

DEPARTMENT OF THE SENATE
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<i>J.R. Odgers</i>
<small>Secretary of the Senate</small>

1969

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

TWENTY-SIXTH REPORT
FROM THE STANDING COMMITTEE
ON REGULATIONS AND ORDINANCES

(Being the First Report of the 1969 Session,
and the Twenty-sixth Report since the formation
of the Committee).

PERSONNEL OF COMMITTEE

Chairman:

Senator I.A.C. Wood

Members:

Senator R. Bishop
Senator J.L. Cavanagh
Senator G.S. Davidson
Senator D.M. Devitt
Senator I.J. Greenwood
Senator A.G.E. Lawrie

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES
TWENTY-SIXTH REPORT OF THE COMMITTEE

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

Guiding Principles of the Committee

2. Since its formation in 1932, the Committee in its scrutiny of delegated legislation has been guided by the principles suggested by the 1929 Select Committee on the Standing Committee System, i.e., that regulations and ordinances should be scrutinised to ensure that -

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

3. In particular, the Committee has in recent years objected to delegated legislation which makes the rights of individuals dependent upon actions which the administration may or may not take, at its discretion; or deprives individuals of the right of appeal to a court of law against administrative actions affecting their rights; or places the onus of proof upon the defendants instead of upon the prosecution in cases at law; or makes payments with long periods of retrospectivity, thereby denying Parliament the right to approve or disapprove of the expenditure before it is made.

4. This Committee has always believed that long-cherished safeguards against arbitrary power, provided by the rule of law, should not be dismantled by regulations.

Procedure of the Committee

5. All regulations and ordinances referred to the Committee, together with the departmental explanatory memoranda, are forwarded to the Committee's legal adviser for his comments. The Committee then examines the regulations and ordinances together with the departmental explanation and the legal adviser's report.

6. Where regulations or ordinances contain provisions which appear to infringe upon the principles which the Committee upholds, the responsible Minister may be invited to send a written explanation as to the necessity for the provisions, or, in some cases, witnesses to give evidence and answer questions regarding the provisions.

7. After considering all the evidence and written explanations available to it the Committee must decide whether it wishes to pursue the matter further; if it is of the opinion that the offending provisions ought to be changed, it may decide to take the matter up with the responsible Minister; alternatively the Committee may wish to report the facts to the Senate and, if it is considered appropriate, recommend disallowance.

8. The Committee regards a report recommending the disallowance by the Senate of certain delegated legislation as a serious matter. Only where important questions of principle are involved should the case be placed before the Senate for consideration.

A report recommending the disallowance of a regulation or ordinance places the matter in the hands of the Senate for its determination.

The Committee believes that its existence and the vigilance of its members in their examination of regulations and ordinances over the years has had a salutary effect upon the formulation of delegated legislation.

9. The Committee acknowledges the ready response which it has received from Ministers of State and their Departmental Advisers.

10. The Committee now reports to the Senate upon some aspects of the regulations and ordinances with which it has been concerned since the time of its last general report.

Norfolk Island Ordinances

11. The Committee has been concerned with several Ordinances of Norfolk Island which, in the Committee's opinion, unduly abridged the rights and liberties of individuals.

12. The Committee is mindful of the special problems of the Island, and of the fact that the Minister for External Territories promulgates the Ordinances with the advice of the elected Norfolk Island Council.

13. It is the duty of the Committee, however, to draw the Senate's attention to any provisions in subordinate legislation which, in the opinion of the Committee, trespass unduly on personal rights and liberties, and the Committee will continue to closely scrutinise these Ordinances to see that they accord with the Committee's guiding principles.

Norfolk Island Ordinance No. 7 of 1966

Bean Seeds and Bean Plants Ordinance, 1966

14. This Ordinance was before the Committee in August 1966.

15. The Committee communicated to the Minister for External Territories its objections to the Ordinance; namely, that it gave unlimited discretionary power to a single officer; that

it did not allow for any appeal against administrative decisions which in this case could involve the confiscation of a citizen's property; and that it did not provide for any legal redress in case of the misuse of the discretionary powers conferred.

