



1959

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

FIFTEENTH REPORT

from the

STANDING COMMITTEE

on

REGULATIONS AND ORDINANCES

(Being the Second Report of the 1959 Session, and the
Fifteenth Report since the formation of the Committee.)

The Standing Committee on Regulations and Ordinances has the honour to present its 15th Report to the Senate.

FUNCTIONS OF THE COMMITTEE

2. On 18th March, 1959, the Committee tabled its 14th Report, drawing the attention of the Senate to regulation-making powers contained in the Civil Aviation (Carriers' Liability) Bill, which was before the Senate at that time. A point of order was taken objecting to a motion for the printing of that report on the grounds, as stated by the Minister for Civil Aviation, that the functions of the Committee did not include the consideration of any bill and the tabling of any report thereon. The point of order was upheld and the motion lapsed.

3. Briefly, the history of the appointment of the Standing Committee on Regulations and Ordinances was as follows:-

In 1929, the Senate, upon the motion of Senator Elliott, appointed a Select Committee "to report and make recommendations upon the advisability or otherwise of establishing Standing Committees of the Senate upon

- (a) Statutory Rules and Ordinances,
- (b) International Relations,
- (c) Finance,
- (d) Private Members' Bills,

and/or such other subjects as may be deemed advisable". It is of interest to note that the motion for the appointment of the Select Committee commenced by stating the reason for its appointment to be "with a view to improving the legislative work of this Chamber and increasing the participation of individual Senators in such work".

4. That Committee, after hearing evidence from no less than fifteen distinguished persons interested and experienced in Parliamentary practice and procedures, came to its considered conclusions in March, 1930. First among its recommendations was the following:-

PERSONNEL OF COMMITTEE

CHAIRMAN

Senator Ian Wood

MEMBERS

Senator J. J. Arnold

Senator J. A. Cooke

Senator K. A. Laught

Senator G. C. McKellar

Senator D. R. Willesee

Senator R. C. Wright.

- "1.(a) That a Standing Committee of the Senate, to be called the Standing Committee on Regulations and Ordinances, be established.
- (b) That all Regulations and Ordinances laid on the Table of the Senate be referred to such committee for consideration and report.
- (c) That such Standing Committee shall be appointed at the commencement of each session on the recommendation of a Selection Committee, consisting of the President, the Leader of the Senate, and the Leader of the Opposition, shall consist of seven members, and shall have power to send for persons, papers, and records; and that four members shall form a quorum.
- (d) That such Standing Committee shall be charged with the responsibility of seeing that the clause of each bill conferring a regulation-making power does not confer a legislative power of a character which ought to be exercised by Parliament itself; and that it shall also scrutinize regulations to ascertain -
- (i) that they are in accordance with the Statute,
 - (ii) that they do not trespass unduly on personal rights and liberties,
 - (iii) that they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions,
 - (iv) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment."

5. That recommendation was followed by a recommendation for the appointment of a Standing Committee on External Affairs and a recommendation relating to procedures consequent upon the establishment of such Standing Committees.
6. Following debate, the report was recommitted to the Select Committee with a view to considering the suggestion that the method of appointment of the Standing Committee on Regulations and Ordinances be altered. It is of interest to note that no controversy existed in relation to paragraph (d) of the recommendation relating to that Committee. The Committee stresses at this point that no objection was raised to that paragraph and that the sole reason for the re-committal of the report was because of objections taken to the proposed method of appointment of members of the Committee.
7. Upon further consideration, following the Senate's motion

for recommital, the Select Committee then submitted a very brief report containing a recommendation as follows:-

- "1 (a) That a Standing Committee of the Senate, to be called the Standing Committee on Regulations and Ordinances, be established.
- (b) That all Regulations and Ordinances laid on the Table of the Senate be referred to such Committee for consideration and report.
- (c) That such Standing Committee shall consist of seven Senators and shall be appointed at the commencement of each session in the following manner:-
 - (1) The Leader of the Government in the Senate shall, within four days from the commencement of the session, appoint, in writing, four Senators to be members of the Committee; and
 - (2) The Leader of the Opposition in the Senate shall, within four days from the commencement of the session, appoint, in writing, three Senators to be members of the Committee.
- (d) That such Committee shall have power to send for persons, papers, and records, and that four members shall form a quorum."

