

DEPARTMENT OF THE  
PAPER No 1573  
DATE  
PRES  
15 SEP 1980  
*MacLachlan*  
Acting Clerk



THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

SIXTY-NINTH REPORT

LEGISLATION CONSIDERED 1980

MEMBERS OF THE COMMITTEE

Senator A.J. Missen (Chairman)  
Senator the Hon. J.L. Cavanagh (Deputy-Chairman)  
Senator N.T. Bonner  
Senator G.J. Evans  
Senator D.J. Hamer, D.S.C.  
Senator A.W.R. Lewis  
Senator M.C. Tate

PRINCIPLES OF THE COMMITTEE

The Committee scrutinises delegated legislation to ensure: Adopted 1932  
Amended 1979

- (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.

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## STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

### SIXTY-NINTH REPORT

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

- 2 This Report is to acquaint the Senate with the Committee's consideration of legislation since its last Report (the Sixty-eighth Report) which was presented in November 1979.

#### AUSTRALIAN FEDERAL POLICE (DISCIPLINE) REGULATIONS

- 3 These regulations, which were contained in Statutory Rules 1979 No. 211, contained detailed provisions for the newly-established Australian Federal Police. The Committee was concerned with regulation 20 of the regulations which provides that the Commissioner of the Australian Federal Police may direct that a member of the force who is suspended pending investigation of an alleged offence shall not be paid salary during the period of suspension. It is to be noted that the Public Service Board is given the same power in relation to public servants. The Minister for Administrative Services has given an undertaking that this power will be exercised only where a member is in gaol or has been absent without leave for a period of more than 48 hours and his whereabouts are unknown.
- 4 The other matter of concern to the Committee was the absence from the ordinance of a provision, such as was included in the old A.C.T. Police (Disciplinary Provisions) Ordinance, to the effect that where a member is dismissed from the force following a conviction, and that conviction is reversed by the courts on appeal, or otherwise quashed, the member is to be reinstated. The Minister has pointed out that whereas the old ordinance provided for summary dismissal of a member convicted of an offence, the regulations provide for proceedings to be taken against a member and for a right of appeal against such proceedings. The Minister has given an assurance that these proceedings would not be concluded until any appeal lodged by a member against a conviction in a court is completely finalised.
- 5 The Committee accepts these undertakings given by the Minister.

#### CENSUS REGULATIONS

- 6 In its Fifty-first Report the Committee expressed its concern, in relation to the regulations for the 1976 census, that there appeared to be a constant expansion of subject matters in the questions of the census, and the Committee expressed its intention of scrutinising

future regulations under the Census Act to ensure that the census questions do not become unduly intrusive.

- 7 The regulations for the 1981 census have been made in Statutory Rules 1979 No. 246. The Committee noted that this time there seemed to be a significant reduction in the subject matters prescribed by the regulations. The Committee received some complaints, including a submission by a Senator, to the effect that the area of the census had been unduly restricted. The Committee was concerned that the Australian Bureau of Statistics may have been unduly inhibited because of the comments in the Fifty-first Report. The Committee noted the Report of the Law Reform Commission on Privacy and the Census and agreed with the conclusion of that report that "sensitivity of a subject matter should not be taken as the sole criterion to be applied" in making decisions on the subjects to be included.
- 8 The Treasurer has indicated to the Committee that the reduction in subject matters in the census was largely the result of experience of difficulties with the great number of topics covered by the 1976 census, and has indicated that the recommendations of the Law Reform Commission, with the exception of those related to the retention of census forms, are being considered.

#### OVERSEAS STUDENTS CHARGE COLLECTION REGULATIONS

- 9 These regulations, contained in Statutory Rules 1979 No. 290, provide, amongst other things, for exemptions from the charge applied by the Overseas Students Charge Act 1979.
- 10 The Committee received a submission from the Australian Union of Students, raising a number of apparent difficulties in the regulations. While most of these bordered on matters of policy, the Committee sought and obtained from the Minister for Immigration and Ethnic Affairs satisfactory clarification of them. The Committee was also concerned with the absence of any review of decisions made under the regulations. The Minister expressed the view that a review was not appropriate because of the highly objective nature of the criteria contained in the regulations, but he agreed to have the Administrative Review Council consider the question as part of its examination of legislation within the Minister's responsibility. The Committee was satisfied with these arrangements.

