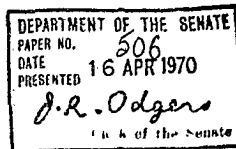


1970



THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

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THE SENATE

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TWENTY-NINTH REPORT

from the

STANDING COMMITTEE

on

REGULATIONS AND ORDINANCES

(Being the First Report of the 1970 Session, and the  
Twenty-Ninth Report since the formation of the Committee.)

PERSONNEL OF COMMITTEE

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Chairman:

Senator I.A.C. Wood.

Members:

Senator Cavanagh  
Senator Davidson  
Senator Devitt  
Senator Greenwood  
Senator Lawrie  
Senator Wheeldon

FUNCTIONS OF THE COMMITTEE - Since 1932, when the Committee was first established, the principle has been followed that the functions of the Committee are to scrutinize regulations and ordinances to ascertain-

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

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

TWENTY-NINTH REPORT OF THE COMMITTEE

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

Statutory Rules, 1969, No. 138

Amendments of the Naval Financial Regulations

2. The purpose of this Report is to acquaint the Senate with the result of the Committee's consideration of the amendments of the Naval Financial Regulation contained in Regulations 8 and 12 of Statutory Rules 1969, No. 138. On Thursday, 12th March 1970, Senator I.A.C. Wood gave a Notice of Motion for the disallowance of these Regulations. The Motion is listed on the Notice Paper for consideration this day.

3. Prior to Amendment, Regulation 122 of the Naval Financial Regulation read as follows:

"122 - (1) For the purposes of this regulation "child" in relation to a member, means -

- (a) a child (not being an ex-nuptial child) of the member;
- (b) an ex-nuptial child of the member who is, by virtue of Part VI. of the Marriage Act 1961-1966, the legitimate child of the member;
- (c) a step-child of the member; or
- (d) a legally adopted child of the member,

who has not attained the age of 18 years.

(2) Where the family of a member has been removed at the expense of the Department under regulation 231 of these Regulations and, as a result of that removal, the member arranges for his child to receive full time education at a recognized secondary school in the locality from which the family was so removed, an allowance, called "education allowance", is payable to the member, subject to sub-regulation (2B) of this regulation and to such conditions as the Naval Board determines, in respect of the attendance of the child at the school.

(2A) The amount of education allowance payable to a member in respect of the attendance of his child at a school is -

- (a) for each complete school year or for a part of a school year for which the child attends the school as a boarder - such amount, not exceeding One thousand one hundred and fifteen dollars, as the Naval Board considers reasonable having regard to the expenses incurred by the member in respect of or incidental to the attendance of the child at the school during the period and the other circumstances of the particular case;
- (b) for each complete school term that the child attends the school otherwise than as a boarder - an amount of One hundred and sixty-eight dollars thirty three cents; or
- (c) for a period less than a complete school term that the child attends the school otherwise than as a boarder - such amount not exceeding One hundred and sixty-eight dollars and thirty three cents as the Naval Board considers reasonable having regard to the circumstances of the particular case.

(2B) Education allowance ceases to be payable to a member in respect of the attendance of his child at a school upon the member again taking up duty, or his family again taking up residence, in the locality in which the school is situated.

(3) Where a member is eligible for the payment of education allowance in respect of a child under the preceding provisions of this regulation, the Department will, subject to such conditions as the Naval Board determines, bear the cost of -

- (a) the return fare of that child for travel once a year; and
- (b) the single fare of that child on completion of its education,

between the locality of the place of education and the place to which the member was last removed."

4. Regulation 8 of Statutory Rules 1969, No. 138 amends this Regulation as follows:

"8. Regulation 122 of the Naval Financial Regulations is amended -

- (a) by omitting from sub-regulation (1.) the figures '18' and inserting in their stead the figures '21';

- (b) by omitting sub-regulation (2.) and inserting in its stead the following sub-regulation :-

'(2.) In such circumstances as the Naval Board determines, an allowance, called "education allowance" , is payable to a member whose child is or has been receiving full-time education at a recognized secondary school in a locality other than the locality in which the member is located or the wife of the member is residing.'; and

- (c) by omitting sub-regulations (2B) and (3.) and inserting in their stead the following sub-regulation:-

'(3.) Education allowance is payable to a member in respect of the attendance of his child at a school for such period and subject to such conditions as the Naval Board determines.'

5. The Committee is not concerned with the policy of the amendments, but is concerned with the provisions in paragraphs 8 (b) and 8 (c) of the amendments whereby the Naval Board is given an unlimited discretionary power to determine the circumstances in which the education allowance is paid, and the period and conditions of payment.

The Naval Board is not bound by any criteria in determining these matters. This contrasts with the former part 2 of Regulation 122, wherein the Board is bound to consider certain criteria when determining whether the allowance is payable.

6. The Committee was informed in evidence that the determinations of the Naval Board under this Regulation are framed for general application and are published and distributed to all naval personnel. The determinations are not framed to cover specific cases. However, the Regulation does not provide criteria

of a general nature for the Board to follow in making or amending its determinations. There is no legal requirement that the determinations of the Board be of general application.

7. The Committee has always held that where regulations confer upon an authority a discretionary power affecting the rights of individuals, that authority should be bound by some criteria, set out in the regulations, in exercising its discretion.

