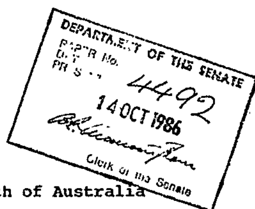


The Parliament of the Commonwealth of Australia

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

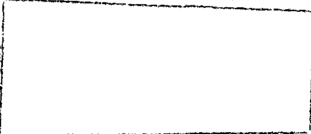
EIGHTIETH REPORT

October 1986

Application of the Committee's Principles

Reform of the Acts Interpretation Act

Legislation Considered 1985-86



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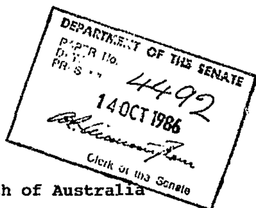

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SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

Members of the Committee

THIRTY-FOURTH PARLIAMENT

First Session

Senator B. Cooney (Chairman)[1]
Senator A.W.R. Lewis (Deputy-Chairman)[2]
Senator The Hon. Sir John Carrick[3]
Senator J. Coates[4]
Senator P. Giles[5]
Senator M.C. Tate[6]
Senator A.E. Vanstone[7]
Senator The Rt. Hon. R.G. Withers[8]
Senator A.O. Zakharov[9]

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1 Appointed 26 February 1985; elected Chairman 14 November 1985.
2 Appointed 26 February 1985; elected Deputy-Chairman 14 November 1985.
3 Appointed 26 February 1985; discharged 19 February 1986.
4 Appointed 26 February 1985.
5 Appointed 11 September 1985.
6 Appointed 26 February 1985; discharged 14 November 1985.
7 Appointed 26 February 1985.
8 Appointed 19 February 1986.
9 Appointed 26 February 1985; discharged 11 September 1985.

PRINCIPLES OF THE COMMITTEE

(Adopted 1932: Amended 1979[1])

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.

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1 Sixty-Fourth Report, March 1979, Parliamentary Paper No. 42/1979.

CHAPTER 1

SUMMARY OF COMMITTEE'S WORK
AUGUST 1985 - JUNE 1986

Introduction

1.1. This is the Eightieth Report which the Committee has presented to the Senate since its establishment in 1932. It is therefore a somewhat more detailed report than usual as it is hoped that it may serve as a source of general reference about the work of the Committee.

1.2. Senate Standing Orders provide that all delegated instruments of a legislative character, made under Acts of Parliament and subject to disallowance by resolution of the Senate, stand referred to the Committee for consideration and if necessary report. The Committee scrutinises each such instrument to ensure that it does not infringe the Committee's bipartisan Principles concerning personal rights and legislative propriety.

1.3. During the period under consideration, the Committee held 33 private meetings, including 3 *in camera* hearings where public service and statutory authority witnesses gave evidence. The Minister for Health, the Hon. Dr Neal Blewett M.P., attended one of these hearings, the first time in the Committee's 54 year history that a Minister has done so (see page 56).

Legislation Considered

1.4. In the light of advice given in some 65 legal reports from its Legal Adviser, Professor Douglas Whalan of the Australian National University, the Committee considered the following 857 instruments of delegated legislation -

Instruments	Total
Statutory Rules	429
A.C.T. Ordinances	63
A.C.T. Regulations	18
Other Territory Ordinances	21
Public Service Board and Teaching Service Determinations	108
Defence Determinations	83
Telecommunications By-laws	24
Postal By-laws	5
Australian Meat and Live-stock Orders	17
Export Control Orders	19
Fisheries - Plans of Management	5
Fisheries Notices	7
Navigation Orders	8
Fees Determinations	28
Remuneration Tribunal Determinations	8
Other Determinations	1
Health Determinations	3
Declarations	2
Other Notices	2
Directions	2
Amendments to Schedules	1
Other Orders	2
Rules	1

1.5. A large variety of instruments came before the Committee. Each instrument in turn was tested against the requirements of the Committee's Principles. Most did not infringe these guidelines. However, 73 pieces of legislation (some 10 per cent of the more substantial instruments scrutinised) prompted the Committee to write to the relevant Minister for either an explanation and an assurance that the instrument did not infringe rights or an undertaking to make amendments to protect rights which it did infringe.

1.6. Of these 73 instruments -

- 2 were disallowed by effluxion of time, the first and second such occurrences in the Senate's history[1];
- 32 matters were disposed of following receipt of written explanations and assurances from Ministers which allayed the Committee's concerns;
- 31 matters were settled after Ministers gave undertakings, subsequently reported to the Senate, to amend offending provisions to ensure that rights were protected; and
- 8 matters were still outstanding when the Senate rose on 13 June 1986.

Significant Undertakings

1.7. Of those matters where ministerial undertakings were given, some were highly significant, including undertakings -

- to restore a defendant's right to a jury trial in the prosecution of certain offences against property, conviction for which could seriously affect a person's career and reputation (see page 66);
- to remove provisions empowering magistrates and justices of the peace to issue search warrants <u>by telephone</u> (the Committee considered that <u>only</u> superior court judges should exercise the remarkable power)(see pages 84 and 112);
- to amend an Ordinance dealing with Acquired Immune Deficiency Syndrome to ensure that a statutory defence granted to the Red Cross, doctors and hospitals did not extend to protect the negligent performance of medical procedures associated with blood donation and transfusion (see page 55);

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1 <u>New South Wales Acts Application Ordinance 1985</u> (deemed to be disallowed on 28 November 1985), and the Health Insurance Regulations (Amendment) (S.R. 1986 No. 290) (deemed to be disallowed on 10 April 1986).

- to amend regulations under the First Home Owners Scheme which would have allowed one Department to give to other Departments unrestricted access to private and personal information about individuals, which had been collected by the first Department in the administration of the Scheme (see page 93); and

- in connection with a wide range of instruments, to provide criteria for official decision-making; to provide that reasons for decisions and notices of appeal rights be given; and to provide that discretionary decisions of officials be subject to a right of appeal, usually to the Administrative Appeals Tribunal.

Special Committee Reports

SEVENTY-SIXTH REPORT

1.8. During the period August 1985 to June 1986 the Committee tabled 3 special reports dealing with particular items of legislation. The Seventy-sixth Report[2] discussed the Committee's consideration of the New South Wales Acts Application Ordinance 1985 which was disallowed by effluxion of time on 28 November 1985, (the first such disallowance in the Senate's history). The Ordinance repealed a very large number of N.S.W. Acts in their application to the A.C.T. However, the names of the repealed Acts were not listed in the text of, or in a schedule to, the Ordinance. It was, therefore, impossible for either House of Parliament, by means of a disallowance motion, to prevent the repeal of any particular Act which should not have been repealed, without at the same time possibly preventing all of the repeals collectively. The Committee considered that an Ordinance which presented Senators with such a dilemma infringed Principle (a) of its terms of reference in that it was not in accordance with its enabling statute (see also page 28).

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2 Parliamentary Paper No. 507/1985.

SEVENTY-EIGHTH REPORT[3]

1.9. The Committee's Seventy-eighth Report criticised aspects of the A.C.T. Artificial Conception Ordinance 1986 although the Committee did not recommend that the instrument be disallowed. The Ordinance dealt with the question of the parentage of artificially conceived children. However, it did not provide for a range of consequential ancilliary issues thus resulting in some uncertainity in its operation. The Committee recommended that, in future, legal consequences arising from biological procedures should be determined, not by delegated legislation, but by enactment in Parliament.

SEVENTY-NINTH REPORT

1.10. The Seventy-ninth Report concerned Health Insurance Regulations and was one of the most significant reports tabled by the Committee in recent years. Although designed to permit transfer of personal identification information from the Health Insurance Commission to the Department of Social Security to assist with that Department's fraud prevention measures, the Regulations made it lawful for the Commission to give the Department access to all of the information held by the Commission, including confidential medical records accumulated over many years relating to millions of insurance claimants. While it appeared that there was no intention to release such information, the regulations infringed the Committee's Principles by making lawful what could in practice have amounted to a gross and undue invasion of privacy. The regulations were, with the Minister's agreement, disallowed by effluxion of time without debate, the second such automatic disallowance in the Committee's history. The Minister for Health decided that, in the light of the Committee's criticism, he would

3 The Seventy-Seventh Report was a general report similar in kind to this one.

not oppose disallowance but would instead prepare amended legislation which would more directly take into account the Committee's Principles.

Delegated Legislation Conference

1.11. During the year a sub-committee of the Committee attended the Inaugural Conference of Australian Subordinate Legislation Committees, held in Brisbane from 4 - 6 June 1986 under the auspices of the Subordinate Legislation Committee of the Queensland Parliament. The Committee members made important contacts with members of other committees from Australia, Canada, Zambia and Zimbabwe. The touchstone of legislative scrutiny committees is their bipartisanship. The Conference provided an opportunity for members to share knowledge and experiences and thereby to reinforce their bipartisan objectives in the cause of protecting personal rights and liberties from deliberate or inadvertent erosion by the State.

Standing Orders

1.12. The Senate agreed by resolutions on 14 April 1986 and 30 May 1986 that for the remainder of the current parliamentary session the Committee would be empowered to move from place to place and, while its membership remained at 6, its quorum for meetings would be reduced to 3.

Senator Missen

1.13. Finally, in this overview of the year, the Committee records its sadness at the untimely death, on 30 March 1986, of Senator Alan Missen, a former Chairman of the Committee and of the Commonwealth Delegated Legislation Committee. Senator Missen's commitment to the protection of personal rights and liberties from

undue erosion by executive law-making, ensured that his tenure of office was an inspiration to those who followed him. As far away as the the Canadian Senate a fine tribute was paid to the Senator by Senator John M. Godfrey Q.C. a former Joint Chairman of the Canadian Joint Committee on Regulations and Other Statutory Instruments. As a mark of respect and esteem, the Chairman of the Senate Committee obtained leave to incorporate this Canadian tribute in the Senate Hansard of 8 May 1986.

CHAPTER 2

POWERS OF DISALLOWANCE

Introduction

2.1. The major legislative basis of the Senate's power of disallowance is provided by Part XII of the Acts Interpretation Act 1901 (the Act).

2.2. Paragraph 48(1)(c) provides that regulations shall be tabled in each House of Parliament within 15 sitting days of being made[1]. Without this formal alerting process Parliament's position as the origin of all legislative authority could be overlooked and ultimately ignored. Therefore, sub-section 48(3) provides that regulations which are not properly tabled "shall be void and of no effect".

2.3. Sub-section 48(4) provides that if either House passes a resolution of disallowance, the regulations "shall thereupon cease to have effect". Sub-section 48(5) ensures that a motion of disallowance cannot be adjourned indefinitely. It provides that unless the motion is withdrawn or defeated within 15 sitting days of notice being given, the regulations shall be deemed to have been disallowed by effluxion of time. Sub-section 48(5A) provides that if a motion of disallowance has not been disposed of before a House is dissolved, the regulations are deemed to have been retabled when the House next sits.

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1 There have been suggestions that 15 sitting days, while a period well suited to the horse and buggy days of the past, is now too long a delay in notifying Parliament of the making of delegated legislation. The Committee has, as yet, no concluded view on this.

2.4. Sub-section 48(6) provides that disallowance has the same effect as a repeal. Sub-section 48(6) and section 50 together have the effect that disallowance shall not affect rights already accrued or liabilities already incurred. Sub-section 48(7) provides however, that the disallowance of regulations which repeal other regulations, will revive those repealed regulations in order to prevent an hiatus arising from disallowance. Section 49 provides that, for 6 months after disallowance, no regulations can be made in substitution for those disallowed, unless the disallowing House has, by resolution, agreed to them being made.

2.5. The Seat of Government (Administration) Act 1910, provides almost identical powers of disallowance of A.C.T. legislation. Other federal legislation which permits the making of instruments other than regulations, for example determinations and orders, almost always expressly applies some of the provisions of Part XII of the Act to those instruments.

2.6. Where they apply in full, these provisions are, *prima facie*, a formidable battery of protections which enable each House to exercise over instruments the kind of veto which it can exercise over primary legislation which confers rule-making powers. It is logical and proper that a House should possess such powers. Indeed it might even call into question the practical sovereignty of a House if it did not expressly take such a power to itself.

2.7. Contemporary federal parliamentarians still acknowledge the wisdom and prescience of the first generation of federal politicians who, in the 1904 Acts Interpretation Bill, recognised that disallowance was the only effective means which a House could use to ensure that Executive law-making was subject to accountability and control in Parliament.

2.8. Provisions of the Act have been refined from time to time. However, in spite of its advantages, the present Acts Interpretation Act contains a number of significant limitations which could result in the infringement of personal rights and the undermining of parliamentary supervision of legislation.

Retrospectivity

2.9. Sub-section 48(2) of the Act provides that regulations shall be void if they are "expressed to take effect" from a date before their gazettal and by doing so retrospectively prejudice the interests of a person other than the Commonwealth. The High Court in Australian Coal and Shale Employees' Federation v Aberfield Mining Co. Ltd. (1942), 66 C.L.R. 161 gave this sub-section an extremely literal interpretation by emphasising the significance of the words "expressed to take effect". When it considered this matter in its Seventy-seventh Report (March 1986) the Committee noted:

> ".... a regulation which would be void if expressed to take effect from a date earlier than notification could achieve the same retrospective effects with simple alteration to the drafting. Thus sub-section 48(2) of the Acts Interpretation Act does not achieve what Parliament undoubtedly intended it should achieve - the proscription of retrospectivity in delegated legislation by regulations where prejudice to individuals will result." (paragraph 21)

2.10. The Committee also warned that:

> ".... until sub-section 48(3) is amended it is difficult for [the Committee] adequately to scrutinise delegated legislation which is retrospective in operation, when that retrospectivity is artificially distinguished *from other retrospectivity .... regardless of* the identical nature of the consequences".

