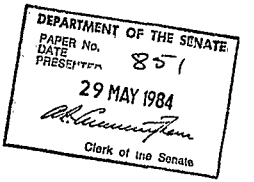

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

SPECIAL REPORT ON

CERTAIN REGULATIONS AND AN ORDINANCE

29 MAY 1984

THE SENATE

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INTRODUCTION

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(ii) promoting or encouraging the use of hard drugs, and

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(3) That the Committee advise the Senate whether, in light of this examination, the Regulations or Ordinance contain matter more appropriate for Parliamentary enactment or revised delegated legislation.

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(iii) depicting hard core pornography, sexual violence or other gross obscenities.

9. In regard to hard core pornography, there is serious difficulty in assessing the legal changes as no set of laws - pre-existing, new, or draft - makes use of that particular phrase or one related to it.

10. If it is assumed that the term is equivalent to or covered by the old references to "indecent or obscene" and "unduly emphasise matters of sex...or are likely to encourage depravity", then the lack of these words in the new law is a restriction. Nevertheless, the new law specifically prohibits the pictorial depiction of child pornography and "violence or cruelty, especially when combined with any sexual element" and thus covers a range of hard core pornography. The draft law also covers a range of hard core pornography. The draft amendments prohibit publications that "depict in pictorial form bestiality in a manner that is likely to cause offence to a reasonable adult person".

11. Sexual violence is referred to in the paragraph above and so there is no restriction involved under this heading, unless one judged that "unduly emphasize matters of sex, horror violence or crime" was less restrictive than "gratuitously depict in pictorial form, violence or cruelty especially when combined with any sexual element".

12. The draft amendments propose to vary the description to be "explicit and gratuitous depictions.....of sexual violence against non-consenting persons" which is a restriction when compared with the new law.

13. In regard to other gross obscenities, the Committee again has serious difficulty since this precise term does not appear in either the pre-existing or new law. The pre-existing law prohibited "obscene" and "blasphemous" publications and also publications that "are likely to encourage depravity". The new law does not contain similar references.

(b) restrict the Commonwealth's existing power to require videos not imported for public exhibition to be registered by the film Censorship Board before release by Customs.

14. The new law restricts the pre-existing power by amending the Customs (Cinematograph Films) Regulations to delete the previous requirement for Censorship Board registration of videos and films not for public exhibition. Under the pre-existing law, the Film Censorship Board had the power to refuse registration on certain grounds, specified in Regulation 13. Registration did not necessarily involve classification. In the A.C.T. for which the Commonwealth has direct responsibility, only since the introduction of the existing Classification of Publications Ordinance 1983 have videos been subject to censorship by way of classification by the Censorship Board. The new package of censorship laws in general expands the power of the Commonwealth to regulate within its jurisdiction the distribution and hire of videos. The draft amendments to that ordinance are intended to make that classification scheme compulsory.

(c) restrict the power of the Commonwealth to protect children from exposure to publications in (a) (i),(ii) and (iii).

15. *There have been changes in the Prohibited Imports* Regulations which permit the entry into the country of a greater range of publications which might be regarded as harmful to children. In addition, under the Cinematograph Films Regulations, videos not for public exhibition are no longer required to be registered by the Censorship Board. In the A.C.T. which is the one area in which the Commonwealth has direct responsibility over point of sale operations, many publications regarded as objectionable are now available subject to restrictions on their display and distribution which are expressly designed to limit the exposure of children to certain types of publications.

16. Section 58 of the A.C.T. Classification of Publications Ordinance restricts the pre-existing law by removing two existing, if rarely used, avenues of legal redress under the common law - the offences of obscene libel and conspiring to corrupt public morals, to the extent to which they might apply in relation to classified publications.

(3) That the Committee advise the Senate whether, in light of this examination, the Regulations or Ordinance contain matter more appropriate for Parliamentary enactment or revised delegated legislation.

17. During the Committee's consideration of this section of the reference, some concern was expressed about the often-overlooked but important ways in which Parliament is directly involved in the scrutiny of regulations and ordinances. Although regulations and ordinances are

made by the Executive, they can be unmade by Parliament: the Acts Interpretation Act requires that regulations must be tabled in Parliament and provides that either House of Parliament can disallow regulations within a specified, fairly lengthy period after tabling. Under the Seat of Government (Administration) Act 1910, ordinances can be disallowed either in whole or in part. Disallowance motions, which can be moved by any parliamentarian, are quite frequent in the Senate, and even when unsuccessful these focus considerable parliamentary attention on delegated legislation.