8. Prior to amendment, Regulation 183 of the Naval Financial Regulations read as follows:-

"183.- (1.) Where the Naval Board decides that, a member is to be discharged, he shall not be supplied with any article of uniform kit, or be paid any allowance in respect of the purchase of articles of uniform kit, after the date of the decision of the Naval Board.

(2.) Where a member is discharged -

(a) within three months after his entry or re-entry for a reason other than a medical reason; or

(b) at any time for a disciplinary reason,

he is entitled to retain, free of charge, of the articles of uniform kit supplied to him at the expense of the Department, or in respect of which an outfit allowance has been paid to him, only one uniform suit without service badges and buttons and sufficient other garments, not including a raincoat, to enable him to be fully clothed on discharge.

(3.) Where for a reason other than a medical or a disciplinary reason a member is discharged within two years, but after three months, after his entry or re-entry, he is entitled to retain, free of charge, of the articles of uniform kit supplied to him at the expense of the Department, or in respect of which an outfit allowance has been paid to him, all articles of personal clothing, not being articles of, or associated with, outer clothing, and one uniform suit without service badges and buttons.

(4.) Where a member is discharged -

(a) after two years after his entry or re-entry for a reason other than a disciplinary reason; or

(b) at any time for a medical reason, he is entitled, subject to sub-regulation (6.) of this regulation, to retain, free of charge, all articles of his uniform kit.

(5.) Where a member is discharged in circumstances specified in sub-regulation (2.) or sub-regulation (3.) of this regulation he is not entitled to retain any article of bedding equipment issued to him under this Part.

(6.) "A member is not entitled to retain his hammock, clews, lanyards or lashings on discharge."

9. Regulation 12 contained in Statutory Rules, 1969, No. 138 amends this Regulation as follows :-

" 12. Regulation 183 of the Naval Financial Regulations is amended by omitting sub-regulations (2.) to (6.) and inserting in their stead the following sub-regulations :-

(2.) Where a member who is discharged from the Service in circumstances determined by the Naval Board to be circumstances to which this sub-regulation applies fails to return to the Department any articles of uniform kit that were supplied to him at the expense of the Department or in respect of which he has received outfit allowance, being articles of a kind included in a list of articles of uniform kit approved by the Naval Board for the purpose of this sub-regulation -

(a) the member is liable to pay to the Commonwealth an amount determined by the Naval Board to be the value of the articles; and

(b) without prejudice to the right of the Commonwealth to recover the amount so payable by other means, an amount equal to that amount may be deducted from the pay and allowances payable to the member under these Regulations.'.

10. This amendment allows the Naval Board to inflict upon a discharged member of the Naval Forces a pecuniary penalty which is fixed by a discretionary power without reference to any objective criteria whatsoever. Moreover, the terms of the amendment ("in circumstances determined by the Naval Board to be circumstances to which this sub-regulation applies") appear to allow the Board to apply or suspend the regulation at will.

The Committee believes that this is a clear example of the rights and liberties of the individual being made to depend upon the unlimited discretionary power of an Administrative body.

11. For these reasons, the Committee recommends the disallowance of Regulations 8 and 12 of Statutory Rules, 1969, No.138, Amendments of the Naval Financial Regulations.

Discretionary Powers of Administrative Bodies

12. In evidence before the Committee the question was raised as to the guidelines which should be followed by the Parliamentary Draftsmen when preparing Regulations granting discretionary powers to Administrative bodies.

The Committee appreciates the problems of the draftsman as outlined in the evidence attached to this Report and is sympathetic to the case for leaving to the determination of an Administrative body those matters of detail which are of relative unimportance and those matters which are subject to frequent change.



13. However, the Committee is of the opinion that basic criteria should be set out in the regulations for the guidance of such a body in the exercise of its discretion and for the protection of rights and liberties of the subject.

Regulations and Ordinances Committee Room,  
Thursday, 16 April 1970.

IAN WOOD  
Chairman

SENATE STANDING COMMITTEE ON REGULATIONS  
AND ORDINANCES

TRANSCRIPT OF EVIDENCE

(Taken at Canberra)

TUESDAY, 14 APRIL 1970

Present:

Senator Wood (Chairman)

Senator Cavanagh

Senator Davidson

Senator Greenwood

Senator Lawrie

MR JOSEPH MONRO, Senior Assistant Parliamentary Draftsman;  
MR THOMAS JAMES KEELY, Chief Executive Officer, General  
Services Branch, Department of the Navy; and

MR ALBERT NEIL PRESTON, Clerk, Legislation Section, General  
Services Branch, Department of the Navy, were called and examined.

Deputy Chairman

Mr Monro, would you like to say anything at this stage - will you wait for questions or is there anything you would like to put forward in relation to regulation 8 of 138? --- (Mr Monro)  
Mr Chairman, I don't think there is anything I would like to lead off with. I am not aware what the Committee's worries are in relation to these two regulations. In the event of its worries turning in certain directions, there are some things that I would like to put to the Senate Committee in the hope that they might do something that would make my task a little easier in that I would know better what the Committee's guidelines are. But maybe I am thinking about worries that are not the Committee's worries and, in the absence of that information, perhaps I could seek leave to say this later if it becomes material.

