

DEPARTMENT OF THE SENATE
PAPER NO. 1019
DATE PRESENTED 19 AUG 1970
<i>J.R. Odgers</i>
Clerk of the Senate

1970

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

THIRTY-THIRD REPORT

from the

STANDING COMMITTEE

on

REGULATIONS AND ORDINANCES

(Being a report upon Statutory Rules, 1970, No.42,
Amendments of the Public Service Regulations)

PERSONNEL OF COMMITTEE

Chairman:

Senator I.A.C. Wood

Members:

Senator Cavanagh

Senator Davidson

Senator Devitt

Senator Greenwood

Senator Lawrie

Senator Wheeldon

FUNCTIONS OF THE COMMITTEE - Since 1932, when the Committee was first established, the principle has been followed that the functions of the Committee are to scrutinize regulations and ordinances to ascertain -

- (a) that they are in accordance with the Statute;
- (b) that they do not trespass unduly on personal rights and liberties;
- (c) that they do not unduly make the rights and liberties of citizens dependent upon administrative rather than upon judicial decisions; and
- (d) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

THIRTY-THIRD REPORT OF THE COMMITTEE

The Senate Standing Committee on Regulations and Ordinances has the honour to present its Thirty-third report to the Senate.

Statutory Rules, 1970, No.42

Amendments of the Public Service Regulations

2. The purpose of this report is to acquaint the Senate with the results of the Committee's enquiries concerning the above statutory rules.

3. Regulation 1 of these amendments is as follows:

1. Regulation 112 of the Public Service Regulations is repealed and the following regulation inserted in its stead:—

" 112.—(1.) For the purposes of this regulation, an officer holds the appropriate educational qualifications for transfer or promotion to the Third Division, if the Board has certified that—

Conditional or transfer or promotion from the Fourth Division to the Third Division.

- (a) the officer has passed an examination for transfer to the Third Division held by or on behalf of the Board;
- (b) the officer has passed, under conditions approved by the Board, in such subjects of a public examination approved by the Board as satisfy requirements determined by the Board for transfer to the Third Division; or
- (c) the officer has been admitted, or is eligible to be admitted, to a degree of an Australian University or to a degree of an overseas University, being a degree that in the opinion of the Board is of a standard at least equal to the standard of a degree conferred by an Australian University.

" (2.) The prescribed conditions for the transfer or promotion of an officer from the Fourth Division to the Third Division are—

- (a) that the conduct, diligence and efficiency of the officer in the period since the officer was appointed or, if before his appointment as an officer, he was employed in a temporary capacity under the Act, since the commencement of that employment or in the period of twelve months preceding the date of his transfer or promotion to the Third Division, whichever is the less, have been satisfactory;
- (b) that—
 - (i) the officer holds the appropriate educational qualifications for transfer or promotion to the Third Division;
 - (ii) the officer was previously an officer of the Third Division and was promoted to the Fourth Division or transferred to the Fourth Division (other than by a transfer made in pursuance of section 55 or 62 of the Act or in pursuance of section 67 of the Act on grounds other than injury or illness);
 - (iii) in the case of a transfer or promotion to an office referred to in sub-regulation (9.) of regulation 105 of, or in Part V. of the Fourth Schedule to, these Regulations, or of a transfer to the Third Division as the occupant of such an office the officer holds the appropriate educational qualifications for transfer or promotion to the Third Division or the officer has passed an examination conducted by or on behalf of the Board, being an examination determined by the Board to be an examination the passing of which qualifies the officer for transfer or promotion to the Third Division to or in that office; or
 - (iv) in an appropriate case, the officer possesses the qualifications, and complies with the conditions, specified in a determination by the Board under section 53 of the Act that is applicable in relation to the office in the Third Division to which the officer is to be transferred or promoted; and
- (c) in the case of a transfer or promotion to an office in the Third Division, being an office for appointment to which applicants are required, as a condition precedent to appointment, to pass a test approved by the Board for determining their aptitude and capacity

for performing the duties of the office, that the Board has certified that the officer has passed such a test.