2.11. In that Report the Committee stated that it had corresponded with the Attorney-General about amendments to the Act. Since then the Attorney-General has tentatively proposed a non-statutory administrative procedure, details of which could be announced in Parliament, under which a senior official of his Department would provide a "certificate stating whether a proposed statutory rule appears, without clear and express authority conferred by the Act under which [it] is made, to have a retrospective effect". This administrative procedure was preferred to amending the Act because the role of the Attorney-General's Department in drafting regulations for other Departments was itself based on administrative arrangements.

2.12. This proposed administrative scheme has a legislative precedent in sub-paragraph 13(3)(b)(i) of the Victorian Subordinate Legislation Act 1962 which provides that a proposed statutory rule is not to be submitted to the Governor unless it is accompanied by written advice from the Chief Parliamentary Counsel as to whether it appears to have a retrospective effect without there being clear and express authority for this under its enabling Act.

2.13. It is to be noted that these methods of dealing with retrospectivity do not make a prejudicially retrospective instrument void, although the Victorian practice has the advantage that it is securely founded on a legislative provision which is precise and certain, and therefore beyond the exigencies of administrative expediency.

2.14. Because of the complexity of the modern regulatory environment, it is not realistic to outlaw all retrospectivity in delegated legislation. However, it should be possible, and it is certainly preferable, to legislate to prohibit regulatory retrospectivity which is prejudicial to the rights and interests of individuals unless this is expressly authorised by statute. It is no

answer to the otherwise real risk of injustice to say that screening by Government lawyers will prevent it, and, in any event, the Regulations and Ordinances Committee will always ensure that retrospective legislation is carefully scrutinised. In examining almost 900 instruments annually, the Committee and its Legal Adviser operate under great pressure. The Committee responds to that pressure and does its utmost to discharge its responsibilities to the Senate. Nevertheless, retrospective effects can be concealed in relatively innocuous or highly complex legal language, the effects of which become evident in practice.

2.15. In this respect the Committee should not be viewed as an ultimate guarantor of the individual's right to be protected from the prejudicial consequences of a ministerially decreed retrospectivity. The Committee cannot protect such a right. It can be protected adequately only by operation of law. With a resolution of the Senate, the Committee may assist in releasing a person from the future effects of a trespass on rights. However, there will be circumstances where disallowance of retrospective legislation will not protect a person from the consequences of liabilities which have been retrospectively incurred up to the date of disallowance. Only the operation of law can adequately protect such a person by invalidating retrospective liabilities <u>ab initio</u>.

2.16. The Committee does not doubt that internal administrative procedures already exist to check draft legislation, and identify and remove prejudicial retrospectivity from it. Indeed, the <u>legislative</u> entrenchment of a revised administrative check, conducted at a senior level and similar to that operating in Victoria, would be a very important addition to the protection of individual rights

from encroachment by retrospectivity. The Committee encourages the Attorney-General to proceed with such a reform.

2.17. However, that alone will not remove the need for an amendment which would have the effect of expressly invalidating that part of a provision which has a retrospectively prejudicial effect. Until this is in place the strong possibility exists that that prejudicial retrospectivity may at some time cause a serious trespass on individual rights. The Committee therefore repeats the recommendation it made in paragraphs 23 and 24 of its Seventy-seventh Report and again urges the Attorney-General to amend sub-section 48(2) of the Acts Interpretation Act to remove the possibility.

Partial Disallowance

2.18. Since 1957, the Seat of Government (Administration) Act 1910 has provided that part of an A.C.T. Ordinance may be disallowed. A part can include a word or a figure. In spite of repeated requests from the Committee, and at least one ministerial undertaking to address the question[2], this power had not yet been included in the Acts Interpretation Act and extended to federal regulations. In its Seventy-seventh Report the Committee, reporting on its latest attempts to persuade the Attorney-General to amend the Act, said:

> "In the interests of legislative scrutiny the Committee considers that Parliament should extend the scope and precision of its disallowance powers ...." (paragraph 30)

2.19. At present nothing less discrete than a single regulation can be disallowed. (See Victorian Chamber of Manufactures v The Commonwealth (Women's Employment

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2 See the Committee's Seventy-third Report (December 1982) where it was reported that the then Attorney-General intended to act. There was a change of Government before he could act.

Regulations) (1943), 67 C.L.R. 347 at 360.) With the increasing complexity of modern government a single amending regulation can often be long and detailed. Should one part of that amendment not meet with the approval of Parliament, a successful disallowance motion would obliterate the entire provision. (See, for example, the Superannuation (Salary) Regulations (Amendment) discussed below at page 116.) The right partially to disallow a federal regulation is not yet available to the Parliament and indeed the Executive may be reluctant to trust Parliament with a power over regulations similar to that which it enjoys over Acts and Ordinances. Yet when it passed the Acts Interpretation Act three years after Federation, the Parliament regarded itself as responsible enough to exercise large powers of disallowance to which the lesser power of partial disallowance is clearly incidental and ancilliary.

2.20. It is no answer to the Committee's quest for a partial disallowance power to argue that a reckless exercise of such power could have serious consequences for government policies and public administration, particularly where financial entitlements and liabilities are involved. Parliament is not a reckless institution. It is the sovereign source of national legislative power to which all other power is ultimately subordinate. If a House of a democratically elected Parliament cannot be trusted by the Executive to use a partial disallowance power with responsibility and in the national interest, then the Executive might appear in some eyes to be calling into question the value of democracy itself. If a Minister considers that partial disallowance of a regulation, of which notice has been given, will seriously distort the way in which that regulation will operate and will thereby undermine the national interest, he or she can demonstrate that in Parliament. There can be no doubt that if the Minister's assessment is accurate such a disallowance motion will be overwhelmingly defeated.

2.21. It may be that, before a successful motion for partial disallowance becomes effective, the Minister should have an opportunity, under the Act, to withdraw or repeal a provision which would otherwise be partially disallowed. The Committee has no concluded view on this aspect. Such an amendment would require careful drafting to ensure that the expression of parliamentary dissent which a disallowance motion represents was not frustrated by the consequences of the repeal or withdrawal.

2.22. The Committee will report to the Senate on the progress of its discussions with the Attorney-General before it, as a Committee, endorses any particular proposals to provide for partial disallowance.

Tabling of Instruments

2.23. Under the Acts Interpretation Act (the Act), provision is made for delegated legislation to be laid before each House. This reflects the significance of the tabling procedure as an aspect of the relationship between the Parliament and the Executive. Gazettal of a law made under powers delegated by Parliament, while of importance for the official promulgation of that law, is not a proper notification to the sovereign legislature that its delegated law-making authority is being exercised. The act of tabling alerts and informs the Parliament. It also reinforces Parliament's role as the originator of delegated powers and the scrutineer of their use.

2.24. However, for the purposes of applying the disallowance provisions of Part XII of the Acts Interpretation Act, tabling is not strictly necessary. The Senate may disallow an instrument that has not been tabled. In any event a Senator who obtains a copy of a disallowable instrument may table it and the Senate may disallow it. In <u>Dignan v Australian Steamships Pty. Ltd.</u> (1931), 45 C.L.R. 188, the High Court established these

propositions. Although the relevant provisions of the Act have been changed somewhat, the Attorney-General's Department advised the Clerk of the Senate that Dignan "should still be regarded as authority".[3]

2.25. However, although tabling is not a condition precedent to the exercise of disallowance powers, it is a condition precedent to the continued validity of the legislation itself. Yet under the Act, delegated legislation can validly operate for a lengthy period of time even if it is never tabled. This arises because, although a failure to table has the effect of making the instrument "void and of no effect", that merely means it is to have the same effect as a repeal (sub-sections 48(6) and (7)). Under section 50 of the Act, a repeal shall not affect liabilities and obligations already incurred up to the repeal. It is therefore possible for the Executive to make delegated legislation which will be effective for 15 sitting days after being made and, on the 16th sitting day, make a fresh instrument repeating the cycle thereafter indefinitely. For each period of 15 sitting days the non-tabled instrument will have full effect and section 50 will ensure continuing effects.

2.26. Prior to the making of certain amendments to the Acts Interpretation Act by the Statute Law (Miscellaneous Provisions) (No. 1) Act 1982, this device could not have been used because under the pre-1982 Act if an instrument was not tabled within 15 sitting days it was deemed to be void and of no effect ab initio. It may be that the Parliament, when it passed these amendments, did not fully appreciate the significance of this change or foresee the opportunity which it created for parliamentary scrutiny to be by-passed.

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3 See J. R. Odgers, Australian Senate Practice, Canberra 1976, page 452.

2.27. When it raised this matter with the Attorney-General on 19 March 1986 the Committee cited a worst possible scenario when it wrote:

> "Inadequate scrutiny can also arise in the event of a double dissolution of Parliament. Fourteen sitting days prior to such a double dissolution a Minister could make an objectionable instrument under delegated powers with neither the intention nor the practical obligation to table it. Such an instrument could operate for as long a period as 4 months, for example, during the period of an election campaign and thereafter until the new Parliament sat. Not having been tabled, the instrument would cease to have effect on the 16th sitting day after being made. However, actions taken under the regulations, affecting rights, or imposing liabilities, would not be affected by the failure to table. On the 16th sitting day an identical instrument could be made, again with no intention or practical obligation that it be tabled. Once more this instrument, possibly infringing basic principles of liberty, could operate in lawful effect until the 16th sitting day after it was made. It is thus possible, as a consequence of amendments made in a Statute Law Bill, for the Executive, without legal impediment or penalty, indefinitely to by-pass the scrutiny and sanction of Parliament in the process of making delegated legislation. Such legislation could of course abrogate or affect fundamental personal rights and liberties. While it may be most improbable that a Government or individual Ministers would, in all conscience, attempt a manoeuvre of this kind, the possibility appears to exist that effective parliamentary scrutiny, dependant as it is under the Acts Interpretation Act on the procedure of tabling, could be set at naught."

2.28. When consideration is given to the scope of regulatory power, it will be recognised that any misuse of the tabling requirement could be a serious impediment to Parliament's supervision of Executive law-making. The Committee awaits the comments of the Attorney-General on this important question.

PROCEDURE IN THE RECESS

2.29. Although not exactly a case in point, the World Cup Athletics (Security Arrangements) Ordinance 1985, discussed below at page 122, is an illustration of what can happen when there is no obligation to table an instrument before it comes into operation.

2.30. It may be that consideration should be given to a legislatively based procedure whereby instruments made when Parliament is not sitting, should be delivered to the President of the Senate who, on a recommendation from the Committee (which can sit during the recess) would invoke a legal mechanism which, except in cases of certified necessity, would cause the operation of the instrument to be suspended until it had been considered by the Senate. Clearly, the Committee would avail of such procedures only where the urgent suspension of an instrument was necessary to prevent a trespass on personal rights and liberties or to prevent a serious abuse of delegated law-making powers. Prior consultations with the relevant Minister would be likely to result in the repeal or amendment of the instrument on the Minister's own initiative before any such mechanisms were invoked. Procedures somewhat similar to this operate in Victoria and Tasmania.

Revival of Instruments

2.31. In its Seventy-sixth Report (December 1985)[4] the Committee indicated that amendments made to the Seat of Government (Administration) Act 1910 by the Statute Law (Miscellaneous Provisions) (No. 1) Act 1982, may have restricted the circumstances in which disallowance of a repealing Ordinance will revive laws repealed by that Ordinance. Previously, disallowance of a repealing

4 Parliamentary Paper No. 507/1985.

Ordinance would have revived any law which it had repealed. Since 1982, it appears that there is revival only of another repealed Ordinance, although, from time to time, Ordinances do repeal laws such as N.S.W. Acts in force in the A.C.T. Unless a comprehensive revival rule operates, disallowance of an Ordinance which repeals laws may cause an hiatus by creating legal gaps which were previously filled by a repealed N.S.W. law which does not revive on disallowance of the Ordinance. The loss of both the Ordinance and the repealed law can leave a void which only statutory intervention or possibly the operation of common law principles, may fill. The absence of revival may therefore be an unnecessary and improper deterrent to disallowance of Ordinances which unjustifiably repeal laws.

2.32. In its Report, the Committee recommended that the disallowance of an instrument which repealed or terminated another law should result in revival of that repealed or terminated law. This was the situation under common law which may have been superseded by provisions in the Acts Interpretation Act and the Seat of Government (Administration) Act. In its Sixty-sixth Report (June 1979)[5] the Committee strongly recommended that common law principles of revival should apply to the disallowance of a repealing instrument. Amendments made by the Statute Law Act in 1982 were intended to implement this recommendation but they may not have done so.

2.33. On 19 November 1985, the Attorney-General gave the Committee an undertaking that he would write to the Minister for Territories, who is responsible for administering the Seat of Government (Administration) Act, to suggest that that Act be amended "as a matter of

5 Parliamentary Paper No. 116/1979, page 3.

high priority" to provide that disallowance of an Ordinance which repeals a N.S.W law in force in the A.C.T. will revive that law.