#### AUSTRALIAN MILITARY REGULATIONS

- 11 The amendments of these regulations contained in Statutory Rules 1979 No. 170 relate to the constitution of boards to assess claims for compensation arising from action taken pursuant to section 69 of the Defence Act. That section of the Act confers upon the Governor-General a potentially

very great power to authorise the entry and use of private property for defence purposes.

- 12 The Committee expressed to the Minister for Defence its view that a person who suffers damage to his property as a result of the use of that power ought not to be dependent in the last resort upon a board established by the military authorities for compensation, and that there ought to be a right of appeal where a person is aggrieved by a decision of a compensation board.
- 13 The Minister for Defence is presently examining this question of appeal with the assistance of the Attorney-General's Department.

#### RETROSPECTIVE LEGISLATION

- 14 The Committee has encountered two cases of legislation being made with retrospectivity of more than two years. In accordance with the undertaking given to the Senate in its Twenty-fifth Report, the Committee now reports upon the regulations concerned.
- 15 The amendments of the Defence Force (Reserves) (Financial) Regulations contained in Statutory Rules 1980 No. 83 are retrospective to 1 July 1975. They relate to the payment of service chaplains, and arose from doubts about the effectiveness of earlier amendments. These doubts appeared to concern rather complex matters, and were not resolved for almost three years. The Committee considers that the circumstances leading to the making of the regulations were exceptional, but as indicated to the Minister it is felt that there were inordinate administrative delays in dealing with the matter after it was determined that the amendments of the regulations should be made.
- 16 The amendments of the Export Market Development Grants Regulations contained in Statutory Rules 1980 No. 53 were retrospective to 1 July 1974. The amendments related to the prescription of bodies for the payment of grants under the Export Market Development Grants Act. An amendment of that Act in 1978 explicitly authorised the retrospectivity of the regulations.

#### A.C.T. MOTOR TRAFFIC ORDINANCE

- 17 An amendment of this ordinance contained in A.C.T. Ordinance No. 32 of 1979 provided for the wearing of seat belts by children in motor vehicles. Where proper child restraints are available, children must wear them, and where no special restraints are available children must wear any adult seat belts that are available. The penalty for contravention of these provisions is imposed upon the driver of the vehicle.

- 18 The Committee received a number of submissions, for and against the ordinance, from persons in the A.C.T. and others, and also had the benefit of submissions from the Ministers for the Capital Territory and Transport. After carefully considering the ordinance and the various submissions, the Committee decided to take no action in relation to the ordinance.
- 19 Because of the great public interest in the ordinance, and the number of submissions received, the Committee considered that it ought to acquaint the Senate and the public with the Committee's decision and the reasons for it.
- 20 It was put to the Committee by some of those who made submissions that by compelling the wearing of adult seat belts by children where no child restraints are available, the ordinance was compelling something that is not in the best interests of safety. Whether it is safer for a child to wear an adult seat belt than to be unrestrained in a motor vehicle is a question of safety policy which the Committee did not consider itself competent to judge. It is sufficient to say that experts in the field of safety, including the advisers of the Federal and State Governments, have concluded that on the whole it is safer for a child to wear an adult restraint than to have no restraint at all.
- 21 The Committee's attention was, however, drawn to two provisions in the ordinance which the Committee considered it ought to examine more closely. The first provided that an approved adult seat belt should be taken to be suitable for use by a child. It was put to the Committee that this provision amounts to an admission that what the ordinance requires is not safe, and that it amounts to an attempt to declare safe by legislation what is in fact not safe. The submission of the Minister for the Capital Territory is that this provision is nothing more than a statement of the policy that, in the absence of proper child restraints, an adult seat belt is better than nothing. The Committee accepts that this provision is inseparable from the policy of the ordinance. The second provision is to the effect that damages recoverable by a plaintiff shall not be reduced by reason of an offence against the ordinance. It was put to the Committee that this again constitutes an admission that what the ordinance requires is basically unsafe. The effect of the provision, however, is that where a claim is made in respect of injury to a child against a person other than the driver of the vehicle in which the child was a passenger, contributory negligence on the part of the driver will not be held to reduce the damages available to the child. The provision does not prevent the damages awarded to a child being increased because of negligence on the part of the driver of the

vehicle in the form of an offence against the ordinance. This situation could arise where damages are claimed from the driver of the vehicle. Looked at in this light, it seems to the Committee that the provision is a fair one.

