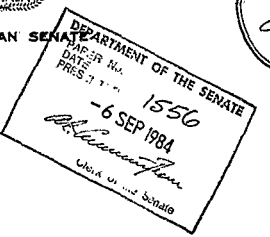
AUSTRALIAN SENATE



SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

SEVENTY-FIFTH REPORT

SEPTEMBER 1984

LEGISLATION CONSIDERED
FEBRUARY - JUNE 1984

THE SENATE

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MEMBERS OF THE COMMITTEE

Senator J Coates (Chairman)
Senator A W R Lewis (Deputy Chairman)
Senator B R Archer[1]
Senator the Hon. Sir John Carrick
Senator P F S Cook
Senator the Hon. P D Durack[2]
Senator G F Richardson
Senator M C Tate

PRINCIPLES OF THE COMMITTEE

(Adopted 1932; Amended 1979)

The Committee scrutinises delegated legislation to ensure:

(a) that it is in accordance with the statute;

(b) that it does not trespass unduly on personal rights and liberties;

(c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and

(d) that it does not contain matter more appropriate for Parliamentary enactment.

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1 Appointed 10 May 1984
2 Discharged 10 May 1984

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CHAPTER ONE: Summary of Committee's Work February - June 1984

1. During the period February - June 1984, the Committee met on 7 occasions, always in private, and examined 268 statutory instruments, of which some 136 were Statutory Rules strictly defined: regulations made under a variety of Commonwealth Acts. The continuing size of the Committee's task is reflected in the fact that during this period, each meeting examined an average 40 statutory instruments.

2. The Committee, with two additional members, also met on 4 occasions in May 1984 to consider a special reference from the Senate on certain Regulations, A.C.T Ordinance and A.C.T Regulation about customs and censorship (Journals of the Senate, 10 May 1984, pp.855-856). The outcome of these deliberations was reported to the Senate in a Special Report on Certain Regulations and an Ordinance on 29 May 1984 (Journals of the Senate, pp.864-870; Senate Hansard, pp.2021, 2074-88).

3. During February - June 1984 the Committee examined the following types and numbers of instruments (some of which were actually made in 1983), which were subject to parliamentary disallowance or disapproval:

A.C.T Ordinances	26
A.C.T Regulations	11
Australian Meat and Livestock Act Orders	31
Defence Determinations	28
High Court Directions	1
Navigation (Orders) Regulations Orders	3
Postal By-laws	1
Public Service Board Determinations	17
Statutory Rules	136

Telecommunications (Charging Zones and Charging Districts) By-laws Amendments	5
Telecommunications (Community Calls) By-laws Amendments	5
Telecommunications (Digital Data Charging) By-laws Amendments	1
Telecommunications (Staff) By-laws Amendments	1
Territory of Cocos (Keeling) Islands Ordinances	2

4. The Committee's routine examination of instruments identified only a relatively small proportion as deserving closer examination in light of the Committee's principles. In selecting cases for closer examination, the Committee was frequently guided by the advice of the Legal Adviser, Professor Douglas Whalan, of the Australian National University. Approximately five per cent of instruments (many with several provisions of interest to the Committee) were subject to closer examination, which in many cases meant no more than that the Committee sought a detailed explanation from the responsible Minister on the merits of the objectionable provision. Approximately two thirds of these inquiries terminated in a simple if detailed explanation from a Minister.

5. However, the other third of the cases identified for closer examination have required more sustained treatment: they include Statutory Rules, A.C.T Ordinances and Regulations and High Court Directions. In many of these cases, the Committee was interested in several provisions. On three occasions the Committee gave notice to disallow an instrument, yet in no case in the period did the Committee actually move to disallow any instrument. It is quite characteristic of the Committee's operations that if a Minister either is slow to answer a request from the Committee or provides an unsatisfactory response, the Committee protects its ability to continue (or indeed speed up) negotiations by

giving notice that it will, within a specified period of sitting days, move to disallow the instrument. The onus is then on the Minister to respond speedily for, if at the expiration of fifteen sitting days a notice has not been withdrawn or otherwise disposed of, the instrument specified in the motion is deemed to have been disallowed (Acts Interpretation Act, section 48(5)).

6. The types of provisions that have been of serious concern to the Committee can be briefly summarized here, leaving the full report and analysis to subsequent chapters. In brief, the Committee has singled out for attention:

- reversal of onus provisions, which impose an undue persuasive or evidentiary burden on defendants (see chapter 2.2 paras. 8-16; and 2.3, paras. 18-20, 29,31-2).