8. As a result of this second report which was adopted by the Senate on 14th May, 1931, in lieu of the first report, the Standing Orders were amended by the inclusion of Standing Order 36A, as follows:-

- "36A.- (1) A Standing Committee, to be called the Standing Committee on Regulations and Ordinances, shall be appointed at the commencement of each Session.
- (2) The Committee shall consist of seven Senators chosen in the following manner:-
 - (a) The Leader of the Government in the Senate shall, within four sitting days after the commencement of the Session, nominate, in writing, addressed to the President, four Senators to be members of the Committee.
 - (b) The Leader of the Opposition in the Senate shall, within four sitting days after the commencement of the Session, nominate, in writing, addressed to the President, three Senators to be members of the Committee.
 - (c) Any vacancy arising in the Committee shall be filled after the Leader of the Government or the Leader of the Opposition, as the case may be, has nominated, in writing addressed to the President, some Senator to fill the vacancy.
 - (3) The Committee shall have power to send for persons, papers and records, and to sit during Recess; and the quorum of such Committee shall be four unless otherwise ordered by the Senate.

(4) All Regulations and Ordinances laid on the Table of the Senate shall stand referred to such Committee for consideration and, if necessary, report thereon. Any action necessary, arising from a report of the Committee, shall be taken in the Senate on motion after notice."

9. The Standing Order was clear in so far as it went but, as in the case of similar Standing Orders relating to other Committees, laid down no principles for the Committee to follow in its work. In its fourth Report to the Senate in 1938, the Regulations and Ordinances Committee referred back to the recommendations of the 1929 Select Committee, as fully set out in its first report, and stated that the Regulations and Ordinances Committee had adopted for its scrutiny of all Regulations and Ordinances the principles set out in paragraph 1(d) of those recommendations. Reference should be made also to paragraph 23 of the 1929 Select Committee's report, as follows:-

"23. In the opinion of the Committee the work of the proposed Standing Committee on Regulations and Ordinances would be both preventive and corrective. It would be charged with the responsibility of seeing that the clause of each bill conferring a regulation-making power does not confer a legislative power which ought to be exercised by Parliament itself. It would be required to scrutinize regulations to ascertain:-

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

Successive Committees since that date have continued to follow those last-named principles, although they were never set out in the Standing Orders or, indeed, in the second report of the 1929 Select Committee.

10. When preparing its 14th report earlier this Session, the Committee, in pursuance of its task of assisting the Senate as a House of Review, followed, in the same way as the Committee in 1938, a principle contained in Paragraph 1(d) of the First

Report of the 1929 Select Committee. In this case the principle followed was to see "that the Clause of each Bill conferring regulation-making power does not confer a legislative power of a character which ought to be exercised by Parliament itself."

11. The Committee regards as a proper demonstration of its function and its effectiveness, the drawing of the Senate's attention to an example of what appeared to the members to be a particularly wide regulation-making power in the Civil Aviation (Carriers' Liability) Bill 1959.
12. It is of interest to note that this function on the part of a Parliamentary Committee dealing with delegated legislation has been recognised in the Parliament of India where the Committee on Subordinate Legislation, appointed in 1953
"to scrutinize and report to the House whether the powers to make regulations, rules, sub-rules, by-laws, etc., conferred by the Constitution, or delegated by Parliament, are being properly exercised within such delegation"
follows this practice. In his "Parliamentary Control of Delegated Legislation", (Public Law, Autumn, 1956) which includes reference to the Australian Senate Committee, Sir Cecil Carr, Q.C., refers without comment to the fact that the Indian Committee does extend its activity to the scrutiny of Bills as well, as subordinate orders.
13. This Committee regards itself as charged with the duty of supervision of the powers of delegated legislation in this Parliament ^{for the purpose} of assisting the Senate in this aspect of its work as a House of Review. Witnesses before the 1929 Select Committee stressed that the Senate was the appropriate House for the careful supervision of delegated legislation, and the Committee, in exercising that supervision, draws strength from the wording, already quoted, of the motion appointing the 1929 Committee to the effect that the appointment of a Committee to investigate the Standing Committee system was with a view to improving the legislative work of the Senate.