What about you gentlemen? Are you in the same position? Do you wish to wait at this stage or do you want to say anything about why the regulations were amended? --- (Mr Keely) As to why they are being amended?

Yes. In particular, regulation 8 and regulation 12 within No. 138? --- I think we could make some comment on that. On the other question we are in the same position as Mr Monro, we have no official advice of the Committee's objections. The reason why we propose an amendment of this regulation is

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essentially to effect the change contained in paragraph (a) of regulation 8, which is a variation in the age rate for which education allowance is provided for children. Previously, it was up to the age of 18 and currently it is provided up to the age of 20. There is in fact a change in the eligibility age for children. This was a change approved by the Treasury - a policy change. We then, in the normal course of events, gave instructions to the Parliamentary Draftsman for the amendment of our regulations to provide for that variation. In the course of examining the regulations for that purpose, a certain circumstance came to notice for which the existing policy intended the education allowance to apply, but in fact the view was expressed that the regulation, as it existed, did not cover such a case. The case to which I refer was where it became necessary for the child of a member to travel from the location of the member in order to have secondary schooling available, whereas the regulation, as it stood, was slanted the opposite way; it required the member to be posted elsewhere. There was no particular case which brought this to notice but it was apparent that it was in accord with the policy; as it was not covered in the regulation, it was thought to be in the Navy's interests generally, to redraft the regulation to include such a circumstance. It is for that reason that (b) of regulation 8 provides, in effect, for the allowance to be payable where secondary school education is being undertaken in a locality other than that in which the member is located. That was the purpose of that amendment and I think there was, in consultation with the draftsman, a consequential requirement to make some other almost automatic amendments in the regulations.

IN CAMERA

Deputy Chairman - On education, are there any questions by members of the Committee?

Senator Cavanagh

Does sub-regulation (2A) still stand? --- Yes.

And that permits the payment of \$1,115 as the Naval Board considers reasonable. I think what we are concerned about No. 3, you omit (2B) and 3 and insert instead the following sub-regulations. This is education allowances payable for a member in respect of the attendance of his child at a school for such period and such conditions as the Naval Board determines. This is the Naval Board making the decision, not the criteria set out as you have set out in (2A) of the regulations. I think we question the power of the Naval Board to be the determining authority as to the period for which the allowance should be paid for the child attending school and what conditions are applicable. Why is there need for this (3) here? ---

Deputy Chairman - I think what the Senator is asking is why is there need for (3.).

Senator Cavanagh

The old (3) that you are replacing says the Department will, subject to such conditions as the Naval Board determines, bear the cost of the return fare of that child to travel once a year and the single fare of that child on completion of education. Now you take the responsibility of saying whether or not you will cover it? --- If I could direct my remarks to the existing (3), which is the return fare of the child, the reason why this has been deleted from the regulation is the same reason regulation 15 of the Statutory Rule repeals regulation 237 of the Naval Financial Regulations.

IN CAMERA

The explanation advanced for that deletion - and it is the same reason for the deletion of the regulation under review by this Committee - reads :

Statutory Rule No. 138, regulation 237: .....

The explanatory statement says :

It is necessary to vary the conditions under which families of members serving overseas may be provided with passages to Australia at departmental expense. The matter is governed by regulation 237 which is unnecessary, it being sufficient if moneys are appropriated by Parliament to meet the expenses of transportation. The moneys are expended in accordance with the appropriation and travel is approved by the competent authority.

This is the explanation which was advanced for regulation 237 being deleted.

What has that got to do with regulation 122? --- I directed my remarks to the existing (3) which I thought you were referring to Senator, which was the question of fares for children.

But that was to cover travel once a year to school; it wasn't to bring them back from overseas. --- It is not the identical situation but I believe the same principle applies here as applied in the case of the other regulation. The omission of (3) did follow consultations with the Parliamentary Draftsman. (Mr Monro) I think perhaps I can help. It seems to me that the Senator might be under the impression that the new (3.) is intended to deal with the same thing as the old (3.) but this is not so. It merely takes its place and it is dealing with something quite different. The old (3.) dealt with the matter of return fares; it didn't provide any kind of allowance for the member; it merely authorised the Department of the Navy to provide travel warrants in certain circumstances. The Department of the Navy, like all

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IN CAMERA

MR T.J. KEELY  
MR J. MONRO

IN CAMERA

Commonwealth Departments, has ample powers, without any regulations at all, to provide travel warrants for people who are entitled to travel because of their duties, or because they are associated with people who have duties, on behalf of the Commonwealth.

Senator Greenwood

May I ask where is the authority which you say is ample without any regulations? --- The authority is to be found in the Appropriation Act which appropriates moneys for the purposes of travel. It is used day by day. There is no authority, to my knowledge, other than that which authorises the payment of your own fares to and from your homes and Canberra and to the other places where you travel in the course of your duty. You will not find any regulations which authorises the making of these travel warrants or tickets available to you to travel in that way; and just as it can be done for you it can be done for every public servant and can be done for other people as well.

Was any use made of the regulation prior to its repeal under this regulation, No. 130? --- I don't know that use was made of it in the sense that any specific authority was directed to this regulation. I think it was merely put in the regulations in the days when the view that I am now advancing was not accepted as a general rule. It has long been accepted, however, that travel warrants could be made available without any reference to regulations at all and I have, over the years, been taking every opportunity, where possible, to delete regulations that are unnecessary in these cases because their presence there merely creates difficulties.