2.34. The Committee continues to await progress on this important matter. However, in the interim, the Attorney-General has given the Committee undertakings to the effect that, should the Senate disallow particular Ordinances which repeal laws other than other Ordinances, he will by express re-enactment revive those other laws in order to overcome the apparent inadequacy of the 1982 amendments. In the event, the Senate did not move to disallow these Ordinances (the Perpetuities Ordinance 1985 and the Limitation Ordinance 1985). The Committee commends the Attorney-General for these undertakings and urges that priority be given to amendments to provide for revival of laws repealed by disallowed instruments.

Repeal and Re-enactment of Instruments

2.35. Revival rules are intended to avoid an hiatus where the Senate disallows a repealing instrument. The rules also protect the Senate from the deterrent effects of contemplating such an hiatus if it desires to disallow in order to express its dissent. However, the current revival rules and the Senate's inability to practice partial disallowance could, in practice, perpetuate the intimidating effects of a non-revival rule.

2.36. If a Minister desires to avoid disallowance of a legislative instrument which may trespass on personal rights and liberties in a fashion and to a degree that would offend against the Committee's principles, he or she may simply make the instrument and then repeal and remake it. Disallowance of the second repealing instrument would merely revive the first. If the repealing instrument is drafted in such a way as to incorporate, in a single regulation, both the repealing

provision and the remade provisions, then, in the absence of a power of partial disallowance, a successful disallowance motion would disallow the whole regulation, including the repeal. The result would be that the remade provisions would fall but the original instrument would revive.

2.37. The Committee does not consider that any Minister would deliberately adopt such a course for the express purpose of by-passing parliamentary scrutiny. However, the Committee can neither guarantee the future nor underwrite the propriety of every administration. There may arise circumstances of intense political controversy where the temptations of administrative expediency could overcome the instincts of parliamentary propriety. This anxiety is compounded by the fact that repeal and re-enactment is an option open to statutory authorities and other delegated law-makers over whose activities a Minister answerable to Parliament has a limited degree of control.

2.38. The Committee considers that an amendment to the Acts Interpretation Act, the Seat of Government (Administration) Act and other Acts which independently of those Acts provide for disallowance procedures, should be made as a matter of urgency to provide the Parliament with partial disallowance powers in order to deal with the repeal and re-enactment of legislation which could otherwise undermine the role of the Committee.

Conclusion

2.39. The Federal Parliament's power to control executive law-making rests exclusively on the terms of the Acts Interpretation Act 1901, the Seat of Government (Administration) Act 1910 and other Acts which apply provisions from these Acts or independently provide for disallowance. During the past year the Committee's scrutiny of legislation has continued to reveal that

these provisions do not provide an adequate legislative foundation for the protection of personal rights and liberties and the preservation of legislative and parliamentary proprieties. The provisions must be amended urgently if it is still to be claimed that Executive law-making is in practice subordinate to and controlled by a supreme parliamentary institution.

2.40. It might be argued that the integrity and good sense of the Executive will, with effective administrative measures, minimise problems associated with retrospectivity, non-tabling, non-revival, or repeal and re-enactment, without the need for comprehensive legislative changes. It may also be argued that partial disallowance powers could create too great a degree of uncertainty in the operation of delegated legislation during the potential disallowance period. The Committee does not accept that such arguments answer its concerns about the long term effectiveness of the current Acts Interpretation Act.

2.41. Effective administrative scrutiny procedures are essential to enhance the ultimate quality of executive law. However, mere administrative changes are not an effective substitute for the precision, the certainty and the security which adequately drafted legislative amendments could introduce into a very important aspect of parliamentary government which has become imprecise, uncertain and insecure. No Executive which respects the sovereignty of Parliament will hesitate to introduce carefully drawn legislation to make parliamentary scrutiny of delegated legislation properly effective. No Executive should place the requirements of power and the needs of administrative expediency above the rights of Parliament.

2.42. Prudence suggests that what the law says can happen will eventually happen. This insight was the rationale for the Committee's strong reaction to the Health Insurance Regulations (Amendment) which theoretically would have made gross intrusions into the medical privacy of millions of people quite lawful (Seventy-ninth Report). Although neither the Minister nor any of his officials intended that this should occur, it could lawfully have occurred. Nothing but disallowance of the regulations could guarantee that it would not occur. Nothing but proper amendments to the Acts Interpretation Act will guarantee that the present flawed provisions will not at some time be abused.

2.43. Administrative resistance to these reforms would be most regrettable. Without them grave injustice may be done to individuals whose rights, at some time in the future, will be perhaps unintentionally removed in circumstances which are beyond the capacity of the Senate to control without express remedial legislation passing both Houses of Parliament. The Committee respectfully urges the Senate and the Attorney-General to give serious consideration to the issues raised in this chapter.

CHAPTER 3

THE COMMITTEE AND ITS PRINCIPLES

Introduction

3.1. In Chapter 4 of this Report the Committee describes its scrutiny of each instrument of delegated legislation which, during the period under review, gave rise to correspondence from it to Ministers. Matters were considered by the Committee because instruments either appeared expressly to infringe the Committee's principles or appeared to affect the Committee's capacity to scrutinise legislation effectively. The Committee tests legislation by reference to four technical criteria of legislative and legal propriety which are set out at page vi. In applying these Principles the Committee considers these questions:

- Is the instrument in accordance with its enabling statute?
- Does it trespass on personal rights and liberties?
- Are administrative decisions under it subject to independent merits review?
- Should its subject matter more properly appear in an Act of Parliament?

3.2. The principles were adopted by the Committee in 1932[1] having been postulated as Principles of scrutiny in the Report of the Select Committee of the Senate on the Standing Committee System, which led to the establishment of the Committee[2]. Two amendments were made by the

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1 First and Fourth Reports, Parliamentary Paper No. 188/1969.

Committee in 1979[3], firstly to take account of the existence of the Administrative Appeals Tribunal as the most likely forum for independent merits review and secondly to take account of the fact that A.C.T. Ordinances could not be confined to purely administrative details. Apart from these two consequential adjustments of perspective, the essence of the Committee's Principles have survived undiluted in spite of over 50 years of unforeseeable legislative and administrative evolution. The Committee's terms of reference, stated with the generality of Principles, represent a remarkable distillation of the varied problems which can arise in delegated instruments to threaten the rights of individuals or the supremacy of Parliament.

3.3. Under its Principles the Committee is not concerned with the merits of legislation. The policy goals which an instrument seeks to achieve are chosen by the Executive and are a matter for the relevant Minister. Such choices may reflect the political objectives and priorities of the Government. These objectives may occasionally be controversial. None of this is of any concern to the Committee. It is traditionally and distinctively a non-partisan Committee and can be so because it applies agreed technical standards of propriety which for much more than the 54 years of the Committee's existence, have been common currency with Australian parliamentary parties because they broadly reflect the doctrine of parliamentary sovereignty, the maxims of natural justice and the principles of the common law. As a consequence of this bipartisanship the Senate has never defeated a motion moved by the Committee for the disallowance of delegated legislation. The Committee's application of

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2 Journals of the Senate, Session 1929-31, Vol. 1, page 541.

3 Sixty-fourth Report, Parliamentary Paper No. 42/1979.

its principles has reflected the technique of the common law. In its Seventy-sixth Report the Committee stated (at page 25):

> "The Committee's Principles represent a miniature codification of the Committee's remit. The Principles have lent themselves to creative, interpretive processes akin to those of the common law technique. Senators over the past 50 years have interpreted and applied the basic principles to meet the successively new demands which delegated legislation places on the ideals of parliamentary democracy and civil liberty .... Seen in this light the Principles are not static and unchangeable. They are dynamic and have been extended by courageous and imaginative application to meet the problems inherent in the necessary delegation of law-making powers to the Executive and the bureaucracy."

3.4. In application the content of the Principles has evolved, matured and sharpened as public administration has developed and executive law-making has become more sophisticated and widespread. Since 1932 the Committee has responded to this evolution. Throughout its history the Committee has never considered that delegated legislation contained any threat to personal rights or parliamentary sovereignity which was so unforeseeable and novel that it fell outside the scope of its four Principles. Nor will the Committee yield to any suggestion that a subordinate instrument, which expressly or impliedly infringes the Committee's Principles, should escape condemnation because it is the policy of the Government to achieve an objective by means which are expressly at variance with the Committee's Principles. This must be so since the Committee, through the application of its Principles, is involved in advising the Senate on the protection of personal rights and liberites, and parliamentary proprieties which. In applying its Principles the Committee will not accept that it is the policy of the Executive to so use

delegated legislation as to expressly negate those Principles. Such legislation will, by definition, infringe the Committee's Principles.

3.5. In its Seventy-ninth Report the Committee noted that there had been a suggestion that it was the Government's policy for regulations to make it lawful for the Health Insurance Commission to transfer to the Department of Social Security, any information, including confidential computer coded medical details on millions of individuals. There was, of course, no such policy which the Committee could recognise in the delegated instrument.

3.6. The instruments discussed in Chapter 4 of the Report reveal the variety of threats to rights which delegated legislation can convey. In isolation, they may not cause great concern. Viewed in toto however, and without the intervention of a scrutiny committee, they have an accumulative effect which, over a long period, could seriously undermine important rights and freedoms. They also demonstrate the continued resilience of the Committee's Principles as templates of propriety. As such the Committee hopes that Ministers and legal drafters will take note of the pitfalls to avoid.

(a) IS DELEGATED LEGISLATION IN ACCORDANCE WITH THE STATUTE?

Impediments to Disallowance

3.7. The most important recent example of the Committee's application of Principle (a) was made the subject of its Seventy-sixth Report (December 1985), on the disallowance of the New South Wales Acts Application Ordinance 1985. This Ordinance repealed over 100 N.S.W. Acts as they applied in the A.C.T. but did so by means of an omnibus clause and without identifying the Acts in a Schedule. Without a list setting out each of the repealed Acts it

was impossible for the Senate to dissent from and disallow any single unwise repeal, with the intention of reviving the repealed Act into force again, without at the same time disallowing and possibly reviving, all of the repealed Acts. Such an outcome was not in accordance with the spirit and intention of section 12 of the Seat of Government (Administration) Act 1912 which provides for Parliament's disallowance powers over Ordinances.

3.8. In its Seventy-sixth Report the Committee firmly stated:

> "Until the Senate directs otherwise, the Committee assumes that it is Parliament's intention when delegating law-making powers, that the exercise of such powers be subject to the control and supervision of Parliament by the mechanism of disallowance (including, by implication the necessary revival of any instrument or law repealed by a disallowed instrument). The Committee draws this mandate from the terms of Principle (a) [by] which .... the Committee .... scrutinise(s) delegated legislation to ensure that it is in accordance with the statute." (page 15)

Tabling and Disallowance of Sub-delegated Instruments

CREDIT ORDINANCE

3.9. Tabling in both Houses of Parliament is of importance to parliamentary scrutiny because it alerts Parliament to the use of delegated powers. A delegated instrument which fails to provide for the tabling and disallowance of a significant sub-delegated instrument may infringe Principle (a).

3.10. In its Seventy-seventh Report (March 1986) the Committee discussed its scrutiny of section 19 of the A.C.T. Credit Ordinance 1985 the effect of which was:

> ".... to give the Minister [for Territories] an executive power to abrogate or suspend, in any way, for any period, subject to any conditions, any provisions of the Ordinance, including

> those provisions which, being designed to protect [people seeking credit], were regarded as central to the intent of the Ordinance" (page 34).

3.11. The Committee considered that a provision conferring power on a Minister to make such exemptions simply by means of a gazetted notice was not an appropriate exercise of the law-making power conferred by the Seat of Government (Administration) Act. It therefore persuaded the Minister that such a power should be exercised by means of regulations which, like the Ordinance, would be subject to tabling and disallowance in Parliament.

BLOOD DONATION ORDINANCE

3.12. Similarly, the Committee convinced the Minister for Health that the form and contents of questions in the blood donor declaration form, which originally had appeared in a schedule to the Blood Donation (Acquired Immune Deficiency Syndrome) Ordinance 1985, should not have been removed from that schedule to be made instead by instrument within the unsupervised discretion of the Minister. The questions were necessarily very intrusive and were an essential element in the protection of the A.C.T. blood bank from viral contamination. However, because of the serious national implications of the Acquired Immune Deficiency Syndrome the opportunity for parliamentary supervision of the declaration form should not have been removed.

Explanatory Statements

3.13. Principle (a) applies to questions of strict legality and *ultra vires*, as well as parliamentary intention and propriety. The Committee faced with the task of scrutinising over 800 complex instruments annually, makes initial use of any accompanying Explanatory Statement. Such a Statement should accompany virtually all

instruments. Prepared by expert officials familiar with the instrument, it should make express reference to the statutory authority under which the instrument is made. It should explain, as far as possible, in terms referable to the regulation-making power, the reasons why the instrument is necessary and how it gives effect to the objects of the Act. By taking time to do this, officials can avoid a later waste of ministerial time in responding to the Committee's requests for explanation and elucidation of issues that should have been dealt with in the Statement in order to dispel concern under the Committee's Principles.

3.14. Comments concerning Postal Services (Australian Post Stock) Regulations, Remuneration Tribunal Regulations, Extradition (Finland) Regulations and Freedom of Information Regulations illustrate the Committee's approach.

Ultra Vires

3.15. The provision of a competently drawn Statement may dispel concern as to whether the retrospective operation of an instrument will or could result in prejudice to an individual's rights. However, the Statement, while a very useful aid, does not relieve the Committee of the obligation to satisfy itself that the instrument is a valid exercise of law-making power. For example, it was immediately clear that the Extradition (Commonwealth Countries) Regulations (Amendment) was <u>ultra vires</u> and void because the Governor-General purported to make it under the provisions of the <u>Extradition (Foreign States) Act 1966</u> instead of the <u>Extradition (Commonwealth Countries) Act 1966</u>.