16. The Committee was not concerned with the policy of the Ordinance, nor with the relative unimportance of the matters with which that policy dealt. The Committee felt that it was necessary, however, to restate the important and long-established principle that Regulations and Ordinances should not make the rights and liberties of the subject dependent upon the exercise of a discretionary power conferred upon executive officials, without the proper safeguards of an appeal to a Court of Law and criteria set out in the regulations or ordinance by which the officials' actions could be judged.

17. After the Committee received an assurance from the Minister that the Ordinance would be amended to accord with the Committee's wishes, no further action was taken. The Ordinance was amended accordingly early in 1968.

Norfolk Island Ordinance No. 5 of 1967

Immigration (Temporary Provisions) Ordinance

18. In March 1968, the Committee had before it the Immigration (Temporary Provisions) Ordinance of Norfolk Island.

19. The Committee was concerned about certain provisions of this Ordinance, which provided that an authorized officer was not bound by any criteria in deciding whether to issue permits to enter Norfolk Island; that the Administrator had a discretionary power to cancel any temporary entry permit; and that the Administrator could take into custody and deport any person whose entry permit had been so cancelled, the person in question having no right of appeal except to the Minister for External Territories.

20. The Committee considered that these provisions imposed undue restrictions on the legal rights and liberties of Australian citizens.

21. After evidence from a witness representing the Department of External Territories, and a conference between members of the Committee and the Minister, the latter gave an undertaking to the Committee that the Ordinance would be limited to a period of six months, and that he would keep the Committee's principles in mind when drafting the permanent Immigration Ordinance, which is discussed below.

22. In view of this undertaking, the Committee resolved not to take any further action with regard to the Ordinance.

Norfolk Island Ordinance No. 7 of 1968

Immigration Ordinance

23. This Ordinance was before the Committee in March 1969.

24. The Ordinance overcame many of the Committee's objections to the temporary Immigration Ordinance.

The Committee was concerned, however, about :

- (a) Section 22(1)(c)(i) and (ii) whereby a person was to be a prohibited immigrant if suffering from a "prescribed" disease or had been convicted of an offence punishable by imprisonment for six months or more;
- (b) Section 26(1)(a), whereby a person could be deported if his conduct was "such that he should not be allowed to remain in Norfolk Island"; and
- (c) Sections 18 and 67 which did not allow for appeal to a normal court of law against administrative decisions regarding the granting of status of resident and the granting of an entry permit.

The Committee felt that these provisions gave to executive officers too great a discretionary power over the rights of Australian citizens.

25. The Committee, on several occasions, received evidence from the Minister for External Territories and officers of his Department, who explained that the absence of appeal to an ordinary court in certain parts of the Ordinance was due to the evidence which would have to be considered on such appeal being not the kind of evidence which a normal court could take into account. The apparently highly restrictive provisions relating to prohibited immigrants and deportation were explained in terms of the peculiar conditions of the island.

26. After deliberating upon this evidence the Committee resolved to insist upon only one alteration of the Ordinance: the deletion of Section 26(1)(a) whereby a person could be deported for any conduct considered to be "such that he should not be allowed to remain in Norfolk Island". This Section, apart from conferring too great a discretionary power upon the administration, was felt to be unnecessary in that specific and adequate grounds for deportation were set out elsewhere in the Ordinance.

The Minister for External Territories agreed to have Section 26(1)(a) deleted, and also agreed to a suggestion that he facilitate a debate in Parliament on the Ordinance.

27. In view of the assurances received from the Minister, the Committee, after long and careful consideration, resolved not to press for any further amendments. In September, the Minister informed the Committee that the desired amendment of Section 26 had been made.

Norfolk Island Ordinance No. 2 of 1969

Crown Lands Ordinance

28. This Ordinance was before the Committee in May 1969.

29. The Ordinance provided for a periodic re-appraisal of the value of leased Crown Lands, and for the lessees to pay rent on the basis of the re-appraised values.

30. The Committee pointed out to the Minister for External Territories that the Ordinance gave lessees no right of appeal to a court against the administration's re-appraisal of land values.

A right of appeal under similar circumstances is provided for in Australian Capital Territory legislation, and must be regarded as a fundamental safeguard of the rights of the lessee.