IN CAMERA

Mr. Monroe, I have before me presently the No. 1 Appropriation Bill of 1969-1970, which of course was passed and under the heading 'Department of the Navy' Division 634, line 01, an item Travelling and Subsistence for which the amount appropriated is \$5,242,000. I take it that is the appropriation to which you refer? --- I would not like to say definitely that that is the one but I think that it probably is.

As you say that, under the general authority given by section 4 that the sums set out are to be appropriated and should be deemed to be appropriated, this is sufficient authority for any travel allowance or travel payment which the Naval Board determines to be valid? --- I would not like to be tied to the Naval Board. It would depend on ---

The case of the Navy, I am referring to. --- I see. You have got to go through the Appropriation Act and through the Audit Act and you find that where warrant authority is issued under the Audit Act in accordance with the Audit Act, then moneys can be spent for purposes which have been approved as Commonwealth purposes and are within the sums that have been appropriated. Whether it is the Naval Board who is the approving authority or whether it is the Minister for the Navy or a delegate on behalf of the Minister for the Navy, I wouldn't like to be tied down to that. But this gives the general idea of where the authority is to be found.

I appreciate your reservations and I can see the point you are making. But whether it be the Naval Board, the Minister,



IN CAMERA

or some specific provision in the regulations or in an Act, are you aware of any place or time at which Parliament would have the opportunity to scrutinise what payments are made under this general appropriation of \$5m for travelling and subsistence? ---- Only during the passage of the Appropriation Bill I would think.

And that would be before any actual amount has been expended. It would simply be an appropriation of that money to be applied for travelling and subsistence. Other than that the Parliament would have no scrutiny of how the money would be applied. Is that your impression? --- Yes.

And it is to remove what would appear, in the light of what I have just said, to be an unnecessary regulation, that first regulation 237 was repealed under Statutory Rules 1969, No. 138 and also sub-clause (3.) of regulation 12 under the same Statutory Rules?--- Yes.

If I may, Mr Chairman, I would have thought, taking up the general point (7) that Senator Cavanagh was raising but directing it more specifically to where I feel there is objection, if one looks at Statutory Rules 1969, No. 138 and regulation No. 8 thereunder you find that there is a new sub-regulation (2.) inserted. It reads:

In such circumstances as the Naval Board determines, an allowance, called education allowance, is payable to a member.

What I want to know is why that regulation has been introduced in view of the fact that the existing regulations specify that education allowance is only payable where a member is transferred

IN CAMERA

by the Navy under regulation 231?--- (Mr Keely) Well, the existing regulation was confined to where a member was transferred. The policy which had been in existence, but which had not been converted into statutory form, was that where a member could be serving in, say, New Guinea, and where a child reached secondary school age, but had no such schooling available in his area, this child would have to be moved to the school. It was purely an extension, if you like, but it was consistent with the principle of the original purpose of the regulation.

Do you say that in circumstances such as you mentioned, an officer serving in New Guinea, with children being educated in Australia, that he was being paid an education allowance, prior to this amendment?--- Prior to this amendment, the payment of education allowance was limited to where an officer was posted away from where the child was in fact undergoing schooling. There was no provision for the reverse situation where a child reached secondary school age in a location where there was no such schooling.

What I am getting at is that I thought under regulation 231, which is the operative criterion on which the existing sub-clause (2.) of regulation 122 operates, the allowance was only payable when, under regulation 231, the family was removed by the Naval Board from one locality to another locality. Is that your understanding of the position?--- This is as the regulation reads, certainly.

IN CAMERA

And do you say that there was in fact a policy operating which gave an education allowance in circumstances other than what the regulation expressly provided for?--- It is my understanding that the policy did include a number of circumstances, one of which was the one to which I have referred where the situation was in reverse. It was intended to be provided for under the policy but it had not been converted into a regulation. Now I have no knowledge that such a case actually existed but it did come to notice when a requirement was there to amend the regulation. We believed that it was the appropriate thing to do - to amend the regulation in advance. We have, as this Committee knows, met odd occasions where such action hadn't been taken and then when a case did arise we were at a disadvantage. A requirement then arose to amend the regulation and this in turn led to retrospectivity which this Committee took exception to.

What you have now done is to put a very broad criterion, namely, in such circumstances as the Naval Board determines. That means, does it not, that whatever the circumstances the Naval Board has an unlimited discretion as to whether it pays an education allowance or not. It can pay it to one officer in respect of his family and yet in identical circumstances concerning another officer it may decline to pay. Is not that the result of the wording which you have used?--- (Mr Preston) Ordinarily you wouldn't make a determination in respect of an individual. The determinations made under these regulations are ordinarily of general application.