- subjectively based administrative discretions, in which the only criterion governing the exercise of discretion is "on such terms as the decision-maker thinks reasonable" or "where the decision-maker is satisfied", the effect of which is to introduce an unchallengeable discretion, thereby severely limiting the scope of any available review of decisions (see chapter 2.1, paras. 1-4).

- possibly defective appeal provisions, where failure by a decision-maker to notify a person of a right of appeal is held not to invalidate the original decision (see chapter 4.3).

- conclusive certificate provisions, which provide that an official certificate is final and conclusive evidence of an act (see chapter 2.3, paras. 19-22).

- beyond power provisions, which, for instance, increase penalties beyond the maximum limit established in the principal legislation (see chapter 2.3, paras. 23-26).

- miscellaneous provisions, such as miscitations or misprints in legislation (see chapter 2.2, para.7).

7. The types of amendments or promised amendments which the Committee has achieved during February to June 1984 include:

- deletion of subjective basis for decision making (re Statutory Rule 1983 No.70);

- removal of persuasive burden of proof on defendants (re High Court Directions No.1 1984 and A.C.T Ordinance No.4 1984);

- introduction of improved appeal protection for individuals (re A.C.T Ordinance No.69 1983);

- removal of penalties which were beyond power (re A.C.T Regulations No. 25 1983).

8. Although the Committee's principles under which it examines instruments were slightly modernized in 1979 to take account of the new administrative law-reviewing agencies, one can still find a reliable guide to the Committee's practical application of its principles and the type of objectionable provisions in the 43rd Report (Parliamentary Paper No.220/1972, pages 14-16).

CHAPTER TWO: Legislation Considered, February - June 1984

2.1 Statutory Rules

QUARANTINE (ANIMALS) REGULATIONS (AMENDMENT) (STATUTORY RULES 1983 NO.70)

9. In its 74th Report at paragraphs 44-46, the Committee advised the Senate of its concern with the amendments to the Regulations. The Regulations give effect to a Government decision to introduce changes to recoup 50% of the cost to the Commonwealth of providing the animal export inspection service in conformity with policy adopted generally for export inspection services. Exporters pay a fee for service on animals inspected for export, for which a certificate of health is granted. The Regulations confer a benefit on a person classified as a recognised exporter, by granting an extension of time in which to pay the required fee for service. Regulation 86F(4) provides that:

> "Where a service relating to a consignment is provided for a recognized exporter he shall pay the applicable fee in respect of that service before the twenty-second day of the month next succeeding the month during which that service is provided." (emphasis added)

The Committee was interested in the apparently subjective process by which applications for recognised exporter status are approved or rejected. For example, Regulation 86B(1) provides that:

> "Where the Director is satisfied that a person exports animals regularly he shall, on an application by that person, approve that person as a recognized exporter for the purposes of this Part." (emphasis added)

The Committee was particularly concerned over the effect such subjective judgment might have on the appeal mechanism included in the Regulations.

10. The Committee advised the Minister for Health of its concern that, although decisions of the Director under Regulations 86B(1), 86B(3), 86C(1) and 86F(8) are reviewable by the Administrative Appeals Tribunal under Regulation 86G, the scope of the review is effectively constrained by resort to use of the language "where the Director is satisfied".

11. As stated in para 46 of its 74th Report, the Committee did not, of course, question the need for administrative discretions; nor did it suggest that specific criteria needed to be listed. However, the Committee strongly believed that any such discretion should have to be, in the form of a proper legal test, objectively determined, rather than allow the possibility of a subjective judgment. This proper legal test requires the use of some standard legal terminology such as "is satisfied on reasonable grounds". The Committee therefore asked the Minister to consider amending the provisions along these lines, which ought in no way to interfere with the administration of the scheme.

12. The Minister has accepted the suggestions of the Committee. An undertaking has been given to amend Regulations 86B(1), 86C(1) and 86F(8) to provide for the Director to be satisfied "on reasonable grounds."

13. On the second matter raised by the Committee, of the use of the term "regularly" in Regulation 86B(1) with respect to approvals of recognised exporters, the Minister has agreed that this description could be unintentionally restrictive in its application. An undertaking has been given to amend the Regulation by omitting "regularly" and substituting other words such as "persons who have a continuing interest in the livestock export industry."