18. The Committee examined both the Regulations and the Ordinance to see whether they contain matter more appropriate for Parliamentary enactment, in which forms of parliamentary consideration are more comprehensive and must involve both Houses. The Committee noted that despite an initial reservation in 1932 against censorship by way of regulation, there has since been no general criticism by the Committee of the form of Films regulations. Over the years the Committee has, however, had specific criticisms of some provisions in both the Films regulations and the Prohibited Imports regulations. Upon examination, the Committee has no reason to regard the matters in the new regulations as being more appropriate for Parliamentary enactment.

19. The case of the Ordinance is more difficult. The Committee adheres to its previously expressed view that ordinances are the appropriate form for almost all Territory legislation. The matters contained in the new Ordinance are no more or less important to the A.C.T community than were the matters in the pre-existing ordinance, which attracted no criticism as to its form. Major changes are often made to the law in the A.C.T, and the standard form for such changes is an ordinance.

Indeed, Parliament has itself stipulated the use of ordinances with the passage of the Seat of Government (Administration) Act 1910.

20. Apart from the reference to "revised delegated legislation", paragraph 3 of the Reference is substantially the same as principle (d) of the Committee's traditional principles. That principle was amended in 1979, with the old form ("that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for Parliamentary enactment") being replaced by the current form ("that it does not contain matter more appropriate for Parliamentary enactment"). In its 64th Report (March 1979), which was formally adopted by the Senate, the Committee stated that principle (d)

> has been a source of some difficulty. It is very doubtful whether delegated legislation can now be restricted to 'administrative detail', if indeed it could even in 1932. Some delegated legislation, such as ordinances of the Territories, by its very nature contains substantive legislation. The Parliament has also seen fit in recent years to pass an increasing number of statutes leaving substantive matters to delegated legislation. The Committee considers, therefore, that principle (d) ought to be revised, but believes that it is still important to ensure that matters which ought to be brought before the Parliament for Parliament's consideration are not put into law by means of delegated legislation, which remains in force until and unless either House of Parliament disallows it.

21. Since 1979, the Committee has found no instance of a regulation which involved matters more appropriate for Parliamentary enactment. Even on the stricter pre 1979

form, the Committee only rarely applied principle (d). It is true that the Committee's 1st Report did in fact apply principle (d) to Customs (Cinematograph Films) Regulations, as was stated in the Senate debate on this Reference. Equally true, however, is that the Committee subsequently examined many additional Films regulations and, although it identified many deficient administrative practices, it did not ever again apply principle (d) to these regulations.

22. The case with ordinances is more difficult. As stated in the 64th Report:

> In 1976 the Committee decided, with the concurrence of the Senate, as reported in its Fifty-fifth Report, that it would no longer apply principle (d) to ordinances of the Australian Capital Territory. The basis of the decision was that that 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 had a fully elected Legislative Assembly, which it was then believed would ultimately acquire legislative powers. The Committee has traditionally withdrawn from the scrutiny of Territory ordinances made by elected bodies with legislative powers.
>
> The Committee now considers, however, that it is desirable to apply principle (d), as revised, to ordinances of the Australian Capital Territory. In coming to this conclusion the Committee has had regard to the result of the referendum in the Territory on self-government. It appears that in that referendum the people of the Territory have indicated their unwillingness at this stage to proceed further down the path to self-government,

and as a result of the referendum the Legislative Assembly will remain an advisory body, and the laws of the territory will continue to be made by the Executive Government and to be subject to disallowance by either House of the Parliament. In this situation the citizens of the Territory ought to be provided with the protection of the Committee's principles.

In applying principle (d) to ordinances of the Australian Capital Territory, the Committee will have regard to some criteria, perhaps taking as a possible guide the kind of criteria suggested by the Standing Committee on Constitutional and Legal Affairs in its report upon the Evidence (Australian Capital Territory) Bill 1972, for determining whether the laws of the Territory ought to be made by ordinance or by Act of the Parliament. These criteria will need to evolve in the course of the Committee's consideration of ordinances of the Territory in the future. The Committee intends as a matter of course when it proposes to apply principle (d) to Australian Capital Territory ordinances to notify and seek a reaction from both the Legislative Assembly and the Joint Committee on the Australian Capital Territory. The Committee does not envisage that many ordinances of the Territory will be reported to the Senate on the basis of principle (d), and it must be emphasised that it is for the Parliament to determine whether a particular law of the Territory should take the form of a statute rather than an ordinance.

23. Since 1979, the Committee has never applied principle (d) to the ordinance of any Territory, although there have been two important Committee examinations of suitable criteria. The first is the 70th Report (June 1981) (paras.29-31) in which the Committee considered a

possible reporting mechanism in the case of an ordinance which is "socially innovatory or affects fundamental rights or liberties" (note that this formulation is considerably wider than disallowance based on principle (b): "that it does not trespass unduly on personal rights and liberties"). The objective was to permit Senate consideration of an ordinance which, while not offending against any of the Committee's principles, effected such important social changes to deserve comment before the passing of the period for disallowance.