IN CAMERA

Senator Greenwood (continuing)

If that be the case and it is a rule of general application, why cannot that rule of general application be made a regulation?--- Well I think there are ----

Senator Cavanagh

I think possibly as it may have been expressed in the previous regulations to some respect.--- (Mr Monro) I think we are now coming to the general question that I wanted to explore with you. The situation, as you are all aware, is this: There is a tremendous amount of drafting to be done and there are very few draftsmen to do it. There is an endeavour to meet the wishes of this Committee in every respect if it is possible. There is also an endeavour to meet the wishes of the other Committee of this Parliament, the Public Accounts Committee. But there are some things which can be done and some things which just cannot be done because there isn't time. The other Committee - the Public Accounts Committee - made a recommendation that unnecessary matters should not be included in regulations and it is for this reason that we have been repealing regulations which purport to provide legal backing for things which can legally be done with the backing of a regulation. There is no purpose in making provision, by regulation, for something which can be done without a regulation. If the only purpose of the regulation is to provide an opportunity for people to look at it, we just cannot afford the time to draft for this purpose and keep the business of the Government running.

IN CAMERA

Senator Greenwood

I think, Mr Monro, I understand the way you are putting this and may I say that I, for one, accept that there are problems with regard to the availability of draftsmen and the fact that there is a limited amount with which one individual can cope; but nevertheless, what you are saying does amount to this doesn't it: As far as the ability of Parliament to scrutinise payments which are made under regulations, there will be no such ability to scrutinise if payments and the conditions under which payments are to be made are entirely in the hands of the Naval Board whose determinations never come before Parliament.---

I was going to lead onto this Senator. It seems to me that what we need is some guideline as to where this is proper and where it is not. I have been endeavouring to provide some guidelines which apply not only to the Services but right throughout the Departments because, in my capacity as a draftsman, particularly with the oversight of the Regulations which are made, it is within my powers to try and see that all Departments are treated in the same way in this respect. The guidelines that seem to me to be appropriate - and if they are not appropriate I would like this Committee to say they are not appropriate, but also to say what are appropriate guidelines - are concerned with the nature of the allowance or the provision and with the terms and conditions; for example, how complicated they are, how often they change, whether they cover all cases, or whether there will be other cases that are likely to be added so that a lot of changes will be involved. These are the

IN CAMERA

kinds of things that seem to me to be relevant and that this Committee might say are relevant. One has to make a judgment on that sort of criteria. When I apply that to this regulation on education allowances, it seems to me that the first thing I am met with is that this is not a major allowance. It is not one that is applied to a lot of people because there would only be a limited number of people who are serving overseas at the one time, and of families serving overseas at the one time. It is an allowance which, over the years, has changed frequently. The allowances and the conditions have changed quite substantially and quite often. It often involved alteration and it often involved major drafting to effect the alterations that were required. When we came to a situation like that, it seemed to me that it was not inappropriate and not contrary to the suggestions that have emanated from this Committee, and the suggestions that have emanated from the other Committee, that, where appropriate, matters that were dealt with in detail in this regulation should be taken out of regulations having regard to the situation that we are in, and delegated to the Naval Board. When I find that a regulation has to be amended frequently, that it is not dealing with a matter of major importance and it leaves a lot of small details to be tied up and changed from time to time, then I suggest to the Department that it might consider altering the regulation to provide for them to be determined by an administrative authority.

But don't you think that, from the viewpoint of the individual serving officer, or any individual who is affected by regulations in terms of what he may or may not be entitled to, it is very important to know what his rights are and not to be placed

IN CAMERA

in the position of having to apply to a Naval Board which may or may not, as it sees the circumstances, grant him an allowance which it may have granted to another person and which the individual applicant himself thinks he should get?

IN CAMERA

--- (Mr. Monro) I agree with your point completely and I should have mentioned that this was one of the facts that I had in mind. Now these Determinations of the Naval Board are just as public, in fact they are more public, to the members of the Navy than the regulations themselves because they are all produced in the orders of the Naval Board - the general orders - and every member of the Service is thus able to learn what he is entitled to under a determination. That is my understanding of it.

Senator Lawrie

Do not you think even if it is only the side effects of one individual and he felt he was not being treated fairly, do not you think that he should have the right to appeal to some authority? --- He has the right of appeal to the Board itself and to the Governor-General. Under the present regulations all members have a right of redress of wrong. They all have the right to go right to the Governor-General himself.

Acting Chairman

In the first instance to the Naval Board? --- The right of redress goes through there ... and eventually it finishes up at the Governor-General.

Senator Cavanagh

But if he was paid something contrary to the regulations he would have an unanswerable case, would not he?--- No, he would have no case at all. The regulations confer no rights on a member to go to law while he remains a member of the Services. He has no more rights under the regulations if he remains a member of the Services than he has under the determination of the Naval Board.



IN CAMERA

At least it would embarrass the Board of the Minister if he had some entitlement under the regulations he was not getting. Now, his own entitlement under this regulation is what the Naval Board decides to give him. --- I think that there is misunderstanding. It is not a matter of individual determination by the Naval Board. The Naval Board determines the general conditions which are applicable throughout the Service and publishes them so that they are available to every member in the Navy.

Senator Greenwood

How do they publish them?--- They publish them in the General Naval Pay Instructions and General Naval Orders. Now, they go right through the Navy. The regulations do not go through the Navy at all. It is much easier for them to find out what is in the determination than what is in the regulations.