"(3.) The prescribed condition under which an officer of the Fourth Division who does not satisfy any of the conditions specified in sub-paragraph (i), (ii) and (iii) of paragraph (b) of the last preceding sub-regulation may be transferred or promoted to a vacant office in the Third Division, being an office for the performance of the duties of which an officer is required to possess special skill or technical knowledge is, notwithstanding anything contained in those sub-paragraphs, that, after the notification of the existence of the vacancy has been published in the *Gazette*, the Board has certified that--

- (a) the office is such an office;
- (b) the officer of the Fourth Division has the special skill or technical knowledge required for the performance of the duties of the office; and
- (c) there is no applicant available for transfer or promotion to the office who is as capable of performing the duties of the office as the officer of the Fourth Division."

4. The Committee's concern is that the new regulation 112 gives the Public Service Board a complete discretionary power to determine requirements for transfer or promotion to the Third Division, to select the subjects and examinations that satisfy those requirements, and to determine what shall be treated as a pass in those examinations.

5. In its evidence and submissions to the Committee, the Public Service Board made the following points:

- (i) The new regulation 112 is virtually identical in its language to Section 35 of the Public Service Act, and it was designed to achieve "harmony" between that Section, which deals with appointments to the Second and Third Divisions, and regulation 112, which deals with transfers and promotions to the Third Division.
- (ii) The old regulation 112 gave the Board substantial discretionary powers, although it did refer to objective criteria in part.
- (iii) The Board was set up by statute as an independent body for the purpose of exercising discretionary powers and making administrative decisions which must be exercised and made by some authority.
- (iv) Determinations of the Board made under regulation 112 are required by Section 53 of the Public Service Act to be gazetted. Section 53 empowers the Board to determine qualifications and conditions for transfers and promotions of all kinds, and the new regulation 112 is made under this Section.
- (v) It would be too difficult to set out in the regulations the educational qualifications determined by the Board, because these are of great length and frequently amended.

6. The regulation was made pursuant to statutory power granted under Section 97 (1) of the Public Service Act 1922-1968. Section 97 (1) provides that -

"The Board may make regulations

- (e) prescribing the conditions under which officers of a Division may be transferred to another Division or to an office in another Division"

The Regulation can scarcely be said to prescribe the conditions under which officers may be transferred. It rather prescribes that the Board may impose conditions. It is not clear from a reading of the Regulation what are the qualifications for transfer or promotion. It seems to the Committee that the officer has passed some subjects of a public examination if he has passed those subjects under conditions which the Board has approved and, in addition the public examination is one which the Board has approved and the subjects are such subjects as the Board decides satisfy whatever the Board's requirements are for transfer to the Third Division. The result is to leave to the Board, without there being stated any objective standard, the power to select the requirements for transfer, select the subjects that satisfy those requirements, select the public examination and to set what conditions it thinks are necessary in order that a pass in those subjects will be treated by it as a pass.

X 7. The Committee is not concerned with the policy of the regulation, but is concerned to scrutinize regulations to ensure:

- (a) that they do not unduly make the rights and liberties of citizens dependent upon administrative rather than upon judicial decisions; and
- (b) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

8. The new regulation 112 is objectionable under the first of these principles, because the Public Service Board is not bound by any objective criteria in making its determinations under the regulation. While it may be difficult to incorporate the Board's determinations in the regulations, the Committee considers that there ought to be criteria by which the Board is to be bound in making its determinations.

If there must be a discretion involved in decisions which the Board makes it should be in respect of qualified officers - not in respect of the imposition of the conditions under which it is determined whether officers are qualified. The exercise of discretion in the actual appointments of qualified officers may be controllable in some measure on appeal - but there is no scope for appeal in the proposed regulations relating to the conditions of qualification for transfers and promotions. At present the regulations merely state that the conditions of transfer and promotion to the Third Division are left to the unfettered discretion of the Board.

9. Under the second of the above-quoted principles, the new regulation 112 is objectionable because:

- (a) Provisions relating to appointment to the Second and Third Divisions and those relating to transfer and promotion to the Third Division ought not to be "harmonised" by regulation. This should more appropriately be effected by substantive legislation, particularly having in mind that the two matters are at present covered by different sections of the Public Service Act.
- (b) Regulations ought not merely to repeat the language of the statute. They should give some indication of the administrative practices which are intended to be adopted under the statute.

10. For these reasons, the Committee recommends the disallowance of the Amendments of the Public Service Regulations contained in Statutory Rules 1970 No.42, made under the Public Service Act 1922-1968.

D.M. DEVITT
Deputy-Chairman

Regulations and Ordinances Committee Room,
Wednesday, 19 August, 1970