



T H E S E N A T E

FORTY-SECOND REPORT

FROM

THE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Retrospectivity of Regulations
relating to the Defence Services

PERSONNEL OF COMMITTEE

Chairman:

Senator I. A. C. Wood

Members:

Senator J. L. Cavanagh

Senator D. M. Devitt

Senator P. D. Durack

Senator P. E. Rae

Senator J. J. Webster

Senator J. M. 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 scrutinise 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.

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

FORTY-SECOND REPORT

The Standing Committee on Regulations and Ordinances has the honour to present its Forty-second Report to the Senate.

Retrospectivity of Regulations
relating to the Defence Services

2. In its Twenty-fifth Report to the Senate, tabled in November 1968, the Committee expressed its concern at the frequency with which regulations, particularly relating to the Defence Services, make provision for salaries and allowances to be paid with long periods of retrospectivity. The Committee set down the ground of its objection to such retrospective regulations:

Delay in the promulgation of regulations providing for the payment of moneys denies to either House of the Parliament the right to approve or disapprove of the expenditure at the time of expenditure and, under these circumstances, the Committee is of the opinion that such provisions should, more properly, be embodied in substantive legislation.

3. The Committee found upon investigation that the retrospectivity of the regulations concerned was largely due to delays in the promulgation of the regulations. These delays were found to fall into two main areas:

- (i) the time taken to decide upon the amount and conditions of the adjustment of the payments concerned, to obtain necessary approval and issue instructions to the Parliamentary Counsel; and

- (ii) the time taken by the Parliamentary Counsel to finalise the regulations and arrange for their promulgation.

4. The Committee set down the guidelines which it would follow in its scrutiny of retrospective regulations:

- (1) All regulations, of whatever character, having a retrospective operation will prima facie attract the attention of the Committee.
- (2) Where the retrospectivity involved is in relation to payment of moneys the Committee will view the retrospectivity as requiring close scrutiny.
- (3) The Committee regards retrospectivity beyond a few months as objectionable. It is recognised, for obvious practical reasons of an administrative character, that some retrospectivity is inevitable. The Committee believes that such retrospectivity should be of the shortest period practicable.
- (4) Regulations involving retrospectivity in payment of moneys, if extending beyond two years, will be the subject of report to the Senate and unless quite exceptional circumstances are established to the Committee's satisfaction, will be the subject of a recommendation for disallowance.

The Committee will continue to scrutinise all regulations for payment of moneys which contain retrospective provisions extending beyond a few months, and will regard the retrospective aspect of such regulations as warranting some explanation.

5. In accordance with that undertaking, which has been supported by the Senate, the Committee has continued to scrutinise retrospective regulations and has required from the responsible Ministers explanations of the circumstances causing the retrospectivity of such regulations. Evidence has been taken from Departmental officers on numerous occasions in relation to particular regulations and in relation to the problem of retrospectivity in general.

6. Although the situation has considerably improved since 1968, in that financial regulations involving

retrospectivity of several years are now of rare occurrence, regulations relating to the three Services still frequently provide for what the Committee considers to be inordinate and unreasonable periods of retrospectivity.

7. The Committee has found that, while the delay in the drafting of regulations by the Office of Parliamentary Counsel accounts for some of this retrospectivity, it is in the main due to delays in the second area mentioned in paragraph 3 above, that is, administrative delays in the Services Departments themselves.

8. A case in point was dealt with in the Committee's Forty-first Report, tabled in the Senate on 28 September 1972. The retrospectivity of more than two years of the regulations which were the subject of that Report was mainly due to inordinate delays in the administrative processes of the Departments of the Army and Defence. While this was an extreme case, the Committee has found that similar delays have operated in the case of almost every financial regulation initiated by the Services Departments.

9. It seems to the Committee that by allowing these delays to recur the responsible Ministers and their Departments have not had due regard for the views concerning retrospectivity expressed by the Committee and supported by the Senate.

10. There is no doubt that by improving their administrative procedures the responsible Departments could eliminate these delays in part. Indeed, the Services Ministers and their Departmental officers have indicated that this will be done, and it was because of a Ministerial assurance to this effect that the Senate was not invited to carry out the recommendation for disallowance made in the Committee's Forty-first Report.

11. It appears to the Committee however, that administrative improvements will not eliminate all of the delays. Part of the problem of retrospectivity is caused by the system whereby decisions on pay and allowances for members of the Services are made.

12. The procedures whereby such decisions are formulated are generally speaking as follows: The Department of Defence or the Service Department concerned initiates a proposal for a pay change, often in reaction to a determination relating to the Public Service, which may itself involve some retrospectivity. If the change is initiated by the Service Department, a submission is put to the Department of Defence on the matter. That Department, which may first study the proposal and consult the Treasury or other Departments, puts the question before the Defence (Conditions of Service) Committee which makes a recommendation to the Minister and on some occasions to the Treasurer. Following Ministerial approval the Department of Defence notifies the relevant Service Department, which prepares instructions for the drafting of the regulation by the Parliamentary Counsel. The Parliamentary Counsel frequently has to clarify those instructions with the Department before proceeding to the drafting. Each step in this process may take some weeks or months. Because it is desirable that Services personnel should receive pay rises from the same date as corresponding Public Service officers, the regulation must provide for a long period of retrospectivity.

13. It appears to the Committee that these procedures for determining changes in pay and allowances are unnecessarily complicated and cumbersome, and inevitably cause long delays which would persist even if the Departments acted more expeditiously.

14. This has apparently been recognised by the responsible Ministers, and the intention to establish a new system of pay determination has been expressed in a statement made by the Minister for Defence on 22 September 1972. The Committee expresses the hope that this new system will enable the Service Departments to keep to their stated intention of reducing retrospectivity of financial regulations.

15. The Committee will continue to closely scrutinise such regulations in accordance with the undertaking which it gave to the Senate in its Twenty-fifth Report. Detailed explanations will be required of all regulations involving retrospectivity of more than a few months, and serious cases will be reported to the Senate. The Senate may well feel, as it has in the past, that action on its part would have a salutary effect upon the authorities responsible for the making of regulations.

D.M. Devitt
Deputy Chairman

Senate Committee Room,
19 October 1972.