24. On balance, there is nothing in the Regulations or Ordinance more appropriate for Parliamentary enactment. The Committee's examination when the legislation first came before it revealed nothing which could give rise to invoking any of its principles.

25. As to revised delegated legislation, any consideration of such suggestions would involve the Committee intruding into the policy area, therefore the Committee makes no such recommendation.

John Coates

JOHN COATES
Chairman

DISSENTING REPORT

Mindful of the consensus approach generally adopted by the Regulations and Ordinances Committee we regret that, in the exercise of our responsibilities, we have no alternative but to present this dissenting report.

Paragraph (3) of the Senate Reference states:-

> "That the Committee advise the Senate whether, in light of this examination, the Regulations or Ordinance contain matter more appropriate for Parliamentary enactment or revised delegated legislation."

A. "MATTER MORE APPROPRIATE"

1. We consider the package of delegated legislation referred to the Committee introduces such fundamental changes that it is more appropriate for Parliamentary enactment.

2. The following are listed as examples of the effect of the matters contained in the new law by comparison with the pre-existing law:-

3. **Customs (Prohibited Imports) Regulations (Amendment).**

These Regulations legalise for the first time the unrestricted importation into Australia of all types of hard core pornography, including child pornography, and all publications (includes videos) no matter how violent, cruel, blasphemous*, indecent, obscene, or likely to encourage depravity or incite a crime (except terrorism), provided that "in the opinion of the Attorney General", they do not contain a picture of a child depicted in such manner as would cause offence to a reasonable adult person or a picture "gratuitously" depicting violence or cruelty.

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* The Committee received detailed correspondence from the Australian Episcopal Conference concerning this and other changes in the law.

4. (Note: The Draft further amendments, circulated by the Attorney General, would qualify the above to the extent of permitting the import of a broader range of pictorial violence, but re-imposing controls over the importation of publications which incite the use of hard drugs, or contain a picture of bestiality depicted "in a manner likely to cause offence to a reasonable adult person" - "in the opinion of the Attorney General".)

5. **Customs (Cinematograph Films) Regulations (Amendment).**

A major change in the law is effected by Regulation 3 which confines censorship controls by way of licensing and registration to films imported for public exhibition. All other imported films (including videos) are now free from the pre-existing licencing and registration requirements.

6. **Classification of Publications Ordinance 1983.**

Under pre-existing law the sale, exhibition, display and distribution, or production for gain of objectionable publications was prohibited.

7. The new law legalises and permits this activity in respect of "objectionable publications" defined in the new law as a publication which describes, depicts, expresses or otherwise deals with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in a manner that is likely to cause offence to a reasonable adult person. (Cf. Interpretation p.2).

8. Another major change brought about by the new law is its removal of the common law offence of obscene libel and also the common law offence of conspiring to corrupt public morals to the extent to which these apply to classified publications, objectionable or otherwise. (Cf. Section 58). This diminishes the rights of individual citizens and the community to the protection of the law and further restricts

the ability of parents to protect their children from exposure to the type of material contained in classified objectionable publications by any person (managers of restricted publications areas excepted).

9. The attention of the Senate is also drawn to page 3 of the "Explanatory Statement" attached to the Ordinance which is an extrinsic aid to its interpretation. The second paragraph deals with classifications and notes that 'an additional classification - "X" - is applied to hard core pornography'.

10. This opens the way for the first time legally in the ACT for the commercial exploitation of "hard core pornography".

11. In this respect the background paper circulated by the Attorney General which was before the Committee described at page 2 the powers under this "model ACT legislation". The citizens of all of the other States of the Commonwealth and the Northern Territory will be entitled to have the matter determined by legislative enactment following all of the relevant Parliamentary procedures including Committee stage amendment and debate. It appears that unless a similar approach is taken the citizens of the ACT will be denied the safeguards associated with having the matter contained in this "model legislation" dealt with by Parliamentary enactment.

12. It is pointed out that a number of States have announced their intention of prohibiting the sale/hire of certain publications which the new law releases from import control.

B. THE IMPORTANCE OF PARLIAMENTARY ENACTMENT

13. The Senate must view very seriously any legislative changes which drastically alter the character of censorship law. The Attorney General* has stated of the recent changes:

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* New Commonwealth Censorship Procedures for Publications - issued by the Attorney Generals Department effective from 1/2/84.

"Barriers to the importation of hard core pornography - other than child pornography, publications which incite terrorism and publications containing ... violence and/or sexual violence - have been lifted".