#### A.C.T. COURT OF PETTY SESSIONS ORDINANCE

- 22 An amendment of this ordinance contained in A.C.T. Ordinance No. 41 of 1979 inserted in the principal ordinance a provision allowing an appeal to the Supreme Court against the dismissal of an information by the Court of Petty Sessions. The specified grounds for such an appeal are:

- . that there was a *prima facie* case of error or mistake on the part of the Court of Petty Sessions;
- . that the Court of Petty Sessions did not have jurisdiction or authority to make the decisions; or
- . that the decision of the Court of Petty Sessions should not in law have been made.

- 23 The Committee noted that an identical provision was removed from the ordinance in 1974 and on that occasion the following explanation was given of the removal of the provision:

"the objection can be taken that these provisions contravene the double jeopardy rule which is that a person should not have to stand trial more than once for the same offence".

The Committee sought from the Attorney-General an explanation of why the provision in question was being restored to the ordinance when it was thought in 1974 that it might be regarded as contravening the "double jeopardy" rule. The explanatory memorandum accompanying the 1979 ordinance indicated that the intention was to allow errors of law in decisions of the Court of Petty Sessions to be corrected on appeal, but the explanatory memorandum of 1974 clearly expressed the belief that the provision in question might allow appeals on the merits of particular cases and not simply in relation to errors of law.

- 24 The Committee also received from the Law Society of the Territory a submission which raised the "double jeopardy" matter and made a number of other observations on the ordinance, particularly suggesting a stated-case procedure as an alternative to the review of dismissals of informations for settling questions of law.



- 25 The Attorney-General provided the Committee with an opinion upon the ordinance, in which opinion he firmly expressed the view, notwithstanding what was said in 1974, that the provisions in question would not allow appeals on the merits of cases but would confine appeals strictly to questions of law. The Attorney-General also responded in considerable detail to the other matters raised by the Law Society.
- 26 After careful consideration, the Committee concluded that it ought to accept the opinion of the Attorney-General and take no further action in relation to the ordinance.

#### A.C.T. FLAMMABLE LIQUIDS ORDINANCE

- 27 An amendment of this ordinance contained in A.C.T. Ordinance No. 2 of 1980 provided the Committee with a further example of provisions creating absolute offences and providing defences in relation to those offences, thereby, in the present state of the law relating to this matter, placing the burden of proof upon the defendant. The whole question of such statutory provisions was examined by the Committee in its Sixty-sixth Report.
- 28 In the case of the particular provisions contained in this ordinance the Committee considered that there was no need for the ordinance to be framed so as to reverse the onus of proof, and expressed the view that the provisions could be re-drafted to avoid this. The Minister for the Capital Territory has agreed to amend the ordinance accordingly.

#### A.C.T. CONSUMER AFFAIRS ORDINANCE

- 29 An amendment of this ordinance was made in A.C.T. Ordinance No. 42 of 1979 so as to carry out a number of undertakings to the Committee in relation to the principal ordinance. One of these undertakings was that the ordinance would be amended to ensure that information gained by the compulsory processes under the ordinance would not be used for prosecutions except prosecutions under the ordinance. The provision which was intended to carry out this undertaking provides that a person shall not be required to disclose to a court information gained under the ordinance. The Committee was concerned that the provision did not prohibit the voluntary disclosure of information to a court. The Minister for the Capital Territory has provided the Committee with an Attorney-General's Department opinion to the effect that the provision would not allow such voluntary disclosure, but the Committee has asked the Minister to make a further amendment of the ordinance to clarify the position.