14. The Committee is satisfied that these two amendments remove the apparently subjective process by which applications for recognised exporter status are approved or rejected. The Committee appreciates the co-operative approach taken by the Minister during the negotiating process and looks forward to examining the amendments when they are introduced.

2.2 HIGH COURT DIRECTIONS NO.1 1984

15. The Directions, made under section 19 of the High Court of Australia Act 1979, regulate the conduct of persons in and around the Court. The Committee was concerned about two possible defects in the Directions: first, a serious miscitation or misprint in Direction 5(2) which contained a reference to a non-existent Direction 1(f); and second, two reversal of onus provisions in Directions 5(1)(b) and 5(1)(o). On the first matter, the Clerk of the Court thanked the Committee for drawing its attention to the miscitation, and undertook to amend the Directions. This amendment was gazetted on 26 June 1984.

16. The relevant reversal of onus provisions can be quoted here, with the persuasive burdens underlined. Directions 5(1)(b) and (o) provide as follows:

"5(1) A person shall not -

... (b) without lawful excuse (proof whereof shall lie on him) interfere with, damage or destroy any tree, shrub, flower, plant, grass, notice, seat, structure, building or other property within the Building or the Precints; or

... (c) without reasonable excuse (proof whereof shall lie on him) enter or go upon any part of the Building or the Precints not being part of the Public Areas or as to which a notice is exhibited or a barrier is erected indicating that admittance is prohibited or restricted; or..."

17. The Committee supports the reasoning and recommendation of the Burden of Proof in Criminal Proceedings Report of the Senate Standing Committee on Constitutional and Legal Affairs, that persuasive burdens placed on defendants should be reduced to evidential burdens. The difference between the two types of burden can be briefly stated. A defendant bearing a persuasive burden must convince the tribunal, on the balance of probabilities, of his contention that a reasonable or lawful excuse existed. A defendant bearing an evidential burden must present sufficient evidence to raise a live issue fit and appropriate to be left to the tribunal of fact. Once this evidential burden is discharged, the persuasive burden - or the traditional burden of proof beyond reasonable doubt - remains with the prosecution.

18. Thus the essential difference between the two burdens is that an evidential burden is capable of discharge by evidence falling short of proof. The Committee accepts, for the reasons stated in the Burden of Proof in

Criminal Proceedings Report, that delegated legislation should, wherever possible, place on the defendant the lesser burden.

19. After examining the Directions, the Committee wrote to the Court, drawing attention to the way in which the provisions contained in Directions 5(1)(b) and (c) place on the defendant the persuasive burden of proving that a lawful or reasonable excuse exists. The Committee drew to the attention of the Court recent amendments which the Committee has obtained to similar provisions (see for example 74th Report at paragraphs 68-71), and sought the Court's co-operation in drafting an alternative type of provision to these Directions. From the outset the Court explained the apparent need for the persuasive burden in the following terms:

> "Whether the defendant had such [lawful or reasonable] excuse is a matter peculiarly within his own knowledge and if it existed easy for him to prove. Disproof by the prosecution may entail such difficulty and expense as to render a prosecution quite impracticable... When one has regard to the very small penalty involved, and to the fact that the offence is triable summarily, it is considered no way unreasonable for the defendant to prove the existence of the excuse on which he relies."

20. In a further letter to the Court the Committee noted that the types of circumstances identified by the Court are almost exactly the same as those described by the Constitutional and Legal Affairs Committee as warranting the use of evidential burdens. Paragraph 6.13 of the Burden of Proof in Criminal Proceedings Report

recommends that, as a matter of legislative policy, evidential burdens should be imposed only in circumstances:

> " (i) where the prosecution faces extreme difficulty in circumstances where the defendant is presumed to have peculiar knowledge of the facts in issue; or
>
> (ii) where proof by the prosecution of a particular matter in issue would be extremely difficult or expensive but could be readily and cheaply provided by the defence."

21. In a letter to the Committee of 22 May 1984, the Court accepted this Burden of Proof rule which justifies the occasional resort to evidential as distinct from persuasive burdens. However the Court went on to argue that:

> "The Court appreciated that the attitude of the Standing Committee is prompted by a desire to secure fairness to an accused. In a case such as the present, however, from a practical point of view the accused will be under no greater disadvantage if he bears the persuasive burden than if he bears the evidential burden. In the latter case, accepting the correctness of Gill [1963] 1 W.L.R. 841, the accused would have to present sufficient evidence to raise a live issue fit and proper to be left to the tribunal of fact. In practical terms that means that the accused would have to establish the facts which amount to a reasonable excuse. He would have to do no more than that if the persuasive burden rested on him."