14. Film censorship, especially of imported films, is a matter of grave national importance. This is not the first time that this Committee has considered whether subordinate legislation is really the appropriate vehicle for censorship law-making. In 1932 the Senate established the Regulations and Ordinances Committee not only to review delegated legislation but also to help roll back the Executives' almost casual use of regulatory powers. As the case before us proves, all Executive Governments are tempted to do by regulation what they fear they can not get away with by resort to open Parliamentary process, where a Bill would have to undergo full Parliamentary scrutiny and where forms of Parliamentary consideration are more comprehensive and must involve both Houses.

15. In the very first Report which the Regulations and Ordinances Committee presented to the Senate, the Committee stated of film censorship that "the determination of public policy on a matter of such moment should not be accomplished by departmental regulation" and that the policy "should be set out in substantive legislation" (1st Report paras. 4 and 7). The Committee also has a history of criticism of the Customs (Prohibited Imports) Regulations. On a number of occasions the Committee has demanded that important change to these regulations should be done by way of substantive rather than delegated legislation (see, eg., 18th Report para. 8; 32nd Report paras. 2 to 7).

16. This Committee has applied principle (d) of its traditional Principles to any matters dealt with by delegated legislation that have deserved full Parliamentary attention - see 4th Report para. 13; 8th Report paras. 29-30; 9th Report paras. 6-8. The Committee's general orientation was

succinctly put in 1952: "... it would be more in the Parliamentary tradition if an important question of Government policy ... were to have been given effect to by Parliamentary enactment..." (8th Report para. 29).

17. The Committee has not refrained from applying principle (d) to Ordinances, for there is no reason why the people of the relevant Territories should not have the protection of the Committee's scrutiny of delegated legislation. The history of the Committee's application of principle (d) to A.C.T. Ordinances shows that matters of great importance to the rights and liberties of Territory residents should not be introduced by delegated legislation. The Committee has abstained from evaluating the policy content involved, but has strongly criticised the form of a number of pieces of legislation which were of no greater importance than the current Classification of Publications Ordinance 1983: the Evidence Ordinance 1971 (36th Report para. 9); the Misrepresentation Ordinance 1975 (53rd Report paras. 4 and 14); the Manufacturer Warranties Ordinance 1975 (54th Report para. 6).

18. The Attorney General has stated that the Classification of Publications Ordinance 1983 is a piece of model legislation, to be emulated by the States. The Ordinance is therefore of national as well as local importance, and should be fully debated and shaped by the national Parliament, instead of being left to the Executive for determination.

19. It further appears that the new law under review offends against Principle (c) of the Principles of the Regulations and Ordinances Committee in that it unduly makes the rights or liberties of citizens dependent upon administrative decisions which are non-reviewable by a Judicial Tribunal. Examples of this occur in the Customs (Prohibited Imports) Regulations Amendment 4A (pre-existing law finally determinable by the Courts); the Customs (Cinematograph Films) Regulations (Amendment) Sub-Regulation 7(4) read in

conjunction with Principal Regulation 40; the Classification of Publications Ordinance Section 56 (wide dispensing power conferred on Attorney General), Section 57 and Section 58.

20. **We recommend that the matter contained in the new law be the subject of Parliamentary enactment.**

C. IMMEDIATE PROBLEM FACING THE SENATE

21. The delegated legislation under review is universally regarded as being defective. The Attorney General has circulated a further 14 draft amendments. It is unreasonable to expect the Senate to deal adequately with this issue with a gun at its head as today is the last day for disallowance of the new law. The Senate could well be placed in the position, if the disallowance motions are defeated, of considering further amendments to already defective Regulations and Ordinance.

22. If the Government does not consider that the matter contained in the new law is more appropriate for Parliamentary enactment, it should, in all of the circumstances repeal the delegated legislation. It could replace it immediately with further delegated legislation which would include all of the amendments drafted or proposed so that proper debate can ensue or enforce the pre-existing law.

23. In conclusion, we remind the Senate that recently the Committee has been developing a reporting mechanism for Ordinances that deserve full Parliamentary discussion even where they contain no provisions which offend against the Committee's traditional principles. Such a mechanism was recommended by the Constitutional and Legal Affairs Committee in its 1977 Report on the Evidence (Australian Capital Territory) Bill (Parliamentary Paper No.237/1977).

24. In that Report, the Committee stated in relation to legislation of a particular Territory which is "socially innovative or affects fundamental rights and liberties": "The Committee recommends to the Senate that if the Committee on Regulations and Ordinances reports that an Ordinance is of this nature, then such Ordinance should be made subject of a substantive debate in the Senate". We strongly believe that this Ordinance most definitely affects fundamental rights and liberties, is socially innovative and ought to be subject to full and open Parliamentary debate and, if necessary, be disallowed.