31. In June 1969, the Committee received from the Department of External Territories an assurance that amendments of the Ordinance were already being prepared so as to provide a right of appeal. The Committee accepted this assurance.

A.C.T. Ordinance No. 23 of 1968

Companies (Life Insurance Holding Companies) Ordinance

32. This Ordinance was before the Committee in March 1969

33. The Committee was concerned about Sections 40 and 42 of the Ordinance, which provided that where a company was convicted of an offence against the Ordinance, the directors of that company would be automatically convicted of an offence unless they could prove that they did not know of the offence or took all reasonable steps to prevent it, and such an offence was to be punished summarily.

34. After considering evidence from a representative of the Attorney-General's Department, and examining closely the implications of Sections 40 and 42 in the context of the whole Ordinance, the Committee resolved to request that the word "and" in the phrase "all reasonable steps" in Section 40 be deleted, thereby making the onus of proof placed upon the defendant less burdensome.

35. Upon an assurance being given by the Attorney-General and the Treasurer that this amendment would be made, the Committee accepted the Ordinance.

A.C.T. Ordinance No. 30 of 1968
Sewerage Rates Ordinance

36. This Ordinance was before the Committee in April 1969.

37. The Committee was not concerned with the policy of the Ordinance, which had been the subject of a disallowance motion in the Senate.

38. The Committee was, however, concerned with certain matters raised by Senator Greenwood during the disallowance debate in the Senate on April 30, namely the discretionary powers given to the Minister under certain Sections of Part III of the Ordinance. These Sections appeared to allow the Minister, at his discretion, to exempt any person from the charges imposed by the Ordinance, or to vary the charges.

39. The Committee resolved to ask the Minister, when amending the Ordinance, to bear in mind the Committee's objection to this type of discretionary executive power.

In June the Minister informed the Committee that he had given directions for amendments to be drafted to repeal the sections to which the Committee objected.

Retrospectivity of Financial Regulations

40. The Committee reiterates the principles which it set out in its Twenty-fifth Report to the Senate on retrospectivity of financial regulations and Parliamentary control of expenditure, and once again draws the attention of Ministers responsible for issuing financial regulations to the terms of this Report.

41. Since that Report, there has been some improvement in the situation regarding retrospectivity, due to the diligent efforts of the responsible Ministers, but regulations are still coming forward purporting to authorize payments involving a degree of retrospectivity which must be regarded by the Committee as unacceptable.

42. The Committee will continue to scrutinise closely and investigate all such regulations.

Effects of Some Previous Reports

43. The following list shows what action has been taken with regard to matters reported upon by the Committee since its last general report (Nineteenth Report):

Twentieth Report: The Christmas Island Ordinance No. 1, 1965, Tuberculosis Ordinance, was amended so as to remove the Committee's objections to it (Ordinance No. 6 of 1966).

Twenty-first Report: Statutory Rules No. 6, 1966, Air Navigation (Buildings Control) Regulations, were amended so as to remove some of the Committee's objections to them (S.R.66 of 1967).

Twenty-second Report: The A.C.T. Ordinance No. 14, 1966, Advisory Council Ordinance, was amended in accordance with the Committee's principles (Ordinance No. 6 of 1967).

Twenty-third Report: The A.C.T. Ordinance No. 27, Freehold Land (Subdivision and Use) Ordinance, was disallowed by the Senate on November 2, 1967.

Twenty-fourth Report: A.C.T. Ordinance No. 13, 1967, City Area Leases Ordinance: the provisions objected to by the Committee in this Ordinance were not removed by subsequent amendments, and the remarks made in the Report stand.

Twenty-fifth Report: Retrospectivity of financial regulations: see paragraphs 40-42 above.

IAN WOOD,

Regulations and Ordinances
Committee Room,
Thursday, 18 September 1969.

Chairman

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TABLING OF TWENTY-SIXTH REPORT OF
THE COMMITTEE

AT TABLING OF PAPERS -

MR. DEPUTY PRESIDENT -

I BRING UP THE TWENTY-SIXTH REPORT FROM THE
STANDING COMMITTEE ON REGULATIONS AND ORDINANCES BEING A
GENERAL REPORT ON THE ACTIVITIES OF THE COMMITTEE AND MOVE -
THAT THE REPORT BE PRINTED.