Subordinate Fettering of Discretions

3.16. Certain mandatory provisions of the Northern Prawn Fishery Management Plan and the Southern Bluefin Tuna Fishery Management Plan appeared on their face to be an unlawful subordinate fettering of primary ministerial discretions conferred by the Fisheries Act 1952. However, following extensive correspondence from the Minister for Primary Industry, which included reference to legal opinions given by the Attorney-General's Department, the Committee decided to note the Minister's view that, on the basis of the advice he had received, the Plans were valid. Although the Committee itself acts on the basis of skilled legal advice, it is not a court and, in difficult cases, validity can sometimes depend on finely balanced legal arguments.

Delegation to Officials

3.17. Finally, the Committee considers that Principle (a) may be infringed when a Minister who possesses important but delegable powers, delegates those powers by means of a disallowable legislative instrument which does not specify an appropriately senior level of official who will exercise the powers on the Minister's behalf. Once again the rationale is that having conferred significant powers on a Minister, Parliament is not to be taken to have intended that he or she may delegate them lightly (see for example the Passport Regulations (Amendment)).

(b) DOES DELEGATED LEGISLATION TRESPASS UNDULY ON PERSONAL RIGHTS OR LIBERTIES?

3.18. This principle gives rise to a variety of problems for legislative scrutineers.

Privacy and Confidentiality

HEALTH INSURANCE REGULATIONS AMENDMENT

3.19. The most significant recent example of a serious trespass on rights arose with the Health Insurance Regulations (Amendment) discussed in detail in the Committee's Seventy-ninth Report (April 1986). These regulations were, with the agreement of the Minister for Health, disallowed in the Senate by effluxion of time. They would have made it lawful for the Health Insurance Commission to have transferred to the Department of Social Security, any of the confidential medical insurance claims information held by the Commission in respect of many millions of individuals in Australia.

FIRST HOME OWNERS REGULATIONS (AMENDMENT)

3.20. The effect of the First Home Owners Regulations (Amendment) was to by-pass certain legal impediments to intra-bureaucracy transfer of personal and financial information about the affairs of applicants to the First Home Owners Scheme. The regulations were made without any clear conception as to the kind of information to be transferred (to the Australian Taxation Office and the Department of Social Security). Under internal administrative guidelines, unspecified types of information could be released in response to statutory demands. The Committee persuaded the Minister for Housing and Construction that such guidelines and

criteria should appear in definitive and legally binding form in the text of the regulations rather than be left to the vagaries of administrative convenience.

Right to Trial by Jury

3.21. In one of the most important undertakings received by the Committee in recent years, the Attorney-General agreed to amend the Crimes (Amendment) Ordinance (No. 3) 1985 to restore to a defendant charged with a substantive property offence the right to be tried by a jury. In the A.C.T. the right to trial by jury had been abolished for certain property related offences falling below a specified monetary threshold. When inflation appeared to have eroded this threshold, the Attorney-General decided to raise it by making the Ordinance which gave a magistrate power to hear and determine the relevant offences without the consent of the accused. The Committee regarded it as a most serious infringement of its principles that delegated legislation, albeit an Ordinance, had reduced and circumscribed a person's right of access to that most fundamental of criminal justice procedures - trial by jury. The Attorney-General accepted the Committee's views and amended the Ordinance to restore the right.

Search Warrants

3.22. The Committee is traditionally circumspect in its assessment of provisions which enable officials to search individuals or enter on to private property and seize material. In its Seventy-seventh Report the Committee described the outcome of its scrutiny of search warrant provisions in sections 233-236 of the Credit Ordinance 1985. The Committee there recommended that a warranted power to enter premises with assistance and by force should be expressly limited by reference to objectively reasonable standards. The Minister for

Territories agreed to amend sub-section 235(1) of the Credit Ordinance to authorise warranted entry "with such assistance as the officer thinks reasonably necessary and by such force as is reasonably necessary". The Committee has repeated, and Ministers have accepted, this recommendation on a number of subsequent occasions. In addition provisions which deemed a limited search warrant to be wider than its express terms have been objected to successfully by the Committee.

Telephone Search Warrants

3.23. The Committee has particularly objected to the practice of conferring on clerks or deputy clerks of petty sessions courts, justices of the peace, or magistrates powers to grant telephone search warrants (see for example the Electricity (Amendment) Ordinance 1985 and the Radiocommunications (Licensing and General) Regulations). The Committee considers that the power to seek and authorise by telephone the right lawfully to break into private property is a most remarkable power. The telephone application arises in circumstances of apparently major gravity for law enforcement. Normal surveillance procedures will have failed to alert officials so that normal procedures for obtaining legal authorisation to enter property and seize goods will have proved inadequate. Negligent failure to ensure proper surveillance and enforcement may be encouraged or concealed by the availability of an urgent procedure of last resort. The application will be dangerously anonymous and reliable identification of the applicant will be extremely difficult. No lower limit is placed on the seniority of the official who may seek the telephone warrant. Until after it has been exercised no documents, affidavits or other relevant evidence is made available to the person granting it by which he or she may determine in advance the existence of a *prima facie* case

for possibly violent entry. Relevant documents are joined together after the event to produce an inherently ex post facto warrant of retrospective application.

3.24. The procedure, while possibly necessary for certain kinds of law enforcement, is unquestionably most remarkable. Its exercise demands the special skills and status of a superior court judge if so remarkable a power is not to endanger the rights of individuals. There is in Australia a sufficient number of superior court judges to ensure that essential recourse to telephone warrant procedures is not undermined by an obligation to apply to such a judge. Indeed, the absence of such an obligation will serve to undermine certain fundamental rights of the individual. Large judicial powers should not only be exercised with care and fairness, they should be seen to be exercised at a level which will deter any possible abuse.

3.25. In the case of the Electricity (Amendment) Ordinance 1985 the Attorney-General did not accept the Committee's view and he elected instead to delete the telephone warrant power entirely rather than make it exercisable only in the discretion of a judge.

Reversal of the Onus of Proof

3.26. Occasionally legislation is drafted which is designed to reverse either the persuasive or the evidentiary burden of proof and cast it upon the defendant. A reversal of the persuasive onus has the effect of expressly abolishing the usual presumption of innocence and expressly substituting for it a presumption of guilt. It is therefore contrary to one of the oldest maxims known to the common law. The classic formulation of the common law principle was enunciated by Lord Sankey in Woolmington v Director of Public Prosecutions [1935] A.C. 462 at 481 where he said:

> "Throughout the web of the English Common Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt .... No matter what the charge or where the trial, [that] principle .... is part of the common law of England and no attempt to whittle it down can be entertained."

3.27. In its Report to the Senate on The Burden of Proof in Criminal Proceedings[4] the Standing Committee on Constitutional and Legal Affairs noted at paragraph 4.19:

> "There are numerous provisions in delegated legislation imposing a persuasive burden of proof on defendants. The Committee views this fact with concern, as such legislation can pass into law without the normal Parliamentary scrutiny afforded other legislation."

3.28. The Committee has conducted a computer survey of Ordinances and Regulations in force in the A.C.T. and has provisionally identified approximately 150 provisions which appear to reverse some aspect of the onus of proof. The Committee has written to the Minister for Territories and the Attorney-General drawing their attention to these reversals and requesting their advice.

3.29. The Committee's attitude to a particular reversal of onus is discussed under the Crimes (Amendment) Ordinance (No. 4) 1985.

Strict Liability Offences

3.30. Provisions which purport to impose on a person a burden of substantive criminal responsibility and punishment without the prosecution having to establish criminal guilt in the form of mens rea (a guilty mind or guilty intention) are an obvious trespass on personal rights and liberties. They depart from a fundamental concept at the heart of a just legal system that a crime must involve both a criminal act and a criminal mind if judicial

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4 Parliamentary Paper No. 319/1982.

authorities are to retain any moral entitlement to dispense retributive justice for offences. Following its scrutiny of the Electricity (Amendment) Ordinance 1985 and the Prescribed Goods (General) Orders No. 1 the Committee persuaded Ministers to amend legislation to ensure that provisions did not impose any strict criminal liability on individuals.

Immunity from Suit

3.31. A provision in delegated legislation which deprives a litigant of a proper opportunity to enforce rights or obtain redress for wrongs, will be regarded by the Committee as an infringment of Principle (b). It is a hallmark of a free society where the rule of law is subordinate to no overrule, that there be freedom of access to courts. An independent judiciary holds the balance between competing disputants be they Government authorities, private bodies or individual citizens. However, it is an essential ingredient of the exercise of such freedom that the right to present a case is not undermined by delegated legislation which has whittled away its substance and left only its shell.

3.32. The Committee was seriously concerned therefore, that a provision in the Blood Donation (Acquired Immune Deficiency Syndrome) Ordinance 1985 undermined these maxims. It provided in effect that in proceedings for damages by a person who had allegedly contracted A.I.D.S. from a blood transfusion, proof that in the testing of the blood certain identified medical procedures had been followed, would be a statutory defence to the suit, regardless of whether those procedures were reasonably the most effective procedures to follow at the time or whether they had been competently complied with by the tester. The Committee, following an in camera hearing attended by the Minister for Health, persuaded the

Minister to amend the Ordinance, to provide expressly that the defence would not defeat an action for negligence.

Extradition Procedures

SOUTH AFRICA

3.33. The provision in regulations of powers and procedures for the extradition of presumptively innocent persons from one country to another is viewed by the Committee as a matter of considerable sensitivity because the power to extradite is not only fundamental to aspects of domestic law enforcement and international comity, but also potentially destructive of basic individual rights. The balance to be drawn between these competing considerations is delicate and complex because issues of diplomacy overlay the procedural variations of diverse legal systems and the Government is not always as free an agent as it might wish to be in matters of international import. These constraints are recognised and appreciated by the Committee.

3.34. Following its major review of the Extradition (Republic of South Africa) Regulations (Seventy-seventh Report page 51) the Committee persuaded the Attorney-General not only extensively to amend these particular regulations, but also to amend the Extradition (Foreign States) Act to entrench the principle of reciprocal minimum penalties as an essential precondition for extradition. The new regulations did not completely reflect one important element of the Attorney-General's undertaking to the Committee concerning non-extradition to South Africa for alleged fiscal offences. The Committee accepted that that part of the undertaking had been given as a result of a misunderstanding of South Africa extradition law and the Government's desired policy was to promote reciprocal extradition arrangements for fiscal offences.

EUROPE

3.35. In the Extradition (Finland) Regulations (Amendment), the Committee accepted the Attorney-General's view that the deletion of the "evidence of criminality" provision from the Treaty with Finland (and prospectively from the Treaties of other European countries) arose as a consequence of amendments made to the Extradition (Foreign States) Act. The Committee shared the Attorney-General's view that if Australia is sufficiently satisfied with the standards of justice in European countries to enter into Treaties with those nations (which is clearly not the case with the Republic of South Africa) then it should not be necessary to require those countries to meet the procedural requirement that *prima facie* evidence of criminality be established when that obligation is at variance with continental legal traditions.

Religious and Sex Discrimination

3.36. Clearly the Committee's principles will extend to cover any provision which has the effect directly or indirectly of discriminating against a person on grounds of gender or religious belief or practice where this has no justification based on an inherent and rational necessity to treat people differently. Decisions based on such criteria are obviously an undue trespass on personal rights and liberties and cannot be acceptable in delegated legislation.

SUPERVISION OF OFFENDERS

3.37. In its *Seventy-seventh* Report the Committee reported on an undertaking it had received from the Minister for Territories to amend the *Supervision of Offenders (Community Service Orders) Ordinance 1985* to ensure that

genuine conscientious beliefs as well as religious beliefs are respected when a person convicted of a less serious offence is sentenced to community service.

DEFENCE REGULATIONS

3.38. The Minister for Defence has also agreed to amend the Defence Regulations (Amendment) to remove provisions which are expressly protective of the special observance days of one religion and thereby inadvertently discriminate against persons who genuinely adhere to other religions with different observance days.

HEALTH REGULATIONS

3.39. The Minister for Health agreed to amend the Health Insurance (Variation of Fees and Medical Services) (No. 38) Regulations to restore retrospectively non-medically indicated circumcision to the list of insured medical services. The Committee had no concluded view on the question whether removal of a benefit which had long been taken advantage of by members of particular religions would indirectly discriminate against such persons as a group.

DEFENCE DETERMINATIONS

3.40. The Minister for Defence offered a detailed explanation for the gender based differences in clothing allowances paid, under a Defence Determination, to naval officers of equal rank and position. The Minister assured the Committee that since all allowances were fully expended on the purchase of regulation clothing and regalia no discriminatory financial advantage accrued to officers of one gender over officers of the other gender. The Committee, therefore, did not move to disallow the Determination. However, it left open for examination in future Determinations, the question whether Defence

Service policies regarding uniforms and regalia could have an *indirectly discriminatory effect* through any inadvertent disparity in the quality, propriety and appearance of dress and accountrements for male and female officers of equal rank and position.

Identity Cards

3.41. The Committee has endeavoured to ensure that officials with entry and inspection powers should be provided with proper photographic identification cards to be produced automatically or on demand when they are acting in the course of their duty (see for example the Meat Ordinance (Amendment) Ordinance 1985, the Bookmakers Ordinance 1985 *and the Radiocommunications (Licensing and General)* Regulations (Amendment)). Such a card can make official identification certain, and thereby deter impostors who might seek to trespass on private property. Its production can serve as a physical reminder to officials who have large intrusive powers that their authority has legislative origins and legal limits.