22. The Committee could not agree that in these cases a defendant would face no greater difficulty under a persuasive burden than under an evidential one. The Committee therefore held to the view that the Directions ought to be disallowed or amended. At the Court's invitation the Committee suggested a possible line of amendment. The prohibitions in Directions 5(1)(b) and 5(1)(o) could be recast at least by deleting the words "(proof whereof shall lie on him)". The activities prescribed would be prima facie unlawful, subject to lawful justification. A new paragraph could then have been inserted ensuring that only an evidential burden is placed on the accused in order to raise the issue of justification.

23. One possibility for such a new paragraph could have been along the following lines:

> A person shall be acquitted of an offence if there is evidence that he had reasonable excuse for (doing the proscribed things) and that evidence is not rebutted by the prosecution.

The advantage of the expression "if there is evidence" over "if he adduces evidence" is that the latter phrase is capable of being interpreted as requiring the accused to give or lead evidence, whereas it should be possible for that evidence to be elicited, for example, by cross examination of prosecution witnesses.

24. In response to these suggested alternative provisions and in the face of a notice of motion to disallow the Directions, (Journals of the Senate 5 April 1984, page 787) the Court informed the Committee that it could not accept the suggested amendment and that, therefore, it had decided to delete the two Directions in question. In withdrawing the notice of motion the Committee

accepted this assurance but expressed its regret that the Court had been unable to see fit to amend the provisions by reducing the burden of proof (Journals of the Senate 6 June 1984, page 928; Senate Hansard 6 June 1984, page 2591). The amendment to the Directions which gave effect to this assurance was subsequently gazetted on 26 June 1984. The Committee will continue to examine fully onus of proof provisions in all statutory instruments.

2.3 A.C.T Ordinances and Regulations

WORKMEN'S COMPENSATION (AMENDMENT) ORDINANCE 1983 (A.C.T ORDINANCE NO.69 OF 1983)

25. This Ordinance amends the principal Ordinance by providing for compensation for disease caused by employment; compensation benefits for a number of specific injuries; and the removal of the restriction on the application of the Ordinance to accidents only. There were several aspects of its operation which the Committee raised with the Minister for Territories and Local Government.

26. First, the Committee noted a concern that new sections 9,9A and 9B appeared to contain reversal of onus provisions. This concern arose from the words "unless the contrary intention appears" and "shall be deemed" which were used in setting out the circumstances under which an employee possesses a right to compensation where disease rather than injury is a factor in the incapacity. The Committee highlighted the difficulties an employee could face in attempting to show the relation-to-work nexus with disease in less obvious cases, such as asbestosis. In writing to the Minister the Committee recognised the problems inherent in this

type of legislation but nevertheless sought the Minister's comments on the necessity for the reversal of onus provisions in these sections.

27. A second matter about which the Committee had some concern was the operation of sections 10A,10B and 10C, each of which contained a conclusive certificate provision and a reversal of onus. Section 10A, for example, provided inter alia that a certificate given by a medical referee "is final" and "either conclusive evidence that the inquiry did not result in such disfigurement" or "conclusive evidence that the injury resulted in such disfigurement". The Committee was concerned over the situation in which the opinion of a single medical referee could be effective in deciding the rights of an employee, an employer or an insurer, without any apparent right of appeal.

28. In response the Minister commented on these matters at some length. A detailed explanation of the operation of the new section 9 satisfied the Committee that it did not raise the question of a reversal of onus. The Committee accepted that the use of reversal of onus provisions in sections 9A and 9B was a policy decision and noted that a model for these provisions was provided by sections 30 and 31 of the Compensation (Commonwealth Government Employees) Act 1971.

29. The Minister understood the Committee's concern that new sub-sections 10A(6),10B(6) and 10C(6) entrusted important decisions to a single medical referee without any appeal rights but pointed out the difficulty of locating or establishing an appropriate appeal body. After the Committee pressed the apparent lack of appeal rights the Minister gave an undertaking to amend the legislation to provide that decisions taken under

sections 10A, 10B and 10C would be made by a panel of medical practitioners rather than by a single medical referee.