All that I am concerned about in the light of what you have just said is why, if the determinations can be made in this form by the Naval Board, they cannot be incorporated in the regulations themselves because I am concerned that Parliament should be able to scrutinise what are the conditions under which payments are made. For example, this Committee can have some judgment on whether they trespass unduly on individual or personal rights. ----

Senator Lawrie

That is one of our terms of reference. --- I appreciate that ----

IN CAMERA

That each individual must have the right of some sort of appeal or some sort of justice, whether he is in the Services or not. --- I appreciate that. We come back to the practicalities of the situation. The determinations of the Naval Board are made by the Navy and are not made by the Parliamentary Draftsman. They are not made by the Attorney-General's Department. They consult our Department on matters of law if they need consultation. There has been a general undertaking, an undertaking that was given to Parliament in 1937, that regulations would not be made unless they had been dealt with in the Attorney-General's Department. If every little detail must be put in the regulations, then the Parliamentary Drafting Division will have to settle every little detail. These details would clutter up, if I can use that term, the pipeline which regulations are going through and everything in the pipeline is going to be that much slower in getting done.

Senator Greenwood

I think it comes to this, does it not, that what you are saying is that if you had the staff and if there was the time available there may be points in my particular case and what I am saying is that you are looking at the practical situation. You have not got the staff and you have not got the time available to do all this work. --- That is the situation. There is no reason in law and there is no reason in practice why it should not be done in the way you suggest and if the Committee says it has got to be done in that way it will be done in that way. But the Committee must understand that it can only

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be done at the expense of delaying everything.

Perhaps it does establish, and it does appear to me that what you are saying is in the nature of confession and avoidance . . . . you confess that this particular regulation does give rise legitimately to the concern I express, but you seek to avoid the consequences of that by saying there are staff problems, time problems, and that practical situation that was looked at by the Senators. Is that a fair assessment of your position? --- Partly. I do not think myself that this is the kind of thing on which the individual Members of Parliament want to waste their time. Now I am not the one to judge this, but I do put to you quite strongly that some of these things are very small points and they affect very few people. If the Members of Parliament want to look at all of those and say that they want to, then what you say is quite right and my plea is one of confession and avoidance.

Senator Lawrie

The matter of affecting very few people, I think, is beside the question. We are here to see that everybody gets justice. --- I can see that but on the other hand if you are going to look at all these very closely you are all going to have to work more than 24 hours each day to do it.

Senator Cavanagh

The Parliament determined we should when they elected the Committee, did they not? --- Yes, but it did not say what should go in regulations and what need not go in the regulations

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and we have to strike a balance. Where the balance goes - my way of thinking and yours - may no doubt be well apart but nevertheless, unless the Committee provides a guideline, everything will have to be set out word for word in regulations or in Acts, and the business of the government will come to a standstill.

Senator Greenwood

What I am interested in is that there is apparently no particular case or particular circumstance which warranted a change in this regulation, but nevertheless, you are looking for something more comprehensive than what presently exists in the regulation and felt that, to cover situations other than the transfer under regulation 231, provision should be made by saying "in such circumstances the Naval Board refers". Is that also a fair summary of what you had in mind? --- (Mr Keely) I believe there were two new circumstances for which we did need to provide. One was the change of age from 18 to 20 and, secondly, there was the situation that was not provided for as the regulation was worded, namely, where a child at a location with the parents is of secondary school age and there is no secondary school facilities available. The approved policy was, but the regulation did not in fact, provide for this, that such a child should be entitled to receive this allowance or rather that the allowance should be payable to the parent.

And I take it that that was the type of instructions that went across to the Parliamentary Draftsman?--- Well, the substance was that. Whether we varied it I would have to check for you. The substance of it would have been that. (Mr Preston) We told the draftsman what our problem was, of course.

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And the draftsman used the expression that now appears in the regulation under discussion, 'in such circumstances as the Naval Board determines'. Why, Mr Monroe, could not this have been worded in a way which took account of this extra consideration which was averted to which was not comprehended by the existing regulation so that you would have set down in the regulations the criteria which the Department had in mind?----  
(Mr Monroe) Of course, this could have been done, but it seemed to me, upon reviewing the history of this regulation, that we have changed it very frequently and these matters were matters which could best be left to be dealt with by the Board. It would save us drafting further amendments after this amendment had been made - when another example was found that was not covered. There would be no need to come back to us again. We had already altered the page, I think, about three times - it was 16, it was 18, and it is now 20. We have altered the rates year by year with a very complicated regulation that deals with the alteration to the rates. We made other alterations to it and this was another one. If my judgment was wrong, it was wrong. But it was my judgment that this was the kind of case where it would be appropriate to make this change. If I may take the Committee back to <sup>an</sup> earlier occasion when we were here before on retrospectivity - the question arose why one Department's regulations were requiring many validating regulations or retrospective ones and another Department was not requiring many. The point was made that, in the case of one Department, much more power was conferred on the Board to determine matters that were not set down in full in the Regulations. I understood the Committee accepted that this was

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desirable in appropriate cases and that this would help to avoid the need for retrospective regulations because the determinations can be made very quickly once the decision is taken. Now if you do not agree with me, you do not agree with me, and I will have to see that a different policy is adopted. But, quite candidly, these are the kind of things that were in my mind when I thought that this was a case where the Committee might say that these matters could well be taken out of the regulations and left to the Board.