Consents to Entry

3.42. The Committee has also advocated that in certain circumstances officials who conduct necessary official visits and inspections of private property with the *consent of the occupier should invite that person to sign* a consent to entry form. A highly protective precedent originally appeared in section 236 of the Credit Ordinance 1985. There is no reason why competent officers should not adopt this protective practice which, with personal skill and professional training, could be carried off without unduly prejudicing any client-like relationship (see for example the Bookmakers Ordinance 1985 and the Electricity (Amendment) Ordinance 1985).

Retrospectivity

3.43. The Committee objects to the retrospective operation of delegated legislation if this results in prejudice to individuals. The following instruments had retrospective effects which were initially of sufficient concern to the Committee to require some further explanation from the relevant Minister - Crimes (Amendment) Ordinance (No. 4) 1985, *Legal Practitioners (Amendment) Ordinance 1985*, Remuneration Tribunal (Miscellaneous Provisions) Regulations (Amendments), Student Assistance Regulations (Amendment), Commonwealth Employees (Redeployment and Retirement) Regulations (Amendment), and Defence Determinations No. 64 and 65.

3.44. The Committee has welcomed the practice followed by some Ministers in their Explanatory Statements of expressly indicating that retrospectivity will not prejudice any individual. The Committee recognises that the unexpected exigencies of public administration can sometimes give rise to a need for delegated legislation to have a retrospective operation. Often this is necessary in order to prevent an individual suffering loss of some benefit which he or she might have been entitled to had the law-making process been able to respond immediately to changed circumstances. However, retrospectivity in delegated legislation is an intrinsically objectionable and dangerous device. It creates a legal fiction in circumstances where sometimes neither the Committee nor the Minister can be absolutely certain that no unexpected and prejudicial consequence can arise. It deprives the Parliament of the opportunity to consider the appropriateness of a particular provision at the time and in the circumstances to which it applies. Retrospectivity which authorises the payment of monies which have already been outlaid is also a dangerous practice.

3.45. In its Twenty-fifth Report (November 1968) the Committee formulated certain guidelines which it would observe in its examination of retrospective instruments. These were:

(1) All regulations, of whatever character, having a retrospective operation will *prima facie* attract the attention of the Committee.

(2) Where the retrospectivity involved is in relation to payment of moneys the Committee will view the retrospectivity as requiring close scrutiny.

(3) The Committee regards retrospectivity beyond a few months as objectionable. It is recognised, for obvious practical reasons of an administrative character, that some retrospectivity is inevitable. The Committee believes that such retrospectivity should be of the shortest period practicable.

(4) Regulations involving retrospectivity in payment of moneys, if extending beyond two years will be the subject of a report to the Senate, and unless quite exceptional circumstances are established to the Committee's satisfaction, will be the subject of a recommendation for disallowance.

The Committee reaffirms these guidelines.

3.46. The Committee urges Ministers and officials to do their utmost to ensure that retrospectivity in delegated legislation is kept to a minimun and that it is justified only by unavoidable or unexpected exigencies of public administration.

(c) DOES THE DELEGATED LEGISLATION MAKE RIGHTS UNDULY DEPENDENT ON ADMINISTRATIVE DECISIONS WHICH ARE NOT SUBJECT TO REVIEW ON THEIR MERITS?

Rights to Merits Review

3.47. The Committee has scrutinised a number of instruments which empower officials to take important discretionary decisions without the persons affected by those decisions having a right of appeal to the Administrative Appeals Tribunal. The Tribunal is Australia's premier forum for the independent administrative review of the merits of significant administrative decisions which affect the rights, benefits or entitlements of individuals. The Tribunal, as an effective mechanism for the redress of legally or factually complex grievances against bureaucratic decision-making, is far in advance of other similar institutions in the common law world. However, its major contribution has not been in the resolution of particular disputes, but in the salutory effect which its existence has had on the quality and coherence of primary decisions which affect people's lives. A right of appeal on the merits to a body whose proceedings are public, whose members are highly qualified and experienced in legal, administrative, commercial or medical affairs, and which espouses a fair and reasonable standard of administrative justice, has done much to put to flight arbitrary and oppressive decision-making. The existence of a right of appeal serves to underwrite the quality of primary decisions by providing precedents, guidelines and standards for officials, thereby nurturing competent analysis of individuals' claims.

RIGHT TO A LIVELIHOOD

3.48. The Committee considers that where a right to a source of livelihood is affected by an administrative decision there should be a right of review (see for example the

Meat Regulations (Amendment), the Excise Regulations (Amendment) and Telecom By-laws No. 43). However, it recognises that there are some circumstances where the A.A.T. may not be an appropriate forum and where alternative avenues of merits review may supply an adequate remedy while not detracting from the A.A.T.'s central position (see for example the Electricity (Amendment) Ordinance 1985 and Telecommunications By-law (Amendment) No. 42).

3.49. Successive Governments have been committed to the principle of merits review of administrative decisions. Their legal drafters almost invariably ensure that the principle is adhered to. However, examples are reported herein where a right to A.A.T. review was not provided until the Committee raised the matter. Understandably, determining whether a particular administrative discretion should be reviewable occasionally calls for a careful judgment to balance practical considerations of cost, delay, uncertainty and administrative convenience against the ideals of merits review. Hard cases make bad law and where the balance is a fine one, it should be decided in favour of providing appeal rights.

Notification of Reasons and Rights

3.50. A right of review is of no value to an individual who does not know that it exists. A person affected by a reviewable decision should therefore be informed of the decision, be given reasons for the decision and be notified of the right to appeal. These matters are more than merely incidental to the making of primary decisions. They provide a procedural structure for the final taking of the decision. Such a structure, like the right to review itself, is an incentive to make the correct and fair decision (see, for example Air Navigation Charges Regulations (Amendment) and the Bookmakers Ordinance 1985).

(d) DOES THE DELEGATED LEGISLATION CONTAIN MATTER MORE APPROPRIATE FOR PARLIAMENTARY ENACTMENT?

Guidelines

3.51. In its Seventy-seventh Report the Committee discussed the application of this Principle and set out the following guidelines:

> "15. The Committee will look carefully at delegated legislation, including any ordinance, which -
>
> - manifests itself as a fundamental change in the law, intended to alter and redefine rights, obligations and liabilities;
> - is a lengthy and complex legal document;
> - introduces innovation of a major kind into the pre-existing legal, social or financial concepts;
> - impinges in a major way on the community;
> - is calculated to bring about radical changes in relationships or attitudes of people in a particular aspect of the life of the community;
> - is part of a major uniform, or partially uniform, scheme which has been the subject of debate and analysis in one or more of the State or Territory Parliaments but not in the Commonwealth Parliament; and
> - takes away, reduces, circumscribes or qualifies the fundamental rights and liberties traditionally enjoyed in a free and democratic society.
>
> 16. Where any of these characteristics are present the Committee may recommend to the Senate that it disallow the delegated legislation. It will invite the Minister to introduce a Bill for debate and analysis. The more of these criteria that are present, the greater the likelihood that such a recommendation will be made."

New Biological Technology

3.52. The Seventy-eighth Report reflects the Committee's application of these guidelines to the Artificial Conception Ordinance 1986 which definitively provided for the legal parentage of an artifically conceived child. In providing, essentially, that the woman who gives birth to a child howsoever conceived, and her consenting spouse, will be the mother and father of that child, the Ordinance was designed to introduce a degree of certainty into a sensitive and controversial area of the law. There was nothing exceptional about this provision. However, while the Committee did not move to disallow the Ordinance as it stood, it recommended that "all future A.C.T. legislation arising from the impact of the new biological technology should be by means of enactment made in the Federal Parliament" (paragraph 34).

3.53. The Committee made this recommendation because it was anticipated that a future Ordinance would address vital ancilliary questions such as the wisdom or necessity of recording, and giving offspring access to, the personal, ethnic and medical history of the donor of the genetic material which resulted in the artifical conception of that offspring. Crucial policy issues will arise from such questions including, from the point of view of the donor, privacy, anonymity, security, consent, and authenticity of records. From the point of view of offspring there will be questions of access to details of identity, genetic and ethnic inheritance, age of and scope of access to records and confidentiality. The Committee concluded that these matters would raise sensitive and complex moral, ethical and practical issues, which the Parliament rather than the Minister alone, should determine.

Reform of Sexual Offences

3.54. While not applying Principle (d), the Committee also drew the Senate's attention to the terms of the Crimes (Amendment) Ordinance (No. 5) 1985 and the Evidence (Amendment) Ordinance (No. 2) 1985 which made major changes to A.C.T. law relating to sexual offences. The Committee incorporated in Hansard its letter to the Attorney-General on these Ordinances which summarised their far-reaching effects. The Attorney-General's reply described the extensive process of consultation he had gone through before he adopted and implemented these law reforms which were based on the Tasmanian Law Reform Commission Report No. 31 on Rape and Sexual Offences (see Senate Hansard, 9 April 1986, pages 1534-1536).

3.55. The Committee did not recommend disallowance of these Ordinances under Principle (d) because, although they made significant procedural and substantive changes to the criminal law, those changes were not of such a novel, major and controversial nature as to warrant enactment in a Bill.

Ministers and the Committee's Principles

3.56. The classes of infringements discussed above are not exhaustive. They are merely recent illustrative examples. Most of the instruments referred to are summarised in Chapter 4 where further details are given which, it is hoped, Ministers, policy advisers and legal drafters will make use of when preparing delegated legislation.

3.57. The Committee expresses its appreciation for the advice and assistance given to it by Ministers, their private office staff and their departmental officials in responding to its concerns. The Committee enjoys and has always enjoyed an exceptional degree of co-operation from

Ministers who understand the important non-partisan nature of its work. The Committee through its <u>ex post facto</u> vigilance can never make itself redundant. But it can be made so by the efforts of careful and enlightened policy advisers and legal drafters whose professional skills and official commitment to the protection of personal rights can ensure that delegated legislation does not infringe the Committee's Principles. The Committee acknowledges the role of Ministers in directing their staff to aspire to this.

3.58. The Committee firmly believes that the Executive accepts and respects its role, even though from time to time clashes of objectives and priorities arise which must always be resolved in favour of the reasonable protection of Parliament's supremacy and the individual's reasonable right to freedom and justice. The Report of the Second Commonwealth Conference on Delegated Legislation held in Ottawa in 1983, contains the classic statement of the role of a legislative scrutiny committee.

> "The scrutiny and control of delegated legislation is not a parlour game for the amusement or vindication of a small group of dedicated parliamentarians, but an exercise necessary to protect the rights and liberties, livelihood and welfare of ordinary men and women who are liable to be trampled under the weight of an insensitive if well-meaning bureaucracy. It is in the light of this fundamental axiom that all the procedures adopted for scrutiny and control must be tested."

3.59. The Committee, on behalf of the Senate, aspires to such a role and it thanks Ministers whose equal commitment to it will ensure the preservation of important rights and liberties.

CHAPTER 4

LEGISLATION CONSIDERED IN DETAIL

> "A committee could scrutinise regulations. But a good deal of its work would be thankless, as it would not discover very much to find fault with. It would certainly be the least interesting of the committees." (Sir Robert Garran, 1930[1])

> "The Senate has taken a good forward step. It has established a Regulations and Ordinances Committee .... I should like to see the Committee further developed and better advertised." (Sir Robert Garran, 1958[2])

> [A former Chairman of the Committee asked Sir Robert Garran about its role.] "As a man who helped with the framing of the Constitution, Sir Robert replied that this was the most important Committee in Parliament because its duty was to see that Parliament ran this country with legislation and that the Executive did not do so by regulations and ordinances." (Senator Ian Wood, 1970[3])

Introduction

4.1. The purpose of this Chapter is to provide a summary of the scrutiny of each item of legislation which raised significant correspondence resulting in an explanation of some uncertain aspect of the legislation or a ministerial undertaking to amend it. Where letters were incorporated into the Senate Hansard, reference is made to this.

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1 Evidence to the Select Committee of the Senate on the Advisability or Otherwise of Establishing Standing Committees of the Senate, Journals of the Senate, Session 1929-31, Vol. 1, page 535, at page 584, paragraph 360.

2 Garran, Sir Robert, Prosper the Commonwealth, Sydney, 1958, page 198.

3 Senate Hansard, 16 April 1970, page 868.

Air Navigation (Charges) Regulations
(Statutory Rules 1985 No. 130)

4.2. These Regulations controlled the sale of aircraft where certain aircraft charges had not been paid. Claims by creditors to a security interest in such aircraft could be made and approved or rejected by authorised persons whose decisions were reviewable by the Administrative Appeals Tribunal. No reasons would be given when a person was notified of a decision rejecting a claim. Reasons might however, be obtainable under section 13 of the Administrative Decisions (Judical Review) Act 1977. The Committee asked the Minister for Aviation whether in the special circumstances of these Regulations, which could possibly affect contracts involving large sums of money, it might be preferable to provide for the giving of reasons under the Regulations without the need to resort to extraneous legislation. Precedents already existed in the Australian Citizenship Regulations (regulation 22) and the Defence Force Regulations (regulation 71). The Minister agreed to the Committee's recommendation and undertook to amend the Regulations to require that creditors be notified of the reasons for rejecting a claim. Administrative guidelines would incorporate this requirement pending the making of the relevant amendment.

4.3. The Committee is pleased to report that the Minister's undertaking was implemented with the making of the Air Navigation (Charges) Regulations (Amendment) (Statutory Rules 1985 No. 330).