30. The Minister did, however, indicate that there may be cases where, due to the shortage of suitably qualified persons in the Australian Capital Territory, it might be necessary to ensure that there is an alternative means of reaching a decision. The Minister advised that in such cases the opinion of a single medical referee would be relied on but that the certificate would only become final and conclusive when signed by all members of a medical panel. This approach follows sections 57 and 59 of the Compensation (Commonwealth Government Employees) Act 1971. The Committee accepted the undertaking given by the Minister, subject to its understanding that the amendment to the Ordinance will provide that certificates given by a single medical referee will not be final and conclusive. In a recent letter to the Committee the Minister has confirmed this understanding. The Committee, therefore, looks forward to examining the amendments when they are introduced.

MOTOR VEHICLE (THIRD PARTY INSURANCE) REGULATIONS (AMENDMENT) (A.C.T REGULATIONS NO.25 1983)

MOTOR TRAFFIC (AMENDMENT) ORDINANCE 1984 (A.C.T ORDINANCE NO.1 1984)

MOTOR VEHICLE (THIRD PARTY INSURANCE) REGULATIONS (AMENDMENT) (A.C.T REGULATIONS NO.6 1984)

31. The Motor Vehicle (Third Party Insurance) Regulations (Amendment) (A.C.T Regulations No.25 1983) were made on 20 December 1983 and notified in the Gazette on 30 December 1983. The purpose of these Regulations was to increase the penalty for an insurer's making a false

return from $100 to $200 and to increase the penalty for using a motor vehicle for a purpose other then the purpose for which the policy was issued, from $40 to $500. Following examination of these Regulations, the Committee drew to the attention of the Minister for Territories and Local Government the fact that the empowering section [s.218 (af)] of the Motor Traffic Ordinance 1936 limited to $100 the penalties which may be imposed for breaches of the Regulations. The penalties imposed by the present amending Regulations were clearly beyond power.

32. In a detailed explanation to the Committee the Minister indicated that the Regulations had been made in error; it had been intended to amend the Motor Traffic Ordinance 1936 to increase the maximum penalty which could be prescribed in Regulations under that Ordinance, prior to the making and gazettal of the Motor Vehicle (Third Party Insurance) Regulations (Amendment). Due to an administrative error the amending Ordinance had been withdrawn from the final Executive Council meeting for 1983 but that action had not been taken in time to prevent the gazettal of the offending Regulations. An amendment to the regulation-making power of the Ordinance was made in the Motor Traffic (Amendment) Ordinance 1984, which now allows penalties to be imposed up to $200. This was made on 31 January 1984 and gazetted on 8 February 1984.

33. On 7 March 1984 a new set of regulations was made, the Motor Vehicle (Third Party Insurance) Regulations (A.C.T Regulations No.6 1984), which were gazetted on 23 March 1984. These Regulations repealed the Regulations made in error at the end of 1983; increased the penalty for failure to lodge a return to $200; and increased the penalty for using a vehicle for a purpose other than that allowed by the third party insurance cover to $100. The Committee was satisfied with the explanation

provided by the Minister and with the amendments to the Ordinance and to the Regulations. It was gratified to note that the Minister gave an undertaking not to proceed with any prosecutions for the period 30 December 1983 and 23 March 1984 when the previous Regulations (1983 No.25) were in force.

34. The Committee did, however, draw to the attention of the Minister the failure of the Explanatory Statement accompanying the new Regulations to make any reference to the reasons for the need for the latest Regulations. The Committee considers that persons affected by statutory instruments and legislators, who have a duty to review delegated legislation, deserve a full explantion of the reasons for all instances of such legislation.

DANGEROUS GOODS ORDINANCE 1984

35. In January 1984 the Minister for Territories and Local Government advised the Committee that the ACT Fireworks Ordinance would be repealed and replaced by a Dangerous Goods Ordinance. At the same time the Minister undertook to amend two provisions relating to burdens of proof, contained in the draft version of the new Ordinance. The Committee had found these provisions to be objectionable when they had originally appeared in the Fireworks (Amendment) Ordinance 1983 (see 74th Report, Paragraphs 68-71).

36. In considering the Dangerous Goods Ordinance 1984 the Committee noted that the amendments made by the Minister fulfilled this undertaking.

37. However, the Committee was concerned at several other features of the new Ordinance. Sections 20(2) 25(2),26(2) and 36(2) of the New South Wales Dangerous

Goods Act, now incorporated into the ACT Ordinance, each contained a reversal of the onus of proof by requiring that the defendant must satisfy the court that no offence had occurred. The Committee noted, furthermore, that clause 41(7) of the New South Wales regulations, as amended by the Schedule to the new ordinance, contained a similar reversal of onus provision.

