

COMMITTEE REPORTS - CONSIDERATION

Committee

The Chairman of Committees (Hon J.A. Cowdell) in the Chair.

*Standing Committee on Ecologically Sustainable Development - Management and Sustainability of the Western
Rock Lobster - Sixth Report*

Resumed from 9 November on the following motion moved by Hon Greg Smith -.

That the report be noted.

Question put and passed.

*Standing Committee on Ecologically Sustainable Development - 2000 National Conference of Parliamentary
Public Works and Environment Committees - Eighth Report*

The CHAIRMAN: We are now considering the eighth report of the Standing Committee on Ecologically Sustainable Development. If no one wishes to raise a motion, we have considered the report.

*Standing Committee on Public Administration - Discussion Paper No 4 in relation to the Remedies Available to
Recipients of Contracted-Out Government Services - Sixteenth Report*

HON HELEN HODGSON: I move -

That the report be noted.

Unfortunately the chairman of this committee, Hon Kim Chance, is absent on urgent business. I am not sure how many other members of the Standing Committee on Public Administration are in a position to contribute to this debate, but I cannot let it pass without making some comments.

This discussion paper arose from a report that the committee tabled previously entitled "Outsourcing And Contracting Out: Investigations In The United Kingdom (Report 13)". An appendix to that report contained a series of suggested terms of reference for future inquiries. This is, I suppose, the development of the first of those terms of reference.

In this series of papers the committee is attempting to present the issues and to encourage public debate; that is why the committee has not presented any findings or recommendations as such. The committee has drawn some conclusions, but it is basically saying that these issues should be in the public arena for future debate. The questions examined in this report and the remedies available to recipients of contracted-out government services relate to the tripartite agreement which develops when there is contracting-out and an outsourcing arrangement. Essentially, there are three parties to that contracting-out - the Government, the provider of the services and the ultimate consumer of the services.

When a public good is being delivered by a private contractor, that relationship becomes quite murky in some respects with regard to the remedies that are available. The fact that this matter is fairly contentious can be seen from the number of previous reports that have been tabled in relation to issues of this type. The thirty-sixth report presented in this Chamber considered some of these issues and it became a springboard for, firstly, the revised composition of the committee, as it is now, and, secondly, some of the work now being done by that committee.

A number of other reports are referred to in the first chapter of this report; specifically, in 1992 the Senate Standing Committee on Legal and Constitutional Affairs presented a report on "The Doctrine of the Shield of Crown", and a number of other papers and reports are cited. This is a comprehensive collection of reading material and will be an invaluable reference for members and, I hope, also for ministers and heads of agencies when they are working out how to handle these issues of contracting-out and outsourcing.

The real problem is the issue of accountability and how one ensures, when government agencies are subject to certain accountability mechanisms and the consumers are entitled to certain protections under the public administration law, that those remedies always flow through to the third party. The doctrine of privity of contract and a number of other legal constructs, although perfectly appropriate in normal day-to-day contracts between two private individuals, can impede accountability and proper delivery of services to the relevant consumer when there is this three-way arrangement,

The first issue specifically examined was whether the privileges that the Crown has under some circumstances flow through to another party who is providing certain services. This is a fairly legal and technical argument which, with the assistance of the committee clerk and the research officer, is easy to follow in the way it is set out in the report.

I will digress for a moment. Because I am not usually the lead speaker in relation to these reports, I have not yet extended the courtesy of acknowledging not only the efforts of the committee's staff - Christina Eftos, the advisory officer; Lisa Hanna and Kate Fitzgerald, the committee clerks - but also the assistance of an articulated clerk, Mr Mark Benson, who was working his articles in the committee office when this paper was developed. Mr Benson did a lot of the preliminary research which led to the preparation of this report.

I now return to the content of the report. The next section of the report looks at the issues of contract and how that contract can be enforced. There are two aspects to a contracted-out or an outsourced agreement: Firstly, there needs to be appropriate enforcement between the government agency and the person who is delivering that service. In many cases we need to ensure there is a proper contract monitoring system so that the service is delivered in accordance with the terms of the contract, as agreed by the government agency in the first place. Should that accountability mechanism be missing, the Government could be seriously caught out. We have seen instances of this in Western Australia in the recent past. One instance that springs to mind was the outsourcing of meter reading. Earlier this year there was an outcry when it was discovered that some of the contractors were not properly fulfilling the terms of the contract because they were falsifying meter readings. I was recently a little late leaving home and heard the dogs carrying on, so I went to the front gate. I discovered that my meter was being checked by AlintaGas staff because there was some question about the validity of the meter reading taken a couple of weeks earlier. I am pleased to see that a checking mechanism is being used in government agencies as a response to the problem identified earlier this year. It is necessary to have in place a method to identify potential anomalies and to monitor whether contracts have been fulfilled. That is one half of the element of ensuring that contract terms are met.