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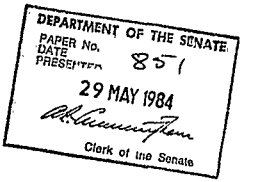

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(iii) depicting hard core pornography, sexual violence or other gross obscenities.

9. In regard to hard core pornography, there is serious difficulty in assessing the legal changes as no set of laws - pre-existing, new, or draft - makes use of that particular phrase or one related to it.

10. If it is assumed that the term is equivalent to or covered by the old references to "indecent or obscene" and "unduly emphasise matters of sex...or are likely to encourage depravity", then the lack of these words in the new law is a restriction. Nevertheless, the new law specifically prohibits the pictorial depiction of child pornography and "violence or cruelty, especially when combined with any sexual element" and thus covers a range of hard core pornography. The draft law also covers a range of hard core pornography. The draft amendments prohibit publications that "depict in pictorial form bestiality in a manner that is likely to cause offence to a reasonable adult person".

11. Sexual violence is referred to in the paragraph above and so there is no restriction involved under this heading, unless one judged that "unduly emphasize matters of sex, horror violence or crime" was less restrictive than "gratuitously depict in pictorial form, violence or cruelty especially when combined with any sexual element".

12. The draft amendments propose to vary the description to be "explicit and gratuitous depictions.....of sexual violence against non-consenting persons" which is a restriction when compared with the new law.

13. In regard to other gross obscenities, the Committee again has serious difficulty since this precise term does not appear in either the pre-existing or new law. The pre-existing law prohibited "obscene" and "blasphemous" publications and also publications that "are likely to encourage depravity". The new law does not contain similar references.

(b) restrict the Commonwealth's existing power to require videos not imported for public exhibition to be registered by the film Censorship Board before release by Customs.

14. The new law restricts the pre-existing power by amending the Customs (Cinematograph Films) Regulations to delete the previous requirement for Censorship Board registration of videos and films not for public exhibition. Under the pre-existing law, the Film Censorship Board had the power to refuse registration on certain grounds, specified in Regulation 13. Registration did not necessarily involve classification. In the A.C.T. for which the Commonwealth has direct responsibility, only since the introduction of the existing Classification of Publications Ordinance 1983 have videos been subject to censorship by way of classification by the Censorship Board. The new package of censorship laws in general expands the power of the Commonwealth to regulate within its jurisdiction the distribution and hire of videos. The draft amendments to that ordinance are intended to make that classification scheme compulsory.

(c) restrict the power of the Commonwealth to protect children from exposure to publications in (a) (i),(ii) and (iii).

15. *There have been changes in the Prohibited Imports* Regulations which permit the entry into the country of a greater range of publications which might be regarded as harmful to children. In addition, under the Cinematograph Films Regulations, videos not for public exhibition are no longer required to be registered by the Censorship Board. In the A.C.T. which is the one area in which the Commonwealth has direct responsibility over point of sale operations, many publications regarded as objectionable are now available subject to restrictions on their display and distribution which are expressly designed to limit the exposure of children to certain types of publications.

16. Section 58 of the A.C.T. Classification of Publications Ordinance restricts the pre-existing law by removing two existing, if rarely used, avenues of legal redress under the common law - the offences of obscene libel and conspiring to corrupt public morals, to the extent to which they might apply in relation to classified publications.

(3) That the Committee advise the Senate whether, in light of this examination, the Regulations or Ordinance contain matter more appropriate for Parliamentary enactment or revised delegated legislation.

17. During the Committee's consideration of this section of the reference, some concern was expressed about the often-overlooked but important ways in which Parliament is directly involved in the scrutiny of regulations and ordinances. Although regulations and ordinances are

made by the Executive, they can be unmade by Parliament: the Acts Interpretation Act requires that regulations must be tabled in Parliament and provides that either House of Parliament can disallow regulations within a specified, fairly lengthy period after tabling. Under the Seat of Government (Administration) Act 1910, ordinances can be disallowed either in whole or in part. Disallowance motions, which can be moved by any parliamentarian, are quite frequent in the Senate, and even when unsuccessful these focus considerable parliamentary attention on delegated legislation.

18. The Committee examined both the Regulations and the Ordinance to see whether they contain matter more appropriate for Parliamentary enactment, in which forms of parliamentary consideration are more comprehensive and must involve both Houses. The Committee noted that despite an initial reservation in 1932 against censorship by way of regulation, there has since been no general criticism by the Committee of the form of Films regulations. Over the years the Committee has, however, had specific criticisms of some provisions in both the Films regulations and the Prohibited Imports regulations. Upon examination, the Committee has no reason to regard the matters in the new regulations as being more appropriate for Parliamentary enactment.