38. The Committee was also concerned over the lack of detail contained in the Explanatory Statements and at the unavailability of a consolidated printing of all the provisions currently in law in the ACT relating to dangerous goods.

39. The Minister replied to the Committee that an appropriate solution to the problem of the reversal of onus provisions contained in sections 20(2),26(2) and 36(2) might be to amend the provisions so as to restore the persuasive onus of proof onto the prosecution and to impose on the defendant an evidentiary onus with respect to the exemptions envisaged by the provisions. The Committee agreed to this suggestion and looks forward to the appropriate amendments to the legislation when they are made.

40. The Minister provided a detailed explanation for the inclusion of the reversal of onus of proof in section 25(2) and in clause 41(7). The Minister pointed out that both these provisions reflected in specific statutory form the common law defence of reasonable mistake of fact, as discussed by the High Court in Proudman v Dayman (1941) 67 CLR 536. The Minister concluded: "The reversal of onus of proof envisaged in section 25(2) and clause 41(7) is thus simply a reflection of the protections afforded by the common law rather than an abrogation of them." The Committee accepted the Minister's explanation of the need for the reversal provision in section 25(2) and in clause 41(7).

41. The Minister accepted the Committee's opinion on the need for more detailed explanatory statements accompanying legislation of this kind, and gave an assurance that this would be normal practice in future. The Minister also drew the attention of the Committee to the fact that his Department is currently preparing a "Plain English" guide to the Dangerous Goods legislation. The Minister agreed with the Committee that the lack of a consolidated version of the legislation was a cause for concern. The Committee noted, with approval, that the Minister and officers of his department are pursuing this matter with the Attorney-General in the hope that a consolidation will be printed in the immediate future.

CHAPTER THREE: Principle (d) of Committee's Terms of Reference

Summary of the problem and the options

(a) The background

42. The history of the Committee's application of principle (d) illustrates the basic premise that it is opposed to the general use of delegated legislation as an instrument of policy innovation (see, for example, 1st Report, paras.4,7; 4th Report, para.13; 8th Report, paras.29-30; 9th Report, paras.6-8; 18th Report, para.8; 32nd Report, paras 2-7).

43. The formulation of principle (d) was altered in 1979 when the original form - "that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for Parliamentary enactment" - was changed to its current form - "that it does not contain matter more appropriate for Parliamentary enactment" (see 64th Report, paras. 5-9). This alteration did not involve a softening of the Committee's resolve in this regard, merely a recognition of the increased usage of delegated legislation as an administrative device of executive government.

44. The Seat of Government (Administration) Act 1910 authorizes the special form of law making for the Australian Capital Territory. Section 12 of that Act states: "The Governor-General may make Ordinances for the peace, order and good government of the Territory." Other provisions in section 12 provide for the tabling of ordinances in both houses of Parliament and for their disallowance by either house. Given principle (d) of

the Committee's Term of Reference, Territory ordinances have posed considerable difficulties to the Committee (see 36th, 53rd and 54th Reports).

(b) The problem

45. In 1976 the Committee decided that it would no longer apply principle (d) to ordinances of the Australian Capital Territory. The basis of the decision was that the principle, as it then stood, was not altogether appropriate in its application to ordinances of the Territories, which by their very nature contain substantive legislation, and that the Australian Capital Territory now had a fully elected Legislative Assembly, which it was then believed would ultimately acquire legislative powers (see 55th Report).

46. In 1979, the Committee reviewed its approach to A.C.T ordinances having regard to the result of the 1977 referendum in the Territory on self-government. It appeared that in that referendum the people of the Territory indicated their unwillingness at that stage to proceed further down the path to self-government, and as a result of the referendum the Legislative Assembly (it was retitled as House of Assembly in 1979) remained an advisory body, with the laws of the Territory continuing to be made by the Executive Government and subject to disallowance by either House of the Parliament. In this situation the Committee believed that the citizens of the Territory ought to be provided with the protection of all of the Committee's principles (see 64th Report).

47. As the Committee has previously recognised, the application of principle (d) is difficult. In 1977 the Senate and Legal Constitutional Affairs Committee, in the course of its examination of The Evidence (Australian Capital Territory) Bill 1972, considered the general problem of substantive legislation for the

Australian Capital Territory. In its Report the Constitutional and Legal Affairs Committee suggested that principle (d) be no longer used as the routine criterion for the examination of A.C.T ordinances and that in its place the Committee adopt a new procedure. This would involve the Committee in making a report to the Senate if it found an ordinance to be "socially innovative or affecting fundamental rights and liberties" (a formulation which is considerably wider than principle (d)).