Another issue is: Do the end users of a service have any rights, and against whom do they have those rights, if a service is not delivered properly? In that instance, does a consumer have a right of action against a government agency or - to use my earlier example - against the person who read the meter? These aspects must be explored and teased out more fully. The way in which government agencies do business is evolving without the normal contract laws keeping pace. That leads to a number of grey areas wherein end users are left with no real remedies. It is a significant issue when one considers the services provided to taxpayers and consumers that are contracted out by the Government. Where does the remedy arise and against whom does the consumer have a right to act when that service is not delivered adequately?

The next question considered by the committee in its report was that of tort law and who the consumer would have an action against in the event of a tort arising. The report refers to torts and tort law remedies. Again, against whom does one have a right of action if a tort occurs? A substantial body of case law on government agencies and their responsibilities exists which provides accurate information. I recall that when I was at university doing a bit of teaching in that area a fairly famous case occurred involving the City of Newcastle. It had given incorrect advice and was held responsible in tort for that advice. This is an area of law in itself. Again, the question is whether connections exist between the three parties to be able to enforce an action under tort law.

Probably the most significant issue is addressed briefly in part 7 of the report; that is, the issue of administrative remedies available when a person has a problem with something that has occurred. The body of administrative law basically exists to ensure that people get a fair deal from government agencies and administrative bodies. It has developed in two ways in the past two centuries. One is the common law of administrative law, which, to a large extent, has been codified in the past 20 to 30 years through freedom of information legislation and offices such as the Parliamentary Commissioner for Administrative Investigations; that is, the Ombudsman. However, that does not completely override common law. The most contentious area concerns the rules of natural justice, which have not been codified, so we continue to rely on common law in that area.

It is clear that in many situations people have a right to seek a review of an administrative decision when they have been injured or prejudiced by a decision. When dealing with an outsourcing contract in which a similar service is provided but which has been carried out by a contractor, to whom does a consumer go for redress and to have the issue resolved fairly if there is no right in contract law and a limited right in tort law? That matter must be taken on board by Governments when they enter into these contracts. It is clear that we need a method whereby consumers can have natural justice principles applied when they believe they are dealing with a government agency and are entitled to a service from that government agency, but it is delivered by somebody else, in many cases without people knowing that fact. For example, it is common for a government agency to employ its own staff and contracted staff. A situation could arise whereby the right to a remedy is different depending on who delivered the service on that day in that area. We must ensure that consumers have a right to a remedy in that situation.

It is important that this Parliament be aware of these issues. It is particularly important that ministers and their agencies be aware of these issues and can cover them when entering into the contracting out of services.

Ultimately, consumers expect certain services to be delivered through the Government. Whether that be the actual government agency delivering it or a contracted party, consumers expect that service to be delivered with a minimum of fuss, with certain rights and with the ability to enforce delivery of that service. When things go wrong we have a problem, and that is when the whole system of outsourcing and contracting out can break down. One of the reasons that people do not trust outsourcing and contracting out of services involves reliability. This matter was reported on extensively in the committee's earlier report on its travels in the United Kingdom. From memory, the report referred to the way in which various UK agencies have established ombudsmen and administrative mechanisms to ensure that the quality of the service delivered meets the expected standard.

I will not comment at this stage on whether contracting out is appropriate as it requires a case-by-case-decision. However, ultimately, a Government with a regime of contracting out must ensure that the quality of the service delivered to the end user is guaranteed; in other words, it must be able to guarantee that consumers will not only have the basic service delivered but also have it delivered in a timely way and according to the standards expected by the community. When those standards slip for one reason or another, the consumer must have the right to complain and to have the complaint dealt with. This is where the relationship between contract, tort and administrative laws becomes difficult. We would need to examine contractual relationships in the first instance to determine whether a right exists. We would need to establish whether a course of action in tort exists and whether a limited action under administrative law exists. A situation could easily develop in which everybody would slip through the net because no legal action or legal remedy was available. I am not encouraging people to commence litigation. However, we must ensure that services are delivered, particularly services that consumers pay for through either service charges to a government agency or the taxation system. People have the right in that case to expect that that service is being delivered adequately and that legal remedies exist.

As I said in my opening comments, this is a discussion paper. That is why it contains no conclusions or recommendations. It is airing fairly complex legal issues, and the intention is that people will consider those when entering into contracts in the future and when drafting legislation. It is my earnest hope that, in future, contracts will be drafted in a way which will ensure that consumers have appropriate remedies and that the government agency will have an appropriate method of reviewing the actions of the contractor to make sure that it has met the terms of the contract. If those clauses are not included in a contract, I would be very concerned, and I would raise questions in this place if I found that delivery of a service was inadequate and no monitoring of that service was occurring.

This is a worthwhile paper. It will be a useful reference for people in the future. I commend the report to the House.

Question put and passed.

Standing Committee on Constitutional Affairs - Overview of Petitions August 1999-August 2000 - Fifty-sixth Report

Hon M.D. NIXON: I move -

That the report be noted.