Australian Meat and Live-stock Orders (Nos. M24/85, MQ14/85, MQ15/85 and MQ16/85)

4.4. These Orders were designed to set up Performance Standards for 1986 and give effect to the Quota Administration Scheme for meat exports to the European Community. It was provided that non-compliance may result in cancellation of performance and/or entitlement "as the Australian Meat and Live-stock Corporation deems just or appropriate".

4.5. These decisions could be subjective, appeared to be discretionary, and were to be taken in the absence of objective criteria. There was no opportunity for independent merits review of a disputed decision. An appeal could be made to the Board of the Corporation and if a licensee was not satisfied with the findings of that review, an appeal could be made to the Minister for Primary Industry.

4.6. A scheme before the Minister for deregulation of certain parts of the Australian Meat and Live-stock Act included a proposal that recourse to the Minister be replaced by an appeal to the Administrative Appeals Tribunal.

4.7. This explanation was accepted by the Committee which wrote to the Minister urging that the proposals for merits review by the Administrative Appeals Tribunal be implemented as soon as reasonably possible. Subsequently, the Minister informed the Committee that although legislation would provide for A.A.T. review of A.M.L.C. decisions involving transfer, cancellation and involuntary surrender of export quotas, decisions involving the allocation of quotas would not be reviewable. He explained that consideration had been given to extending the A.A.T.'s powers of review to quota decisions in order to remove the need for ministerial approval. However, the Attorney-General's Department had

advised that the Administrative Review Council in paragraph 41 of its Eighth Annual Report had recommended against merits review of discretionary decisions apportioning a finite resource. Since a successful A.A.T. review of the quota would affect the amount of that limited resource distributed to or available for other applicants, review of an individual's allocation would necessitate an assessment of the relative merits of all allocations. The Minister had therefore abandoned the proposal to provide for A.A.T. review of quota allocations and the ministerial approval procedure would be retained pending the possible establishment of a body, independent of the A.M.L.C., to consider objections to proposed quota allocations.

4.8. The Committee's protective notices of motion of disallowance of the Orders had been withdrawn from the Senate with 10 sitting days still to run on the basis that the undertaking from the A.M.L.C., in foreshadowing conferral of a right of appeal to the A.A.T., could be relied upon. The Committee was therefore concerned about the proposed departure from what it had understood would occur. In researching the matter the Committee noted that, since the Eighth Report, the A.R.C. had revised its views on the role of the A.A.T. in review of decisions allocating a finite resource like export quotas. In its Ninth Report, 1984/85 at paragraphs 96 to 100, the Council had indicated that the A.A.T. could perform a review role where:

- all claims were identified at a particular date and all future claims barred;
- all claims were dealt with together; and
- no claims were paid prematurely in such a way as to deplete the limited fund available.

4.9. In the light of these revised views the Committee asked the Minister to consider whether the discretionary allocation of quota could not in fact be made amenable to A.A.T. review as originally proposed. The matter is still under consideration by the Minister for Primary Industry.

Banks (Shareholdings) Regulations
(Statutory Rules 1985 No. 336)

4.10. Two different sets of these regulations, bearing the same number, were made by the Governor-General. It was important to identify which set had been made, gazetted and tabled in Parliament in accordance with the intention of the Treasurer. It appeared that some copies of the Rules had been misprinted. This was corrected and the misprinted copies withdrawn from sale. The Treasurer assured the Committee that the Statutory Rule No. 336 which was tabled in the Senate on 11 February 1986 was an accurate copy of the regulation made by the Governor-General.

Blood Donation (Acquired Immune Deficiency Syndrome) Ordinance
(A.C.T. Ordinance No. 27 of 1985)

4.11. This very significant Ordinance provided that, in an action against a doctor, a hospital or the Red Cross Society, by a person who claimed to have contracted Acquired Immune Deficiency Syndrome from blood supplied by the Society, it would be a defence that the Society had obtained a health screening declaration from the blood donor and, having tested the sample for A.I.D.S. virus antibodies using approved equipment and in accordance with the approved method, had obtained a negative result. The Committee was concerned that the practical effect of this provision could be to remove, from certain patients or their relatives, a cause of

action for negligence. This would be a serious matter because of the unique nature of the disease and the absence of any other redress or compensation.

4.12. The Minister for Health informed the Committee that the Red Cross Society had been unable to obtain private insurance cover because of the increased liability that could result from the spread of A.I.D.S. This was because legal advice had indicated that the Society could be found negligent even if it took all precautions which it thought might reasonably be required. It was thought that a solution to this dilemma was to enact legislation setting out specifically the Society's duties in the testing of blood and exempting it from liability for failing to do anything not so specified. The Minister considered that while on its face the Ordinance appeared to remove a cause of action, it was in fact codifying what the Attorney-General's Department had advised was the common law duty and standard of care imposed on the Society. The effect of the Ordinance was therefore to provide a statutory statement of what constituted due care in order to render the legal position clearer.

4.13. Because of the implications of the issues the Minister for Health offered to arrange an oral briefing for the Committee and an in camera hearing of evidence was arranged at which he attended, accompanied by legal, medical and administrative advisers. This is believed to have been the first occasion in the history of the Committee where a Minister has appeared before the Committee to assist it with its scrutiny of delegated legislation. Following the hearing, the Committee informed the Minister that, in its view, because of the likely development of new medical procedures and tests, the statutory defence was so wide that it could conceivably defeat an action for negligence in conducting tests or in failing to follow more reliable tests which had not been approved. The Committee also noted that in

at least one State, the Red Cross Society had obtained adequate insurance without having to curtail common law rights of action. The Committee considered therefore that the Ordinance should be amended:

a) to ensure that no statutory defence would defeat a claim for negligence; and

b) to cease to have effect by the end of 1986 in accordance with a proposed sun-set clause. This was to ensure that a review was immediately commenced into all of the legal and medical issues arising from the Ordinance.

4.14. The Minister agreed that an amendment to the Ordinance should specifically state that the statutory defence would not extend to cover the negligent performance of any action associated with the collection, testing, or administering of blood. It was later indicated that this amendment would also make it clear that the defence would not exclude actions in respect of workers' compensation claims by employees of the Red Cross Society, hospitals or medical practitioners. The fact that the Ordinance has this further unintended effect had come to light within the Department as a result of the Committee's scrutiny. The Minister also agreed that a sun-set clause should be placed in the Ordinance to terminate it at the end of 1986.

4.15. The Committee had previously sought and received advice from the Minister that section 7 of the Ordinance, providing for serious penalties for a blood donor convicted of making a false statement, was not an offence of strict liability. The donor declaration form which might contain such a false statement was a declaration by a donor "to the best of [his or her] knowledge" which connoted the vital element of <u>mens rea</u>. (See Senate <u>Hansard</u>, 27 November 1985, page 2320)

4.16. The Minister's undertakings were implemented in the Blood Donation (Acquired Immune Deficiency Sydrome)(Amendment) Ordinance 1986, (No. 47 of 1986).

Blood Donation (Acquired Immune Deficiency Syndrome)(Amendment) Ordinance 1985
(A.C.T. Ordinance No. 55 of 1985)

4.17. This amendment Ordinance amended the Principal Ordinance by providing that the form of the declaration to be made by a blood donor shall be in "a form approved by the Minister". Previously the form which contained necessary but very intrusive personal questions designed to identify high risk individuals who might be donating blood, had been in a Schedule to the Ordinance and was subject to parliamentary scrutiny. Because of the nature of the issues involved the Committee was concerned about the transfer of the form from the Ordinance to another ministerial instrument which would not be subject to parliamentary oversight.

4.18. In the light of the Committee's concerns the Minister for Territories, who assumed responsibility for certain A.C.T. health matters, gave the Committee an undertaking that the Ordinance would be further amended to provide that ministerial changes to the form would be tabled in Parliament and be subject to disallowance. In this way it will be possible for changes to be made speedily without prejudicing Parliament's power to scrutinise such changes.

4.19. The Minister's undertaking was implemented as described in paragraph 4.16 above.

Bookmakers Ordinance 1985
(A.C.T. Ordinance No. 43 of 1985)

4.20. A number of issues arose from the Committee's scrutiny of this Ordinance. An inspector's power to enter premises with force was not limited by reference to a test of reasonableness which could ensure that an inspector would tailor the exercise of a power of entry to the requirements of the particular case. The Minister for Territories had previously undertaken to amend the Credit Ordinance 1985 and the Electricity (Amendment) Ordinance 1985 by providing for such a limitation and he readily agreed to amend the Bookmakers Ordinance in the same way.

4.21. Secondly, a provision in the Credit Ordinance had provided that a search warrant could be deemed to have a wider application than its terms disclosed, if, in the course of its execution, evidence of alleged offences not referred to in the warrant were found (see Seventy-seventh Report, paragraph 71). A similar provision appeared in the Bookmakers Ordinance. The Committee had argued that "fishing expeditions", which could become an abuse of the original warrant, could be avoided by a provision which allowed other alleged evidence to be seized and placed in the custody of a Registrar of a Court for 24 hours, pending the issue of a fresh warrant in respect of such material. It was considered that this procedure would not obstruct reasonable law enforcement and it would give a person whose property was seized by officials under a "deemed" warrant, an opportunity to challenge the issue of a proper warrant before a superior court if he or she felt strongly that the search powers were about to be abused. The Attorney-General had not agreed to this proposal and since the Committee objected to the uncertainties of a deemed search warrant the deeming provision had been

deleted from the Credit Ordinance. Following the Committee's correspondence the Minister agreed to delete the provision from the Bookmakers Ordinance also.

4.22. Thirdly, the Committee objected that a "consent to entry" provision was not as protective of rights as an earlier precedent appearing in section 236 of the Credit Ordinance. This required a signed acknowledgement that consent was voluntarily given after the right to refuse had been explained. In the absence of such an acknowledgement a court could assume that consent was not voluntary unless the contrary was proved. The Minister agreed to amend the Bookmakers Ordinance to incorporate this protective provision.

4.23. Fourthly, the Committee obtained the Minister's agreement that, given the wide intrusive powers of inspectors, "certificates" of identification should be replaced by proper photographic identity cards to avoid the risk of impersonation and abuse.

4.24. Fifthly, the Committee queried whether a decision refusing to grant a licence to a bookmaker's agent should be subject to review by the A.A.T. since an unjustified refusal to grant such a licence might possibly have a serious effect on a person's right to a livelihood. The Minister explained that an agent would act for a bookmaker only in situations of emergency, e.g. illness, or for a short period, e.g. during a vacation. The absence of a review right was not therefore at variance with the recommendation of the Administrative Review Council that it was both inappropriate and ineffective to provide review of emergency decisions or those having effect for a short time (A.R.C.'s Eighth Annual Report 1984/85, paragraphs 40-41). To make the matter clear the Minister undertook to amend the Ordinance expressly to limit the duration of an agent's licence to 3 months.

4.25. Finally, section 51 of the Ordinance, providing that notification be given of a decision and a person's right of review, was drafted in such a way that a failure to provide a notification of the decision, the reasons for it and a statement of review rights would not invalidate the decision. Usual drafting practice is to provide that a failure to notify review rights will not invalidate the decision. The Minister agreed to amend the provision to reflect the usual practice. In accepting this undertaking the Committee pointed out that it did not approve of the usual drafting practice which undermined the vital significance which a notification of review rights has in protecting a person's right of appeal. Such a right may be said not to exist if a person is not made aware of it. The Committee awaits with interest a report from the Administrative Review Council which is studying this matter.

4.26. From its scrutiny of the Credit Ordinance, the Electricity (Amendment) Ordinance (see below) and the Bookmakers Ordinance, the Committee considers that it has established certain reasonable standards for the protection of individuals from official power. The Committee expects that these standards will be adhered to by Government lawyers drafting delegated legislation which confers on officials powers of entry, search and seizure with or without a search warrant.

4.27. The Minister's undertakings were implemented in the Bookmakers (Amendment) Ordinance 1986 (No. 38 of 1986).

Christmas Island Assembly (Election) Regulations 1985
(Territory of Christmas Island Regulations No. 1 of 1985)

4.28. Sub-regulation 54(2) of these Regulations made it an offence, punishable by a fine up to $100, for an elector to vote more than once at an election. However, paragraph 74(c) also provided that a person would be

liable to a fine of up to $500 for voting more than once. The Minister for Territories explained that the duplication was a drafting oversight and an amendment, to be prepared before the next Island Assembly elections, would delete the sub-regulation and achieve the Minister's intention that the offence would attract a penalty of up to $500. If in the meantime it became necessary to prosecute a person for the offence of multiple voting during elections held on 28 September 1985, the Court had a discretion to impose any monetary penalty up to a maximum of $500.

4.29. While the Committee accepted the Minister's explantion it is hoped that, to avoid any confusion or uncertainty about the offence of multiple voting, the Regulations will be amended well in advance of the next Assembly elections. The Minister's undertaking was given on 3 October 1985.

Commonwealth Employees (Redeployment and Retirement) Regulations Amendment
(Statutory Rules 1985 No. 310)

4.30. These regulations retrospectively applied the Commonwealth Employees (Redeployment and Retirement) Act 1979 to employees of the newly established A.C.T. Health Authority. The accompanying Explanatory Statement made no reference to whether the retrospectivity was prejudicial to any individual. The Minister for Finance assured the Committee that only the Commonwealth was prejudiced by the Redeployment and Retirement Act. In a significant initiative, the Minister undertook to ensure, in future, the effect of any retrospectivity in Public Service Board instruments would be adverted to in Explanatory Statements.