48. Upon examining this Report the Committee sought the advice of the former and current Attorneys-General and the Ministers responsible for the A.C.T. They have all agreed that:

- ordinances and not parliamentary enactments are the appropriate form of legislation for matters local to the A.C.T;

- the elected House of Assembly has a positive advisory role in relation to the content of ordinances, and its view should be properly acknowledged;

- principle (d) should be retained as a guide to disallowable legislation but only as a device of quite limited application;

- consideration be given to a new reporting mechanism for ordinances that are socially innovative or affect fundamental rights or liberties.

Faced with these suggested modifications to the operation of principle (d) as it relates to A.C.T ordinances what are the options available to the Committee?

(c) The options

(i) A return to the 1976 view

49. Principle (d) would be retained as one of the Committee's guiding principles but it would not be applied to ordinances of the Australian Capital Territory because the Seat of Government (Administration) Act 1910 provides that an ordinance is the means by which legislation dealing with State-type matters is implemented. This decision would be taken with a view to the introduction of self-government in the Australian Capital Territory in the near future.

(ii) Reporting to the Senate

50. A reporting function would be adopted whereby the Committee would not recommend disallowance but would draw the attention of the Senate to ordinances which contain important legislative changes.

51. Two possible ways of determining "important legislative changes" are:

(1) ordinances which are "socially innovative or affect fundamental rights and liberties"; or

(2) ordinances which are of "paramount influence in the laws of the nation as a whole" (see 53rd and 54th Reports).

52. This course of action would allow the Committee to alert the Senate to important delegated legislation but would not recommend action to the Senate. The underlying idea is that if the Senate does not disallow such an ordinance, it should do so with open eyes and by

deliberate choice. The Committee has previously adopted this approach on two occasions (see 70th and 72nd Reports).

53. In this context the Committee could implement the idea put forward by the Constitutional and Legal Affairs Committee, that the House of Assembly and the Joint Parliamentary Committee on the Australian Capital Territory be included in the alerting process. The Committee could advise the House of Assembly or the Joint Committee before alerting the Senate.

(iii) Take no action

54. Continue to apply principle (d) to Australian Capital Territory ordinances and allow criteria for this application to evolve as the Committee's consideration progresses. This could take place with or without the involvement of the House of Assembly and the Joint Parliamentary Committee on the Australian Capital Territory.

(d) The Resolution?

55. Before moving to a resolution of this important question the Committee is keen to elicit responses from individuals and organisations on the options outlined in this Report. This process will ensure that delegated legislation for the Australian Capital Territory continues to receive appropriate and close parliamentary scrutiny.

CHAPTER FOUR: Other Matters

4.1 RETROSPECTIVITY

56. The Committee's classic statement on retrospectivity was delivered in the 25th Report (November 1968). The Committee continues to accept the view that "delay in the promulgation of regulations denies to Parliament the right to approve or disapprove of expenditure at the time of expenditure". Consistent with earlier undertakings, the Committee during February - June 1984 examined all instruments involving retrospectivity in the payment of moneys extending beyond two years. However, retrospectivity of even a few months is considered as deserving close scrutiny, and the Committee is pleased to note the full and detailed explanations which the Minister for Defence provided concerning Defence Determinations No.4 and No.7 of 1984, Defence Force (Salaries) Regulations Amendment (Statutory Rules 1984 No.45) and Defence Force (Salaries) Regulations (Amendment) (Statutory Rules 1984 No.62).

4.2 PRINTING OF CONSOLIDATED LEGISLATION

57. During consideration of the Dangerous Goods Ordinance 1984 the Committee noted with concern the delays which are being experienced in the printing of consolidated versions of legislation. The Committee welcomes the action taken by the Minister for Territories and Local Government to ensure an early full printing of the Dangerous Goods legislation. The Committee trusts that similar assurances will be forthcoming from other areas of responsibility where delays in the printing of consolidated legislation are being experienced.

4.3 NOTIFICATION OF APPEAL RIGHTS IN DELEGATED LEGISLATION

58. In a detailed statement to the Senate on 15 September 1983 the Chairman of the Committee alerted the Senate to the almost standard drafting practice in delegated legislation which provides that the validity of a official's decision is not affected by a failure to notify the affected individual or party of their right of appeal, even where other provisions of the legislation stipulate that a notification of appeal rights must be sent to affected persons (Senate Hansard, 15 September 1983, page 741).