## CHRISTMAS ISLAND CENSUS AND STATISTICS ORDINANCE

- 30 This ordinance, contained in Christmas Island Ordinance No. 3 of 1980, contained powers of entry and search without warrant. A submission was made to the Committee that these powers were objectionable. The Committee did not agree with that submission for the following reasons. The Committee considers that it is important to inform the Senate of these reasons, as they clearly indicate the Committee's attitude to powers of entry and search.
- (i) The powers concerned involved entry and inspection only of shops, factories or workshops and did not extend to other premises.
  - (ii) The power of entry was confined to business or working hours and there was no power to enter by force, for which a judicial warrant should normally be necessary.
  - (iii) Having entered such places, officers could only inspect the places, goods, plant and machinery; there was no power to remove or to seize anything, which should normally be conferred only by judicial warrant.
  - (iv) The ordinance contained provisions which seem to the Committee to achieve that which has been insisted upon by the Committee in relation to powers to enter, search and compel information, namely that such powers should be strictly limited to the purposes of the particular law in question.
- 31 There are a large number of authorities under various statutory provisions empowered to enter and inspect premises. These statutory provisions could not be effective without such powers, and many of them confer much wider powers than the ones discussed here. The Committee considers that it is unrealistic to suggest that all powers of entry and inspection should be only upon judicial warrant, but considers that such powers should be subject to proper limitations, as are contained in this ordinance.
- 32 The Committee also had regard to the report of the Law Reform Commission on Privacy and the Census, in which the Commission concluded that the Bureau of Statistics must be able to rely on legal compulsion. Such compulsion is contained in Section 19 of the Census and Statistics Act in virtually identical terms to the provisions in question of this ordinance.

## FORM OF SUMMONSES

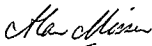
- 33 The Committee has requested the Attorney-General to give consideration to the reform of summons documents in jurisdictions under the control of the Commonwealth. This request arose from the Committee's consideration of the A.C.T. Motor Traffic Ordinance. The Committee observed that the summons forms in use in the A.C.T. are archaic and unnecessarily complicated in language, confusing to the defendant, and lacking in information which they ought to contain. In particular, they do not refer to the statutory provisions relating to the alleged offence, and are misleading in implying an absolute obligation on the defendant to appear in person. The Attorney-General has agreed to consider this matter and to consider particular suggestions put forward by the Committee.

## CONFERENCE OF DELEGATED LEGISLATION COMMITTEES

- 34 With the approval of Mr President and Mr Speaker, and with the support of the Commonwealth Parliamentary Association, the Committee will be holding in Parliament House later this year a conference of parliamentary committees involved in the scrutiny of delegated legislation in Parliaments which belong to the Association. The Committee hopes that this conference will lead to a valuable exchange of ideas on the parliamentary control of delegated legislation, and a greater appreciation of the importance of that control. The Committee plans to present to the Parliament the proceedings and major documents of the conference.

## UNDERTAKINGS BY MINISTERS

- 35 The Committee expresses its appreciation of the co-operation extended to it by Ministers and their Departments. Appended to this Report for the information of the Senate is a list of undertakings by Ministers still outstanding with a summary of recent developments in relation to those undertakings. Also appended is a list of the recommendations of the Committee in its previous reports other than recommendations for amendment or review of particular pieces of legislation.