Credit (Amendment) Ordinance (No. 2) 1985
(A.C.T. Ordinance No. 60 of 1985)

4.31. In its Seventy-seventh Report the Committee reported on its scrutiny of the Credit Ordinance 1985, including an undertaking by the Minister for Territories to amend the Ordinance to ensure that the power conferred on him by section 19 to exempt credit providers from all or any of the provisions of the Ordinance would be exercised by an instrument which would be subject to tabling and disallowance in Parliament. In addition the Minister had agreed not to exercise his exemption power until the Ordinance was amended. Subsequently, the Minister informed the Committee that to resolve an urgent problem he had made a further exemption prior to the Ordinance being amended.

4.32. A previous exemption, concerning the term lending activities of banks, was about to expire although another similar exemption concerning the banks' competitors (credit unions and building societies) was still operative. It had been hoped that before the exemption expired, complementary legislative amendments would have been in place, to take account of lending practices by banks. Since A.C.T. banks should not be faced with commercial difficulties for which they were not responsible, the Minister had extended the previous exemption by notice in the gazette.

4.33. The Committee agreed that an exceptional case existed for the Minister to be released from part of his undertaking although there was some disappointment that he had written to the Committee only the day before the exemption expired making it impossible for the Committee to consider the matter prior to the extension. The Committee will not, in the absence of compelling and exceptional circumstances, release a Minister from an undertaking, freely given, presumably carefully

researched, which has been reported by the Committee to the Senate. In its Seventy-seventh Report at page 56 the Committee in the context of its scrutiny of the National Crime Authority Regulations (Amendment)(S.R. 1985 No. 3) discussed its attitude to requests for release from ministerial undertakings.

4.34. The Committee is pleased to report that the Credit (Amendment) Ordinance (No. 2) 1985 implemented the Minister's undertaking to ensure tabling and disallowance of exemptions by providing that the power to exempt be exercised by means of regulations.

Crimes (Amendment) Ordinance No. 3 1985
(A.C.T. Ordinance No. 40 of 1985)

4.35. This Ordinance raised a point of fundamental principle for the Committee: whether the removal, in delegated legislation, of a right to trial by jury, was at variance with the criteria by which it tests such legislation.

4.36. New section 477 gave a Magistrate jurisdiction to try defendants charged with certain offences where money or property not exceeding $10,000 was involved. Sub-section 477(6) provided that where the defendant pleaded not guilty and the court considered that the case could properly be disposed of summarily then the court could try the case regardless of whether the defendant consented to such a course. The effect of the Ordinance was therefore to abolish the right to trial by jury in those cases. While sub-section 477(8) set out criteria to which the magistrate must have regard before deciding to dispose of a case summarily, including "any relevant representations made by the defendant", there was no question that consent to summary trial was necessary.

4.37. It was true that a defendant, charged with an offence below the prescribed financial limit, could seek Supreme Court review of an adverse exercise of the Magistrate's discretion. Nevertheless, the Committee was concerned that in certain cases the right to trial by jury could be dependent on the judgment of the person who quantified the cost of damage to property. In some offences involving damage to official property this could even result in the prosecutor effectively determining whether a defendant had a right to a jury trial and the defendant could be placed in the invidious position of having to argue that the damage caused by an offence which he or she denied having committed, exceeded the prescribed limit.

4.38. The Attorney-General explained that provision already existed for a magistrate to hear indictable property offences without consent where the value of the property did not exceed $500. The real value of this threshold, fixed in 1974, had been eroded by inflation and the Ordinance was designed to restore the jurisdiction to its 1974 value, while also ensuring that an accused could not affect the decision to prosecute by insisting on a costly jury trial for a relatively trivial offence. The maximum penalty on conviction by a magistrate was imprisonment for one year and/or a fine of $2000 and in the vast majority of cases it was likely that an accused would wish to avail of these penalties which were considerably lower than the prescribed penalties for conviction on indictment. The Attorney-General in making the Ordinance had considered that it was not inappropriate for the Magistrate to make a judgement as to where the balance should be drawn between the competing interests of the accused and of society, particularly as the decision could be reviewed by the Supreme Court.

4.39. The Committee however, was concerned that other legislation applying in the A.C.T. imposed quite severe disabilities on people convicted of relatively trivial offences. For example, under paragraph 227(2)(b) of the Companies Act and under paragraph 132F(1)(a) of the Conciliation and Arbitration Act, people convicted of an offence involving fraud or dishonesty punishable on conviction by imprisonment for a period of not less than 3 months could be denied important offices in corporations and in registered organisations. While the Committee recognised the Attorney-General's concern about the possible cost of more frequent jury trials for some offences, the Committee was concerned that the fundamental right to trial by jury should not be displaced by such a side-wind and that a person's reputation and ability to hold important offices should not be subordinated to such a factor. The Committee noted with approval that section 69 of the Victorian Magistrates Court Act 1971 required the consent of the accused before a magistrate could summarily try a charge under the Theft Act. That law seemed to address this major issue of principle in a satisfactory way.

4.40. When the strength of the Committee's feeling on the matter became apparent, the Attorney-General agreed to amend the Ordinance so that its effect would be that a Magistrate must obtain the consent of an accused person prior to dealing with an indictable property offence. (See Senate Hansard, 5 December 1985, page 3073)

4.41. The Committee is pleased to report that the Crimes (Amendment) Ordinance (No. 6) 1985 implemented the Attorney-General's undertaking.

Crimes (Amendment) Ordinance (No. 4) 1985
(A.C.T. Ordinance No. 44 of 1985)

4.42. This Ordinance was designed to amend provisions of the Crimes Act 1900 (N.S.W.) as they applied to property offences in the A.C.T. Two matters were of concern to the Committee.

4.43. Firstly, new sub-section 98(1) provided that a reference to stolen property shall be a reference to property stolen before or after commencement of the Ordinance. The Attorney-General explained that the provision related to new offences of handling stolen property, and since they came into effect after January 1986, retrospectivity was needed to ensure that the provisions could apply to the handling of property stolen before that date. The Attorney-General assured the Committee that no non-criminal acts were rendered criminal by the retrospectivity which was merely intended to avoid a *lacuna*.

4.44. Secondly, section 116 of the Ordinance created the offence of possessing an article for use in the course of theft or burglary. Sub-section (2) provided that proof that a person was in possession of an article made or adapted for committing theft or burglary "shall be evidence" that the person had the article for that use. It seemed that to avoid conviction a defendant would be obliged to show that he or she did not intend that the article would be put to an unlawful use. Liability clearly hinged on intention to use the article for theft or burglary. Yet proof of possession became evidence of a particular intention which the defendant would have to rebut with evidence of such calibre as would make his or her *innocence* once more a live issue in the trial.

4.45. In its Report on The Burden of Proof in Criminal Proceedings (Parliamentary Paper No. 319/1982), the Senate Standing Committee on Constitutional and Legal Affairs wrote that in relation to the accused the evidential burden of proof meant that the matter must be taken as proved against the accused unless there is sufficient evidence to raise an issue on the matter. (paragraph 2.2, emphasis added)

4.46. The Committee noted from Cross on Evidence[4] that to satisfy the evidential burden "it is .... necessary for there to be such evidence as would, if believed and uncontradicted, induce a reasonable doubt in the minds of a reasonable jury ....". An accused's silence, or mere assertion of innocence or lack of intent would probably not be sufficient to satisfy this test. Yet traditionally an accused is presumed to be innocent until the prosecution has established guilt beyond all reasonable doubt.

4.47. In its Report, the Senate Committee recommended that as a matter of legislative policy, provisions imposing an evidential burden on defendants should be kept to a minimum. The Report stated:

> "In order to enable this legislative policy to be achieved, such provisions should be imposed only ....
>
> (i) where the prosecution faces extreme difficulty in circumstances where the defendant is presumed to have peculiar knowledge of the facts in issue; or
>
> (ii) where proof by the prosecution of a particular matter in issue would be extremely difficult or expensive but could be readily and cheaply provided by the defence."

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4 J. A. Gobbo, D. Byrne, J. D. Heydon, Cross on Evidence Second Australian Edition, Butterworths, Sydney, 1979, page 113, paragraph 5.13.

Sub-section 116(2) could hardly fall under either limb of this paragraph which refers to extreme difficulty or expense.

4.48. The Attorney-General explained that sub-section (2) was merely an evidentiary aid for the Crown though he conceded that the accused would be at considerable risk if he or she failed to rebut the inference as to a guilty purpose that lay behind proof of possession of an adapted article. He pointed out however, that rebuttal could be achieved through cross-examination of a Crown witness without the accused having to give direct evidence. He considered that not only could the Court reject as unconvincing the prosecution's proof that an article was specially made or adapted for burglary but the accused's silence would not prevent the Court from inferring from the evidence as a whole, a lack of criminal intention. Thus, the critical onus of proof remained on the prosecution.

4.49. The Committee having noted the Attorney's explanation did not seek disallowance of section 116 although it retained serious reservations about the provision, particularly its possible use as a holding charge. Nevertheless, the Committee considered that it could not ignore the fact that the provision was not novel and provisions very similar to it also appeared in the Theft Act 1969 (U.K) and Crimes Act 1958 (Vic.).

Crimes (Amendment) Ordinance (No. 5) 1985
Evidence (Amendment) Ordinance (No. 2) 1985
(A.C.T. Ordinances Nos. 62 and 61 of 1985)

4.50. These Ordinances made quite fundamental changes to the rules concerning the definitions of, and the giving of evidence in relation to sexual offences. The Evidence (Amendment) Ordinance, prevented the accused without the judge's consent from adducing evidence of any complaint

made by, or the sexual reputation of, the complainant. The Crimes (Amendment) Ordinance, abolished the crime of rape as it has been conventionally understood, widened the definition of sexual intercourse, more strictly defined the requirements of consent and made sexual intercourse without consent within marriage a criminal offence.

4.51. In responding to the Committee's request for information about how widely the A.C.T. community had been consulted prior to the making of these changes, the Attorney-General referred to the extensive consideration given to the initial proposals by the A.C.T. Criminal Law Consultative Committee, the A.C.T. House of Assembly and the Office of the Status of Women. (See also Senate Hansard, 9 April 1986, pages 1534-1535)

Customs Regulations (Amendment) and
Excise Regulations (Amendment)
(Statutory Rules 1985 Nos. 75 and 76)

4.52. Prior to these regulations a claim could be made at any time for a rebate of customs and excise duty on diesel fuel purchased for certain purposes. The amending regulations provided that a rebate would not be payable unless the application had been made within 12 months of purchase. The regulations came into operation on 1 July 1985 with the effect that claims for fuel purchased before 1 July 1984 were forever barred.

4.53. These regulations caused some distress and were the subject of investigation by the Commonwealth Ombudsman and federal and State parliamentarians, because of the practice adopted by some purchasers of waiting for a lengthy period before compiling invoices for the purpose of lodging a claim. The proposed time limits had been advertised in advance of the regulations. The

Government's policy was to limit the time within which claims could be made to facilitate efficient processing of them.

4.54. The Committee considered that the Regulations were not so unreasonable as to raise a possibility that they could not have been within the contemplation of Parliament when it conferred power to make them. The Committee forwarded to the Minister for Industry, Technology and Commerce copies of the complaints and representations it had received.

Customs Regulations (Amendment) and
Excise Regulations (Amendment)
(Statutory Rules 1985 Nos. 126 and 127)

4.55. Customs sub-regulation 138B(1) and Excise sub-regulation 248(1) imposed on the Comptroller of Customs an obligation to notify a person, whose interests were affected by a decision, that a right existed to seek merits review of the decision by the Administrative Appeals Tribunal. The sub-regulations were so drafted however, that this important obligation was made dependent on the Comptroller first giving notice that a decision had been made. Unfortunately there was no obligation to give such a notice. Further, the right to seek A.A.T. review itself appeared to exist only where the Comptroller did in fact give a written notice of decision. The Minister for Industry, Technology and Commerce explained that the omission of an obligation to notify a person of a decision was the result of a drafting error and he undertook to amend the Regulations to correct it.

4.56. The Committee is pleased to report that Customs Regulation (Amendment) (Statutory Rules 1986 No. 176) implemented the Minister's undertaking.

4.57. The Committee also asked the Minister about the way these Regulations were to be administered and whether there should be a requirement that reasons be given for decisions. It appeared however, that the number of decisions made daily by Customs Service officers was considerable, the majority being of a routine nature having little impact on personal rights. The Administrative Decisions (Judical Review) Act and the Administrative Appeals Tribunal Act could be used to obtain reasons for decisions. The Committee accepted this explanation on the understanding that the decisions were numerous and routine and did not involve any exceptional circumstances which could give rise to a fair entitlement to be provided with reasons as of right.

Defence Determinations Nos. 64 and 65 of 1985

4.58. These determinations retrospectively varied a living allowance payable to service personnel in Pakistan and Sweden. The Explanatory Statement said that the variation involved "decreasing the rates payable in Pakistan, with retrospective effect". If the explanation was correct this retrospectivity would be prejudicial to individual service people.

4.59. The Minister for Defence however, informed the Committee that the statements in the Explanatory documents were incorrect. The error had escaped a usually very thorough Departmental scrutiny of draft documents and the Determinations had the effect of retrospectively increasing the rates of allowance.

4.60. The Committee's legal adviser having examined all of the past Determinations relating to the allowances in question, advised the Committee that there was no retrospective decrease.