59. In considering the Medical Practitioners Registration (Amendment) Ordinance 1984 (A.C.T Ordinance No.13 of 1984) and the Veterinary Surgeons Registration (Amendment) Ordinance 1984 (A.C.T Ordinance No.14 of 1984) the Committee once again noted the inclusion of the "saving clause". The Committee is aware that these Ordinances provide for appeals to the Administrative Appeals Tribunal, and that this body is granted the discretion to entertain late applications. However, the Committee is concerned at the continued use of this standard "saving clause" and at the effect this may be having on the decision-maker's performance of the apparent statutory obligation to notify persons of their appeal rights. The fact that the appeal body can entertain late applications should not be used as an excuse for the failure by decision-makers to notify persons of appeal rights. The important requirement is that aggrieved persons be notified at an early stage of their rights of appeal.

60. The Committee draws the attention of the Senate to the continued use of the "saving clause" and to the comments made in its 74th Report at paras 40-41.

4.4 LEGAL ADVISER

61. The Committee again places on record its deep appreciation of the excellent work performed by its current Legal Adviser, Professor Douglas Whalan of the Faculty of Law, Australian National University, Canberra; and by its staff: John Uhr, Robert Walsh, Jan Wood and Sasikarn Vichiensingh.

4.5 MINISTERS AND OFFICIALS

62. The Committee also wishes to express its thanks to the Ministers and officials who have assisted the Committee with its inquiries. Much of the Committee's work takes place behind the scenes, and many outsiders would not appreciate the help provided to the Committee by those many Ministers and public servants who co-operate with the Committee in its inquiries and routine examination of statutory instruments.

John Coates

John Coates
Chairman

APPENDIX 1

Report on Undertakings by Ministers to Amend or Review Delegated Legislation

A. Listed in the 66th Report (June 1979)

Regulations under the Customs Act: rights of appeal against administrative acts: undertaking given 16 March 1979. Aspects of this matter have been under review by both the Administrative Review Council and the Industries Assistance Commission. It has been recommended by the Commission that the recommendations of the Administrative Review Council for the administrative review of by-law decisions be adopted. Some remaining matters are still under consideration by the Council; it is expected that this report will be completed during 1984.

B. Listed in the 73rd Report (December 1982)

Quarantine (Cocos Islands) Regulations (Statutory Rules 1982, No.194): unrestricted right of a quarantine officer to enter premises: undertaking given 13 October 1982. In 1982 the then Minister agreed to amend regulations 14 and 19, to require that a warrant be issued by a Justice of the Peace before premises are entered by a quarantine officer without the owner's approval. After discussions between the Department of Health and the Attorney-General's Department, the Committee was informed that the proposed amendments to the Regulations would not proceed, but that an amendment to the Quarantine Act incorporating the requirement for a warrant would be brought before Parliament in 1984. This undertaking was fulfilled by the Quarantine

Amendment Act 1984. Regulations 14 and 19 were repealed by Quarantine (Cocos Islands) Regulations (Amendment) Statutory Rule 1984 No.174.

C. Listed in the 74th Report (March 1984)

1. Statute Law (Miscellaneous amendments) (Patents) Regulations (Statutory Rules 1983 No.49): subjectively based administrative discretion. The Minister advised that he had asked the Commissioner of Patents to review all such provisions in Patents Regulations with a view to having any necessary amendments prepared.

2. Mental Health Ordinance 1983 (A.C.T Ordinance No.52 of 1983): procedure for appointment of prescribed representative; and right of prescribed representative to be informed in every instance where there is a restriction of communication on the person in custody. The Minister agreed to suitable amendments, which have been circulated in a draft amendment to the Ordinance which has been noted by the Committee. The Committee awaits the formal introduction of the amendment.

APPENDIX 2

Recommendations Contained in Previous Reports

1. A statutory provision to the same effect as section 12(6) of the Seat of Government (Administration) Act should be applied to instruments made under Acts of the Parliament, so that the disallowance of a repealing instrument would revive the repealed provisions, and so that the present doubtful position with regard to the effect of disallowance and repeal would be clarified (66th Report, June 1979).

2. The Senate Standing Committee on Constitutional and Legal Affairs should investigate the matter of the alteration of important entitlements by regulation (68th Report, November 1979).