CUSTOMS (PROHIBITED EXPORTS) REGULATIONS (S.R.1958, No.5)

14. The Committee has considered these Regulations closely and has heard evidence as to their practical application in the administrative field. The basis of the Regulations is that the export from Australia of specified goods is prohibited, in some cases absolutely, and in others subject to conditions. In the case of goods referred to in Regulations 5 to 12, the condition is stated to be "unless an approval in writing to the exportation of the goods issued by the Department of is produced to the Collector" (in Regulation 11 the issuing authority is the Australian Atomic Energy Commission).
15. The policy of the regulations is a matter entirely outside the Committee's consideration.
16. But the form of this regulation illustrates the exclusive and ultimate claim of bureaucracy. The individual right of the citizen to export is prohibited. But in respect of the exercise of the prohibition he is totally denied recourse to the Law Courts. His right is determined and finally decided by the administrators. But even the responsibility which devolves on an administrator is evaded - because the regulations rest the power not in an officer but in the bureau itself - the Department - with the result that the official who actually refuses or grants approval is not by law identified.
- Consequently, the citizen is wholly excluded from legal redress in the Law Courts and the administrator can hide behind the general cloak of "the Department" if the citizen having a grievance wishes to complain.
17. In other words, this is the form of regulation which expresses bureaucracy in the ultimate. For a misuse of the authority given the ordinary citizen who feels himself aggrieved has neither legal nor political redress.

ORDINANCES OF THE TERRITORIES

18. In 1947, provision was made, by the Northern Territory (Administration) Act, 1947, for the establishment of a Legislative Council for the Northern Territory, including a number of elected members. In 1949, during the post-war period when the Territories of Papua and New Guinea were functioning under a provisional administration, somewhat similar provision was made, by the Papua and New Guinea Act, 1949, for the election of a number of members to the new Legislative Council for the Territory of Papua and New Guinea.
19. Since these provisions came into effect, the relationship of the Ordinances of those Territories to the Committee's functions have from time to time been considered. The terms of the Senate Standing Orders constituting this Committee are probably wide enough to bring the territorial ordinances within the scope of the Committee's consideration. But the general purpose of this Committee is not felt to be to supervise the legislation of a territorial Legislative Council. Such a Council consists of elected representatives and nominated members. Its ordinances are resolved upon after public debate. There is an incongruity about the idea of this Committee examining legislation so made for the purposes specified in paragraph 4 above, namely -
- (1)
 - (ii) that they do not trespass unduly on personal rights and liberties,
 - (iii) that they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions,
 - (iv) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment."
20. The view which the Committee has taken is that it has no responsibility to scrutinize the ordinances of the Legislative Councils for such purposes.

21. That view leaves a position which might be thought to be a constitutional anomaly. The Minister by reason of his power to appoint a majority of the Council members, in effect directs and procures the enactment of ordinances. If the Minister himself enacted the legislation in the form of regulations this Committee would be bound to take the regulations into consideration. But as the Legislative Council ordinances, at any rate in form, are the product of a legislative assembly they are exempt from this scrutiny although in truth they may be the ordinances of the Minister approved of by the Council.
22. Neither House has power to disallow the ordinances of a Legislative Council.



Ian Wood

CHAIRMAN

Regulations and Ordinances Committee Room,
22nd September, 1959.