19. The case of the Ordinance is more difficult. The Committee adheres to its previously expressed view that ordinances are the appropriate form for almost all Territory legislation. The matters contained in the new Ordinance are no more or less important to the A.C.T community than were the matters in the pre-existing ordinance, which attracted no criticism as to its form. Major changes are often made to the law in the A.C.T, and the standard form for such changes is an ordinance.

Indeed, Parliament has itself stipulated the use of ordinances with the passage of the Seat of Government (Administration) Act 1910.

20. Apart from the reference to "revised delegated legislation", paragraph 3 of the Reference is substantially the same as principle (d) of the Committee's traditional principles. That principle was amended in 1979, with the old form ("that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for Parliamentary enactment") being replaced by the current form ("that it does not contain matter more appropriate for Parliamentary enactment"). In its 64th Report (March 1979), which was formally adopted by the Senate, the Committee stated that principle (d)

> has been a source of some difficulty. It is very doubtful whether delegated legislation can now be restricted to 'administrative detail', if indeed it could even in 1932. Some delegated legislation, such as ordinances of the Territories, by its very nature contains substantive legislation. The Parliament has also seen fit in recent years to pass an increasing number of statutes leaving substantive matters to delegated legislation. The Committee considers, therefore, that principle (d) ought to be revised, but believes that it is still important to ensure that matters which ought to be brought before the Parliament for Parliament's consideration are not put into law by means of delegated legislation, which remains in force until and unless either House of Parliament disallows it.

21. Since 1979, the Committee has found no instance of a regulation which involved matters more appropriate for Parliamentary enactment. Even on the stricter pre 1979

form, the Committee only rarely applied principle (d). It is true that the Committee's 1st Report did in fact apply principle (d) to Customs (Cinematograph Films) Regulations, as was stated in the Senate debate on this Reference. Equally true, however, is that the Committee subsequently examined many additional Films regulations and, although it identified many deficient administrative practices, it did not ever again apply principle (d) to these regulations.

22. The case with ordinances is more difficult. As stated in the 64th Report:

> In 1976 the Committee decided, with the concurrence of the Senate, as reported in its Fifty-fifth Report, that it would no longer apply principle (d) to ordinances of the Australian Capital Territory. The basis of the decision was that that 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 had a fully elected Legislative Assembly, which it was then believed would ultimately acquire legislative powers. The Committee has traditionally withdrawn from the scrutiny of Territory ordinances made by elected bodies with legislative powers.
>
> The Committee now considers, however, that it is desirable to apply principle (d), as revised, to ordinances of the Australian Capital Territory. In coming to this conclusion the Committee has had regard to the result of the referendum in the Territory on self-government. It appears that in that referendum the people of the Territory have indicated their unwillingness at this stage to proceed further down the path to self-government,

and as a result of the referendum the Legislative Assembly will remain an advisory body, and the laws of the territory will continue to be made by the Executive Government and to be subject to disallowance by either House of the Parliament. In this situation the citizens of the Territory ought to be provided with the protection of the Committee's principles.

In applying principle (d) to ordinances of the Australian Capital Territory, the Committee will have regard to some criteria, perhaps taking as a possible guide the kind of criteria suggested by the Standing Committee on Constitutional and Legal Affairs in its report upon the Evidence (Australian Capital Territory) Bill 1972, for determining whether the laws of the Territory ought to be made by ordinance or by Act of the Parliament. These criteria will need to evolve in the course of the Committee's consideration of ordinances of the Territory in the future. The Committee intends as a matter of course when it proposes to apply principle (d) to Australian Capital Territory ordinances to notify and seek a reaction from both the Legislative Assembly and the Joint Committee on the Australian Capital Territory. The Committee does not envisage that many ordinances of the Territory will be reported to the Senate on the basis of principle (d), and it must be emphasised that it is for the Parliament to determine whether a particular law of the Territory should take the form of a statute rather than an ordinance.

23. Since 1979, the Committee has never applied principle (d) to the ordinance of any Territory, although there have been two important Committee examinations of suitable criteria. The first is the 70th Report (June 1981) (paras.29-31) in which the Committee considered a

possible reporting mechanism in the case of an ordinance which is "socially innovatory or affects fundamental rights or liberties" (note that this formulation is considerably wider than disallowance based on principle (b): "that it does not trespass unduly on personal rights and liberties"). The objective was to permit Senate consideration of an ordinance which, while not offending against any of the Committee's principles, effected such important social changes to deserve comment before the passing of the period for disallowance.

