. Whilst the potential lawfulness of the issue of the notice and the inspector's belief in that respect are not determinative, they are least instructive in considering whether any potential interference was inappropriate.
37. Whilst I of course agree with the proposal that no action be taken against my office, it is incumbent, in all the circumstances, that the Committee make clear in its findings, consistent with its terms of reference, that neither my conduct, nor the conduct of my staff, constituted a contempt in any respect in relation to this matter.

Yours sincerely



Jacqueline Agius
Work Health and Safety Commissioner

24 November 2022