Senator Cavanagh

I take it that under the existing regulation before these amendments, Parliament had approved of payment of educational allowance of \$168.03 per annum to a member concerned for his child. Do you say that, without any knowledge of Parliament, this can now be increased from time to time. I mean provided the increases are within the limits of the appropriation for travelling allowances.----- Not travelling allowance - the present regulations specify the travelling allowances - the alteration only deals with their tickets.

Well, from whatever purse of the appropriation you take it from. --- It only allows payment of the fare for bringing them home and taking them to school each year. It is not the one under which money is paid into the bank of the member. It is only a ticket to enable them to get on a plane or a train.

But this is an allowance for the keep of the child. --- No. It is not for the keep - it is just the fare, the fare that is paid to the airline. It enables them to be handed a ticket, nothing more than that.

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Well, what I am referring to is (2A). --- Oh, (2A). That provides ----

It is what the Naval Board considers reasonable, up to a limit of \$1150. --- That is to enable the member to pay the fees and the expenses of the child while he is overseas.

What Parliament has approved, I am not referring to the old regulation, is the payment of \$1150. Under the new regulation, the Naval Board can make it any amount now. --- No, we have not, at this stage, touched (2A) although, to be quite frank with the Committee, I have, in fact, a draft which I have not used yet but one which would enable the Naval Board to determine the amounts as well. My thinking is that, again, sub-regulation (2A) might be one that the Committee would allow to be taken out of the regulation so that the Board could determine the scale of rates. The Committee might give me some guidance on that so that I would know whether I should tear it up or not. As I say, I felt that this kind of allowance was not the kind that really concerns the Committee. The Committee has drawn a distinction between matters which can be dealt with by regulation and matters which are of such substance that they ought to be in an Act. Now this leads to the making of a judgment and it seems to me that, having regard to - and only having regard to - the situation in which the Commonwealth finds itself with respect to the drafting of its laws, the Committee has gone along with a somewhat similar practice about things that are of such substance that they ought to be in regulations and things that are of lesser importance and can be left to a Board or administrative authority to determine. My feeling is that the Committee has gone along with this sort of idea. It is a question of

degree where the dividing line lies. As I have said on a number of occasions, my judgment in this case was this went across the line where the Committee would not see it inappropriate to leave these things to the Board because they appear to me to be of minor importance compared with the very many things which, of necessity, must be in these regulations, such as matters that affect the members' futures, their major entitlements to pay, discipline, amounts that can be deducted from their pay and things of that nature. I would never suggest that that sort of thing should generally be left to determination. But it seemed to me that this particular one was one which was, generally speaking, of minor importance. My reasons for looking forward to coming here today were to ask the Committee if it thought that I was wrong in this judgment and to address itself to the question whether there are any matters that they think might be delegated to authorities and, if so, to the guidelines determining the matters that can be delegated and the ones that cannot.

Senator Greenwood

Is it true that entering into your consideration of what is a matter of substance and what is not a matter of substance appropriate to be dealt with by regulation in preference to being dealt with by determination, is this element, namely, that there are not so many draftsmen and what draftsmen there are at the moment are - I say it - grossly overworked. Therefore this is a factor in saying: This ought to be regarded as a matter of not such substance. --- It is a factor in this sense that, to the extent to which I feel the Committee will support it, we avoid drafting what can reasonably be avoided. Yes. As I say, we have, in fact, been invited to do that; that is what the Public Accounts -----



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You do agree that the Public Accounts Committee's concern is an entirely different concern to this Committee?---It is an entirely different concern from this Committee's and that is why I do say that from this Committee we would greatly appreciate some guidelines because it is not only in relation to this Department or the Service Departments that I have been applying this rule but it is being applied in relation to all Commonwealth Departments.

Senator Cavanagh

I think you will find it more difficult to get regulations through the Committee which allows the power of the Board to discriminate despite the fact that they may not discriminate. It is the very power that the Committee is apprehensive about and on both of these regulations under challenge now that is the thing that is occupying the Committee's mind.---

Senator Lawrie

Can I ask what the witnesses think of regulation 12 and any reasons for that. That is the one about the charging the people for the kit.---This again depends, I think - indeed the whole of this exercise depends on this - on the practice of the Service. As I have said the practice of the Service is that the Board's determinations in these matters are circulated by means of orders and things of that nature right throughout the Service. Its determinations are well known right throughout and there is no question of varying it from individual to individual. The things are published in general orders and everybody knows whether they come within it or without it and they have means of finding out.

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They are there through the orders and the substance of the regulation . . . have also to be circulated to them through orders because they have no other means of finding out the regulations. When you come to regulation 183, it talks about articles of a kind included in a list of articles of uniform kit approved by the Naval Board. This list is published so they all see it. In fact Mr. Keely will show you the list. The member is liable to pay an amount determined by the Naval Board to be the value. The Naval Board has determined that articles have a certain life. It gives a life to each of the various articles of uniform and kit that members have.

Senator Davidson

This is all in your schedule?---All in the orders.