24. On balance, there is nothing in the Regulations or Ordinance more appropriate for Parliamentary enactment. The Committee's examination when the legislation first came before it revealed nothing which could give rise to invoking any of its principles.

25. As to revised delegated legislation, any consideration of such suggestions would involve the Committee intruding into the policy area, therefore the Committee makes no such recommendation.

John Coates

JOHN COATES
Chairman

DISSENTING REPORT

Mindful of the consensus approach generally adopted by the Regulations and Ordinances Committee we regret that, in the exercise of our responsibilities, we have no alternative but to present this dissenting report.

Paragraph (3) of the Senate Reference states:-

> "That the Committee advise the Senate whether, in light of this examination, the Regulations or Ordinance contain matter more appropriate for Parliamentary enactment or revised delegated legislation."

A. "MATTER MORE APPROPRIATE"

1. We consider the package of delegated legislation referred to the Committee introduces such fundamental changes that it is more appropriate for Parliamentary enactment.

2. The following are listed as examples of the effect of the matters contained in the new law by comparison with the pre-existing law:-

3. **Customs (Prohibited Imports) Regulations (Amendment).**

These Regulations legalise for the first time the unrestricted importation into Australia of all types of hard core pornography, including child pornography, and all publications (includes videos) no matter how violent, cruel, blasphemous*, indecent, obscene, or likely to encourage depravity or incite a crime (except terrorism), provided that "in the opinion of the Attorney General", they do not contain a picture of a child depicted in such manner as would cause offence to a reasonable adult person or a picture "gratuitously" depicting violence or cruelty.

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* The Committee received detailed correspondence from the Australian Episcopal Conference concerning this and other changes in the law.

4. (Note: The Draft further amendments, circulated by the Attorney General, would qualify the above to the extent of permitting the import of a broader range of pictorial violence, but re-imposing controls over the importation of publications which incite the use of hard drugs, or contain a picture of bestiality depicted "in a manner likely to cause offence to a reasonable adult person" - "in the opinion of the Attorney General".)

5. **Customs (Cinematograph Films) Regulations (Amendment).**

A major change in the law is effected by Regulation 3 which confines censorship controls by way of licensing and registration to films imported for public exhibition. All other imported films (including videos) are now free from the pre-existing licencing and registration requirements.

6. **Classification of Publications Ordinance 1983.**

Under pre-existing law the sale, exhibition, display and distribution, or production for gain of objectionable publications was prohibited.

7. The new law legalises and permits this activity in respect of "objectionable publications" defined in the new law as a publication which describes, depicts, expresses or otherwise deals with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in a manner that is likely to cause offence to a reasonable adult person. (Cf. Interpretation p.2).

8. Another major change brought about by the new law is its removal of the common law offence of obscene libel and also the common law offence of conspiring to corrupt public morals to the extent to which these apply to classified publications, objectionable or otherwise. (Cf. Section 58). This diminishes the rights of individual citizens and the community to the protection of the law and further restricts

the ability of parents to protect their children from exposure to the type of material contained in classified objectionable publications by any person (managers of restricted publications areas excepted).

9. The attention of the Senate is also drawn to page 3 of the "Explanatory Statement" attached to the Ordinance which is an extrinsic aid to its interpretation. The second paragraph deals with classifications and notes that 'an additional classification - "X" - is applied to hard core pornography'.

10. This opens the way for the first time legally in the ACT for the commercial exploitation of "hard core pornography".

11. In this respect the background paper circulated by the Attorney General which was before the Committee described at page 2 the powers under this "model ACT legislation". The citizens of all of the other States of the Commonwealth and the Northern Territory will be entitled to have the matter determined by legislative enactment following all of the relevant Parliamentary procedures including Committee stage amendment and debate. It appears that unless a similar approach is taken the citizens of the ACT will be denied the safeguards associated with having the matter contained in this "model legislation" dealt with by Parliamentary enactment.

12. It is pointed out that a number of States have announced their intention of prohibiting the sale/hire of certain publications which the new law releases from import control.

B. THE IMPORTANCE OF PARLIAMENTARY ENACTMENT

13. The Senate must view very seriously any legislative changes which drastically alter the character of censorship law. The Attorney General* has stated of the recent changes:

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* New Commonwealth Censorship Procedures for Publications - issued by the Attorney Generals Department effective from 1/2/84.

"Barriers to the importation of hard core pornography - other than child pornography, publications which incite terrorism and publications containing ... violence and/or sexual violence - have been lifted".