When looking through the contents of the report, it reminded me that after about 12 months the committee had discussed something like 45 petitions. When I looked up the number of the latest report to be tabled, I realised that about 12 reports have been tabled in the past 12 months. That is an indication of the number of petitions and Bills that come before the committee. The overview of petitions refers to 45 petitions, and several have been considered since this report was tabled. Up to a point, I suppose the overview of petitions is the committee's annual report. This overview covers the period from August 1999 to August 2000, and it contains comments on every piece of business that came before the committee during that period.

The committee has two major responsibilities, one of which is to discuss petitions. In doing that, the committee adopts several policies. One is to prepare a full report. When a petition is tabled in the House, it is automatically referred to the committee. The committee then writes to the principal petitioner and the tabling member, asking for a one or two-page comment on the petition, so that the committee can best assess the correct way to proceed. The committee does not set itself up as a new environmental protection agency or a new planning body. Therefore, if matters pertain to planning or the environment, the committee adopts the policy that unless there has been a breakdown in procedures, it does not become involved. The committee writes to the principal petitioner and asks if he or she believes there has been a breakdown in procedures. If there has been, the committee may examine that; if nothing is forthcoming, the committee will consider that the matter has been finalised. On the other hand, if the committee receives a petition which deals with a subject being discussed by another committee - often that is the case - the petition is referred to that other committee, and that is reported in this overview of petitions. However, my committee would not prepare a detailed report.

Other matters that come before the committee often pertain to motions or Bills before the House. Unless requested to do so by the House, the committee is reluctant to get involved in those matters. Quite a few matters fall into that area. The other area of work of the committee concerns uniform legislation that comes before it. Of course, in all those cases, a detailed report is made.

It is interesting to look at the details of some of the petitions that have come before the committee. They have dealt with establishing a nuclear waste dump; uranium mining; the School Education Bill; and the hardy annual, secession, which was an interesting petition in that it asked the committee to rule on whether a referendum that was held in the 1930s was still valid. Of course, the committee's view was that not many people who participated in that referendum would still participate in the electoral system, so it felt that it was no longer valid. Apart from that, the matter had been referred to the House of Lords, and it had made a ruling on it. The list of petitions goes on and on. Members should read this report, because it deals not only with matters that come before the committee, but also with matters that concern the public. Often when a petition is presented to Parliament, that in itself achieves the object of the petitioners, because it is an opportunity for 500 or 1 000 or however many people to express a view to Parliament about what they think should be done in a particular area.

One of the unfortunate things for our committee is that because it is required to report on uniform legislation, sometimes that keeps members busier than they would like to be on those matters, and we therefore do not have time to spend on some of the petitions. In particular, if the petitions are tabled late in the parliamentary session, they lapse, without a report being completed. If that is the case, the committee writes to the petitioner, saying that because Parliament has been prorogued the committee has been unable to continue its consideration of the petition. However, the committee reminds the petitioner that only one signature is required for the petition to be re-tabled. That reactivates the petition and the committee can then continue its inquiries.

The overview of petitions is a valuable document in that it outlines the work of the committee. I will give an example of some of the matters that were discussed. The Voluntary Euthanasia Bill was referred to the committee by a petition. The committee had previously produced an extensive report on this matter, and that report was available. In this case, the committee did not believe that it was appropriate for it to again inquire into, or report on, the business of the House. Accordingly, it resolved that it would not inquire further into the petition at that stage.

Another petition, which really involved a petitioner expressing a view, requested a permanent medical practitioner in the division of Avon. That petition was received on 4 August. The Parliament prorogued a little later, so it was impossible for the committee to continue its inquiry. Unfortunately, that matter was left in abeyance because of the prorogation of Parliament. I commend the report to the House.

Question put and passed.

Standing Committee on Constitutional Affairs - A Petition Requesting Action to Cut Fuel Costs - Fifty-ninth Report

Hon M.D. NIXON: I move -

That the report be noted.

This is probably one of the shortest reports the committee has ever produced. This is a topical report because it deals with action that should be taken to cut fuel prices. The petition that was presented dealt with many issues, including the need to reduce fuel excise to benefit all Australians; the suspension of the consumer price index excise adjustment in February 2001; a review of the alignment of Australian crude oil to world parity pricing; the protection of the role of small business retailers of petrol; and price competition and transparency at the wholesale level. I am sure that all members are aware that this petition was received after a select committee in the other place had conducted an inquiry into the matter. That report was tabled about the time the petition was tabled in this place. The committee was of the view that it did not require reworking because the select committee has done a thorough job of examining the issues in the petition. A letter was sent to the petitioner expressing the view that the committee believed the matter had been dealt with by the select committee report. The principal petitioner then wrote back and informed the committee that that might well be the case but the petitioners would prefer that the Parliament express the view that the matters were important.

This report presents to members the concerns of those petitioners and includes recommendations. The committee recommends that the State Government reiterate to the Commonwealth Government the concerns of many Western Australians relating to the needs outlined earlier. The committee also noted that both the Premier and the Leader of the Opposition have made many comments in broad terms supporting the concerns that were expressed in the petition. It is a short report which I recommend to members.

Question put and passed.