Alan Missen  
CHAIRMAN

## APPENDIX 1

### OUTSTANDING UNDERTAKINGS BY MINISTERS TO AMEND OR REVIEW DELEGATED LEGISLATION

#### A Referred to in the 66th Report (June 1979)

1. Postal Services Regulations: provisions allowing the opening of mail by officers: undertaking given 5 November 1975. This undertaking was delayed by the consideration of the opening of mail by the Law Reform Commission and the Royal Commission on Drugs. The responsible Minister agreed in February 1979 not to await the reports of those bodies and to proceed with the promised amendments. In April 1980 the Minister reported that difficulties had been encountered in preparing the amendments. These difficulties were the subject of a hearing of various officers on 17 April 1980. The officers considered that there were no substantial difficulties preventing the speedy enactment of the amendments, with minor modifications. The Committee reported this conclusion to the Minister on 28 April 1980. In August 1980 the Minister advised that the amendments would proceed.
2. Regulations under the Customs Act: rights of appeal against administrative acts: undertaking given 16 March 1976. This matter is partly still under consideration by the Administrative Review Council. In August 1979 the Council reported that it had sent to the Government the Report on the Customs (Import Licensing) Regulations, and in November 1979 reported that it would be "well into 1980" before the remaining matters were concluded. In June 1980 the Attorney-General advised that the report, which deals with import control generally, was under consideration.
3. A.C.T. Sale of Motor Vehicles Ordinance: powers of registrar to determine disputes: undertaking given 20 October 1977. The promised review of the ordinance has not been completed, but the responsible Minister has assured the Committee that the provisions in question are not being used. In September 1979 the Minister reported that amendments were being drafted.
4. Dried Fruits Export Control (Licences) Regulations: review of licensing decisions: undertaking given 28 March 1979. The Minister undertook to review all other primary industry licensing regulations, and some amendments of these have appeared. In April 1980 the Minister advised that the review was proceeding and that the main amendments were being drafted.

## B Given since the 66th Report

1. A.C.T. Poisons and Narcotic Drugs Ordinance: offences and penalties: undertaking given 19 July 1979. The responsible Minister undertook to amend some provisions of the Ordinance and review others. In March 1980 he advised that amendments were being drafted.
2. A.C.T. Fuels Control Ordinance: powers of entry and search: undertaking given 9 October 1979. The Committee agreed that the amendments might be postponed pending a complete review of the Ordinance by the Department of the Capital Territory and the A.C.T. House of Assembly.
3. Norfolk Island Regulations: power of Parliament to disallow regulations not made by the local responsible executive: undertaking given 9 October 1979. In May 1980 the Minister advised that the amendments were being drafted.
4. Cocos (Keeling) Islands Immigration Ordinance: entry of persons into the Territory: right of appeal: undertaking given 1 June 1979. In September 1980 the Minister for Home Affairs advised that the Ordinance would be redrafted in the light of the recommendations of the Administrative Review Council.
5. Cocos (Keeling) Islands Postal Services Ordinance: power of Parliament to disallow by-laws: undertaking given 22 October 1979. The Minister also undertook to amend the provisions relating to the opening of mail when the amendments of the Postal Services Regulations appear.
6. Overseas Students Charge Collection Regulations: question of appeals to be reviewed by the Administrative Review Council: undertaking given 17 May 1980.
7. A.C.T. Flammable Liquids Ordinance: onus of proof: undertaking given 6 May 1980.

APPENDIX 2

LIST OF RECOMMENDATIONS CONTAINED IN  
REPORTS (OTHER THAN THOSE FOR AMENDMENT  
OR REVIEW OF PARTICULAR REGULATIONS AND ORDINANCES)

1. The Acts Interpretation Act should be amended to remove the uncertainty about the position of a notice of motion for disallowance remaining on the Senate notice paper at the end of a Parliament when the House of Representatives is dissolved but the Parliament is not prorogued (50th Report, December 1974).
2. A statutory provision to the same effect as section 12(6) of the Seat of Government (Administration) Act should be applied to instruments made under Acts of the Parliament, so that the disallowance of a repealing instrument would revive the repealed provisions, and so that the present doubtful position with regard to the effect of disallowance and repeal would be clarified (66th Report, June 1979).<sup>1</sup>
3. The Senate Standing Committee on Constitutional and Legal Affairs should investigate the matter of statutory provisions imposing the burden of proof upon defendants in criminal cases (66th Report, June 1979).<sup>2</sup>
4. All statutes providing for the disallowance of statutory instruments should be amended so as to incorporate the provisions in the Acts Interpretation Act relating to the voiding of instruments not tabled in time, the "automatic" disallowance if a notice of motion is not resolved within a limited time, the opportunity for renewal of a notice of motion unresolved at the end of a session, and the prohibition upon the making of an instrument the same in substance as a disallowed instrument within six months (68th Report, November 1979).<sup>1</sup>
5. The Senate Standing Committee on Constitutional and Legal Affairs should investigate the matter of the alteration of important entitlements by regulation (68th Report, November 1979)<sup>2</sup>
  - 1 This report is now overdue for a Government response in accordance with the undertaking relating to responses to Committee reports.
  - 2 That Committee has been asked to consider these matters at its convenience.