14. Film censorship, especially of imported films, is a matter of grave national importance. This is not the first time that this Committee has considered whether subordinate legislation is really the appropriate vehicle for censorship law-making. In 1932 the Senate established the Regulations and Ordinances Committee not only to review delegated legislation but also to help roll back the Executives' almost casual use of regulatory powers. As the case before us proves, all Executive Governments are tempted to do by regulation what they fear they can not get away with by resort to open Parliamentary process, where a Bill would have to undergo full Parliamentary scrutiny and where forms of Parliamentary consideration are more comprehensive and must involve both Houses.

15. In the very first Report which the Regulations and Ordinances Committee presented to the Senate, the Committee stated of film censorship that "the determination of public policy on a matter of such moment should not be accomplished by departmental regulation" and that the policy "should be set out in substantive legislation" (1st Report paras. 4 and 7). The Committee also has a history of criticism of the Customs (Prohibited Imports) Regulations. On a number of occasions the Committee has demanded that important change to these regulations should be done by way of substantive rather than delegated legislation (see, eg., 18th Report para. 8; 32nd Report paras. 2 to 7).

16. This Committee has applied principle (d) of its traditional Principles to any matters dealt with by delegated legislation that have deserved full Parliamentary attention - see 4th Report para. 13; 8th Report paras. 29-30; 9th Report paras. 6-8. The Committee's general orientation was

succinctly put in 1952: "... it would be more in the Parliamentary tradition if an important question of Government policy ... were to have been given effect to by Parliamentary enactment..." (8th Report para. 29).

17. The Committee has not refrained from applying principle (d) to Ordinances, for there is no reason why the people of the relevant Territories should not have the protection of the Committee's scrutiny of delegated legislation. The history of the Committee's application of principle (d) to A.C.T. Ordinances shows that matters of great importance to the rights and liberties of Territory residents should not be introduced by delegated legislation. The Committee has abstained from evaluating the policy content involved, but has strongly criticised the form of a number of pieces of legislation which were of no greater importance than the current Classification of Publications Ordinance 1983: the Evidence Ordinance 1971 (36th Report para. 9); the Misrepresentation Ordinance 1975 (53rd Report paras. 4 and 14); the Manufacturer Warranties Ordinance 1975 (54th Report para. 6).

18. The Attorney General has stated that the Classification of Publications Ordinance 1983 is a piece of model legislation, to be emulated by the States. The Ordinance is therefore of national as well as local importance, and should be fully debated and shaped by the national Parliament, instead of being left to the Executive for determination.

19. It further appears that the new law under review offends against Principle (c) of the Principles of the Regulations and Ordinances Committee in that it unduly makes the rights or liberties of citizens dependent upon administrative decisions which are non-reviewable by a Judicial Tribunal. Examples of this occur in the Customs (Prohibited Imports) Regulations Amendment 4A (pre-existing law finally determinable by the Courts); the Customs (Cinematograph Films) Regulations (Amendment) Sub-Regulation 7(4) read in

conjunction with Principal Regulation 40; the Classification of Publications Ordinance Section 56 (wide dispensing power conferred on Attorney General), Section 57 and Section 58.

20. **We recommend that the matter contained in the new law be the subject of Parliamentary enactment.**

C. IMMEDIATE PROBLEM FACING THE SENATE

21. The delegated legislation under review is universally regarded as being defective. The Attorney General has circulated a further 14 draft amendments. It is unreasonable to expect the Senate to deal adequately with this issue with a gun at its head as today is the last day for disallowance of the new law. The Senate could well be placed in the position, if the disallowance motions are defeated, of considering further amendments to already defective Regulations and Ordinance.

22. If the Government does not consider that the matter contained in the new law is more appropriate for Parliamentary enactment, it should, in all of the circumstances repeal the delegated legislation. It could replace it immediately with further delegated legislation which would include all of the amendments drafted or proposed so that proper debate can ensue or enforce the pre-existing law.

23. In conclusion, we remind the Senate that recently the Committee has been developing a reporting mechanism for Ordinances that deserve full Parliamentary discussion even where they contain no provisions which offend against the Committee's traditional principles. Such a mechanism was recommended by the Constitutional and Legal Affairs Committee in its 1977 Report on the Evidence (Australian Capital Territory) Bill (Parliamentary Paper No.237/1977).

24. In that Report, the Committee stated in relation to legislation of a particular Territory which is "socially innovative or affects fundamental rights and liberties": "The Committee recommends to the Senate that if the Committee on Regulations and Ordinances reports that an Ordinance is of this nature, then such Ordinance should be made subject of a substantive debate in the Senate". We strongly believe that this Ordinance most definitely affects fundamental rights and liberties, is socially innovative and ought to be subject to full and open Parliamentary debate and, if necessary, be disallowed.

Senator B.R. Archer
Senator the Hon. Sir John Carrick
Senator B. Harradine
Senator A.W.R. Lewis