

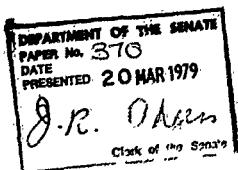
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THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

SIXTY-FOURTH REPORT

PRINCIPLES OF THE COMMITTEE

**MEMBERS OF THE COMMITTEE**

**Senator A.J. Missen (Chairman)**

**Senator N.T. Bonner**

**Senator the Hon. J.L. Cavanagh**

**Senator G.J. Evans**

**Senator G. Georges**

**Senator D.J. Hamer, D.S.C.**

**Senator A.W.R. Lewis**

## STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

### SIXTY-FOURTH REPORT

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

#### PRINCIPLES OF THE COMMITTEE

- 2 The principles adopted by the Committee since 1932 are as follows:

The Committee scrutinises 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.
- 3 These principles, which were adopted with the concurrence of the Senate, have served the Committee and the Senate well. They have been copied, sometimes with modifications, by other committees in Australia and throughout the world, and have given this Committee the ability to adapt its scrutiny of delegated legislation to changing circumstances and in particular to changing perceptions of individual rights and liberties.

Due to historical developments, however, the four principles are now, in the opinion of the Committee, in need of revision.

- 4 Principle (c) was formulated at a time when it was believed that administrative decisions could be restricted to relatively minor matters, and where they could not be so restricted they should be subject

to review by the courts. Since that time administrative decisions affecting the rights and liberties of citizens have grown enormously in scope and importance, and the Parliament has increasingly relied upon administrative tribunals as a means of review of the more important of those decisions. In 1975 the Parliament enacted the Administrative Appeals Tribunal Act to establish a general Administrative Appeals Tribunal, which is intended to have the power to review a wide variety and an ever increasing number of administrative decisions. There are also a number of other administrative tribunals with the power to review particular types of decisions. The judgments of administrative tribunals are not technically "judicial decisions", but the Committee in its scrutiny of delegated legislation has often accepted review by administrative tribunals as an adequate safeguard of the rights of individuals where important matters are left to administrative decisions. The Committee has been concerned mainly to ensure that decisions having an important effect on individual rights are reviewable on their merits; the Committee has not been primarily interested in the review of the lawfulness of decisions, under the old prerogative writ procedures, and now provided for in the Administrative Decisions (Judicial Review) Act (yet to be proclaimed). In order to take account of recent developments in administrative law, the Committee has therefore revised its third principle, as will be indicated below.

- 5 Principle (d) has for some years 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.
- 6 The Committee intends, with the concurrence of the Senate, to adopt henceforth the following principles in its scrutiny of delegated legislation.

The Committee scrutinises delegated legislation to ensure:

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

- (b) that it does not trespass unduly on personal rights and liberties;
- (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- (d) that it does not contain matter more appropriate for Parliamentary enactment.

The Senate will observe that the new principle (d) is highly subjective, but no more so, it is submitted, than the original of 1932. As will be seen from the following discussion, the Committee intends to develop some criteria in applying that principle.

- 7 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.
- 8 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.

- 9 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.
- 10 The expression "delegated legislation" is used instead of "regulations and ordinances" because the Committee has for many years scrutinised more than regulations and ordinances and has recently asked the Senate in its Sixty-second Report to amend its Standing Order accordingly.
- 11 The Committee does not consider that the revision of its four principles will result in any alteration to the manner in which the Committee works at present, except with regard to Australian Capital Territory ordinances. The revised principles reflect the present practices of the Committee.
- 12 The Committee recommends that this report be adopted by the Senate.



Alan Missen  
Chairman

8 March 1979