Senator Greenwood

May I ask Mr Keely or Mr Preston a question? Why this change was wanted?---(Mr Keely) There is a fairly long history to this question of recovery for losses of kit and if I could just run very briefly through it. It goes back over a number of years. Recoveries of items of kit not returned in the sort of circumstances, broadly the circumstances, to which this regulation relates were prior to 1956 recovered under a Naval financial regulation 143(a). In 1956 that regulation was repealed, I believe, following some criticism by this Committee, I think. (Mr Preston) Yes, it was an Air Force Regulation. (Mr. Keely) Which offended in some respect. So the Navy regulation on this matter was repealed in 1956

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and no recoveries were made in respect of these items of kit for several years. In 1962 a regulation - Naval Financial Regulation 132(a) - was, in fact, made which permitted recoveries for neglect and in other circumstances. Under that regulation, for a period, recovery for these items of kit was, in fact, effected until the propriety of this was questioned and subsequently in recent years no recoveries have been effected. The Policy aspects of recovery for items of kit not returned has been under discussion with the Treasury and the Service Departments in recent years on a sort of inter-Service basis to get a uniform approach to the principles involved and a uniform basis was generally agreed on. Navy at this time, however, had no regulation to effect recovery. Army and Air Force did have such authority and it was agreed that Navy should proceed and obtain that authority. Prior to this present regulation Navy had no authority to deduct from pay for recovery of items of kit that were not returned on discharge in the limited circumstances envisaged.

Senator Lawrie

Could I ask a question about that one. Apparently you say that the value of these articles are all determined. There is a good bit of difference between a new pair of boots and an old pair and according to this regulation: 'Pay to the Commonwealth an amount determined by the Naval Board to be the value of the article'. The Naval Board can in effect put any value they like on that pair of boots. The rating or whoever is involved has no appeal, no chance, he has just got to stand that docked out of his pay and that is where it offends this Committee.---

No.---

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Senator Greenwood

Is it fair to say Mr Monroe that this regulation will in fact authorize the recovery by the Board of unlimited amounts without appeal and without providing the discharged member with any procedure to be heard?---(Mr Monroe) I think that if determinations were made appropriately, that might be possible, but under the determinations that have been made, as I understand them, that would not be possible because, as I say, the values of all these articles have been determined as the price which these people pay for them in the Navy stores if they go and buy them. A period of life has been set down and the Naval Board has determined that what is to be deducted is to be the balance of the cost price that you would have to pay for a new one proportional to the balance of the life of the article. So that if he has had it for half of its life, he pays half the cost. If he has had it for 11-12ths of its life, he pays 1/12th of the cost.

Senator Davidson

Is that provided for in that list which Mr Keely has? --- This is provided for in the list, I think.

Senator Davidson - So the Naval Board has a guide in making its determination.

Senator Cavanagh

Why cannot that be stated in the regulations - the cost of the article?---It takes some pages to set it all down.

Senator Davidson

I do not mean the whole lot, but why cannot it be stated that the determination is fixed according to the schedule?---That is what I

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determined to be the value of the article.

Senator Cavanagh - It could be determined to be something else.

Chairman - The use of the word 'reasonable' value.

Senator Davidson

No, they have got their scale of values. The question Senator Cavanagh is asking is why cannot it be stated that when the determination is made it is made according to the scale of value set out in a prescribed document or a described document. Why could not that be added here in this clause? Or why could it not be referred to so that, at least, there is this protection both as far as the person is concerned and as far as this Committee is concerned.---If the Committee is concerned with the fact that there might be individual determinations, it would be possible to provide that these should not be made. There will only be the scale, if that is what is really worrying you. With regard to the suggestion concerning referring to another document, it seems to me that this would only unnecessarily complicate the regulation. The determination of the Board itself must be a document and it is the substance of that document which is reproduced in these orders so a reference to the orders appears unnecessary. I could if you like provide that these determinations are to be published in the orders but that is done as a matter of course. If you wanted it spelt out that would be easy enough.

Chairman - In view of the fact that you say you have

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guidelines which would be used by the Committee do not you think to this extent that to be the value of the article having regard to the purchase price of the article and its useful life that some indication like that might have been inserted into the regulations. It gives people some idea just what the basis might be.

Senator Cavanagh

It takes away the power of discrimination, although we accept that it has not been used for that purpose but we are concerned with the giving of power.---There are several ways in which it should be altered which would not affect in any way the way in which it is operating if the Committee feels that these would be helpful. I am sure that Mr Keely would be happy to consider them and I am sure that they would not present any great problems from a drafting point of view.

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Senator Greenwood

Mr. Monro, an area which, to me, gives greater concern is the language used in the opening three lines of the new regulations, where a member who is discharged in circumstances determined by the Naval Board to the circumstances to which this sub-regulation applies. Well that makes it very wide and, in effect, gives to the Naval Board the power in effect to suspend the regulation at will, doesn't it?---No.

Why not?---A determination only completes the regulation because unless there are some circumstances determined the regulation does not operate.

Senator Lawrie

Why did you take out the bit from the old regulation where a member is discharged within three months after his entry or re-entry for a reason other than a medical reason, or at any time for a disciplinary reason? You spelt it out there but you have taken it completely out in this new one.--- The existing regulation took half a page; this one takes very much less. There may be reasons why it is required now and no reasons why it should be required in twelve months' time.

Senator Greenwood

I suppose that then comes down to the consideration you urged upon us with regard to regulation 8 - that we ought to look at matters of substance and, as far as the draftsmen are concerned, you have got the practical problem of there being

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a lot of work and not enough of you.---That is right. I am  
sorry but I cannot get away from that.

The witnesses withdrew