Defence Determination No. 8 of 1986

4.61. This Determination deleted certain schools from, and added others to, the list of approved schools where a child's attendance attracted a certain allowance. The changes were made retrospective to 1 January 1986. The Committee was concerned about retrospective loss of entitlement by Defence Force members by having their children at schools which ceased to be approved.

4.62. The Minister assured the Committee that no member of the Defence Force could have been prejudiced by the retrospectivity because no Defence Force personnel had been posted to the areas served by the schools.

Defence Determination No. 14 of 1986

4.63. This Determination dealt with payment to Naval officers of allowances for the purchase of uniforms and clothing. The rates of outfit allowance prescribed for officers of equal rank and position varied, in some cases significantly, depending on whether the officers were males or females.

4.64. The Committee accepted that the uniforms of male and female officers, while presumably being of equal quality and propriety, would for gender reasons differ in aspects which could affect their price. Where the supply of complete uniforms was the responsibility of the employer these discrepancies in respective costs of items would not give rise to the appearance of disparate treatment on the grounds of gender. On the other hand the payment of differing levels of allowance for the private purchase of necessary items, could in practice have resulted in discriminatory treatment if male or female officers of a particular rank or position enjoyed a monetary advantage over their fellow officers as a consequence of gender difference.

4.65. It appeared however, that no monetary advantage accrued to any officer because the amount paid was fully expended on the range of uniform items considered necessary.

4.66. However, the Committee retains a residual concern that significantly different allowances should not reflect, or be seen to reflect, significant differences in the quality of uniforms, accoutrements and insignia, and, by implication, a lack of equality between the male and female officers who wear them. Any such differences could reflect, or be seen to reflect, an outmoded gender-based distinction between the perceived status of officers described as being of equal rank and responsibility. (See Senate Hansard, 12 June 1986, pages 3832-3833)

Defence Force Discipline Regulations
(Statutory Rules 1985 No. 125)

4.67. These regulations dealt with aspects of Defence Force Discipline including the use of Detention Centres. The Committee was concerned about a number of matters.

4.68. Firstly, regulation 13 conferred a discretion rather than an obligation on an authorised officer to appoint visiting officers to inspect detention centres. Such official inspections were designed to oversee the fair and proper treatment of detainees in the Centres. The Minister for Defence undertook to redraft the Regulation to impose an obligation.

4.69. Secondly, paragraph 5(2)(a) of the Regulations provided that a person found guilty of certain military offences could be confined in a unit detention centre for up to 7 days. There was no provision for inspection of unit detention centres, although the officer in charge was required "as far as practicable" to visit each detainee daily.

4.70. The Minister explained that a unit detention centre was in the nature of a guard house, attached to the unit, staffed by ordinary members of the unit, and thus offered a detainee relatively easy access to his or her platoon or company commander. The Committee accepted that these factors sufficiently addressed the possibility of unfair treatment which an inspection might otherwise have deterred.

4.71. Thirdly, sub-regulation 15(5) conferred on the officer in charge of a centre discretion to refuse entry to a visitor if there are reasonable grounds to believe that the person could affect the security or discipline of the centre. The Minister explained and the Committee accepted that unfair or arbitrary exercise of this discretion could be the subject of appeal though established military procedures for redress of grievances.

4.72. Finally, the Committee noted that although a detainee could be required to perform reasonable work, sub-regulation 17(4) provided that no detainee would be required to perform work on a Sunday, Christmas Day or Good Friday other than necessary work for the continued operation of the centre. The provision left open the possibility of discriminatory treatment of non-Christian detainees since the express protection of particular religious observance days discriminated against other persons whose bona fide day of religious observance was not equally protected. Civilian prison regulations made provision for genuine religious observance by inmates of different denominations.

4.73. The Minister for Defence readily agreed to amend the regulation to meet the point raised. The Committee is pleased to report that the Defence Force Discipline Regulations (Amendment) (Statutory Rules 1986 No. 46)

satisfactorily implemented the Minister's undertakings in respect of the first and final points above, the second and third having been satisfactorily explained.

Defence Force Discipline Rules
(Statutory Rules 1985 No. 128)

4.74. This instrument, made by the Judge Advocate General of the Australian Defence Force, laid down rules of procedure for Defence Force Disciplinary Tribunals. The Committee had two concerns.

4.75. Firstly, Rule 14 provided that an authorised officer in the Defence Force could take steps necessary to secure the appearance at the hearing before a tribunal, of persons reasonably required by the accused person to appear and give evidence.

4.76. This provision appeared to confer a wide and a rather vague discretion. The Committee was uncertain whether the Rules thereby empowered service officers to order the attendance of civilian witnesses perhaps involving the use of military police. Such powers would not be appropriately conferred by delegated legislation.

4.77. The Judge Advocate General explained however, that Rule 14 restated a principle that existed under the previous law of providing an accused person with the right to have the attendance of relevant witnesses on his behalf secured by the Commonwealth at the expense of the Commonwealth. This right was not carried into effect under the Rules but by exercising power under sub-section 138(2) of the Act.

4.78. Secondly, paragraph (3)(d) of Rule 26 conferred on an officer discretion to certify that a witness "cannot, in the officer's opinion, reasonably be procured", whereupon a written statement of that witness' evidence may instead

be read to an accused. The question arose whether the unsupervised exercise of this discretion could unfairly deny the accused an opportunity to cross-examine a witness.

4.79. It appeared however, that under the Defence Force Discipline Act 1982, a commanding officer could either hear evidence or, in serious cases and court martials, direct another officer, legally qualified if possible, to hear that evidence. A record of the evidence adduced before an examining officer would be admissible before a summary authority like a commanding officer but only if that authority was satisfied that its admission would not be unfair and the person charged consented. The record of evidence taken by the examining legal officer would not be admissible before a court martial or a defence force magistrate. Thus, the certification procedure could be used only in limited proceedings presided over by a supervising senior officer and with the consent of the accused.

Defence Force Regulations (Amendment)
(Statutory Rules 1985 No. 88)

4.80. These regulations raised a number of issues of concern to the Committee. Firstly, the Committee was particularly concerned about sub-regulation 49(1) which provided that the Minister for Defence could by a gazetted notice, declare any area of land, sea or air in or adjacent to Australia to be a "defence practice area" for carrying out defence practice operations. Such operations could involve Australian and foreign Defence Forces.

4.81. Private land (land not occupied by the Commonwealth) could not be the subject of a declaration without the consent of the occupier or failing that, unless it was necessary or expedient in the interests of safety and defence. A declaration of private land would be tabled

in Parliament and subject to negative resolution within 15 sitting days. On the other hand an area of Commonwealth land, (not in private occupation) could be declared without regard to overriding consideration of safety or defence and without the opportunity for parliamentary supervision.

4.82. The Committee asked the Minister for Defence whether, subject to other Commonwealth laws which have dedicated Commonwealth land to particular uses, Commmonwealth land in the A.C.T. and other Federal Territories, Commonwealth airports, offices and buildings which are Commonwealth places and perhaps even Parliament House itself, could be declared to be defence practice areas without any form of parliamentary supervision.

4.83. The Minister explained that the purpose of the regulations was to protect public safety by authorising the legal exclusion of people from declared practice areas, usually large areas where dangerous weapons practice and manoeuvres were held. There was no legal need for legislative authority to enable an operation to be conducted since such activities could be conducted on Commonwealth or private land subject to compliance with the law, including the rights of property owners and occupiers. The Minister pointed out that provision had always existed for the declaration of such areas and there had never been declarations of practice areas other than in large, relatively remote locations.

4.84. The Minister conceded that it was quite possible that there could be declarations over areas in the A.C.T. or other territories elsewhere in Australia, though clearly the proposed practices would have to be compatible with any other continuing use of the areas. He assured the Committee that there was no possibility that declarations would be made in respect of developed land, offices or

buildings in current use since the practices at which the new regulations were directed did not require use of such premises.

4.85. Furthermore, the requirement for Gazettal of all practice area declarations provided a clear indication that the declaration process would not be open to misuse in respect of Commonwealth property.

4.86. Secondly, the Committee noted that although ministerial declarations of private land, whether by consent or compulsion, were subject to parliamentary tabling and negative resolution, there was no additional protective requirement, similar to that in sub-section 48(3) of the Acts Interpretation Act 1901, that a failure to table would make the declaration void and of no effect. The Minister agreed with this suggestion and undertook to amend the regulations accordingly.

4.87. Finally, regulation 57 provided that the Commonwealth would pay reasonable compensation to persons who sustained loss or damage from a defence practice operation. There were no procedures for assessing compensation and there was no right to have a compensation decision reviewed on its merits by the Administrative Appeals Tribunal. The Minister readily agreed to correct this oversight. The Minister's undertakings were given on 8 October 1985.

Defence (Inquiry) Regulations
(Statutory Rules 1985 No. 114)

4.88. These Regulations established procedures for certain inquiries into the Australian Defence Force. A number of points were of concern to the Committee.

4.89. Firstly, regulation 17 provided that a General Court of Inquiry could order that a test be carried out on an article which could result in its destruction. While a person with an interest in that article was entitled to be paid compensation by the Commonwealth, no procedure was specified for assessing the level of compensation and nor was there any right to seek review of the merits of any assessment decision.

4.90. The Minister for Defence explained that articles requiring testing were likely to be Commonwealth property and there was therefore no practical need for appeals from compensation decisions. In the rare likelihood of disagreement between a private owner and the Commonwealth as to the value of an article, the owner could challenge the fairness and adequacy of the compensation in the courts, on the basis of the entitlement conferred by regulation 17.

4.91. Secondly, it appeared to the Committee that a member of a Court of Inquiry or a Board of Inquiry could not resign from that appointment. The Minister agreed to correct this oversight in so far as it concerned civilian members of the Court or Board.

4.92. Thirdly, regulations 21 and 37 provided that where certain members were no longer able to conduct an inquiry then, until the Minister appointed replacements or directed a continuation with the existing membership, the inquiry would be suspended.

4.93. Since the Minister had a discretion to so appoint or direct, a Court or Board could in effect be suspended indefinitely leaving those persons, who were the subject of the proceedings, in an invidious position where possibly false allegations remained unresolved.

4.94. The Minister explained that inquiries were fact-finding in nature, set up for a specific task, and of limited duration, most being concluded within a few days. Thus, suspensions because of vacancies would be a most unlikely event and in view of the overriding interest in the rapid completion of inquiries, indefinite suspension would be unlikely and impracticable.

4.95. Fourthly, the power to dissolve an inquiry conferred on the Minister under sub-regulation 67(3), contained a very wide, unstructured and unreviewable discretion, the exercise of which could have serious implications for individuals with an interest in the completion of an inquiry. An inquiry that could be dissolved at will would become the property of the person appointing it, thus calling into question the credibility of the inquiry process itself.

4.96. Once again, it appeared that the limited duration of Defence inquiries would make abuse of the dissolution power impracticable. However, the power to dissolve a court or board was needed to cover some contingencies, for example, where it appeared that the subject matter of the inquiry was without substance or where the investigation had been overtaken by another fact-finding body. In any event a member aggrieved by any decision to dissolve an inquiry, could make a complaint to his or her commanding officer, pursuant to regulations relating to redress of grievances.

4.97. Fifthly, regulation 33 provided for appearances before a Board of Inquiry. Sub-regulation (3) gave the appointing authority discretion whether to allow a legal practitioner to represent a person. Under the regulation it would have been possible for one person to be granted legal representation while another person appearing before the same inquiry was not.

4.98. The Minister agreed that it would be undesirable for a Board's discretion to be exercised unfairly in a differential fashion between persons with similar interests. However, as the inquiries were inquisitorial rather than adversarial, there was no scope for common treatment of, for example, an expert witness and an officer who may have displayed bad judgment. The former would not require representation but the latter probably would require assistance.

4.99. Sixthly, although regulation 57 was generally similar to the contempt provision in section 60 of the Royal Commissions Act 1902, paragraph (d) of the regulation conferred on a Court of Inquiry powers of contempt which appeared to be beyond those of a Royal Commission. Thus sub-paragraph 57(1)(d)(ii) could possibly have extended the proscription on public reporting on the proceedings of an inquiry to true words concerning its bona fides or fitness for office. The appearance in delegated legislation of such a proscription had implications for freedom of expression by individuals and the media.

4.100. The Minister agreed that contempt provisions for a Court of Inquiry should not go beyond those for a Royal Commission and he undertook to obtain legal advice on the matter from the Attorney-General's Department with a view to making any adjustments necessary. The matter remains under examination. The Minister's undertaking to have regulation 57 revised was given on 10 October 1985; the Committee awaits the implementation of this undertaking and understands that the Minister has had consultations with the Attorney-General's Department to this end.

Electricity (Amendment) Ordinance 1985
(A.C.T. Ordinance No. 20 of 1985)

4.101. This Ordinance established a scheme for the registration of electrical equipment and the enforcement of safety standards. The Committee was concerned about four issues.

(a) INDEPENDENT REVIEW OF DISCRETIONARY DECISIONS

4.102. Most discretionary decisions under the Ordinance were subject to merits review by the Administrative Appeals Tribunal. However, there was no review of a decision, under section 32C, to declare that electrical equipment was prohibited because it was likely to become unsafe or of a decision, under section 32D, to declare that equipment was likely to become unsafe unless it complied with certain safety standards. The Committee considered that a right of appeal to the A.A.T. could protect the safety of consumers while also ensuring that unjustified declarations did not prejudice the livelihood of suppliers. A review right would serve to guarantee the quality of declaration decisions.

4.103. The acting Minister for Territories pointed out that it was generally inappropriate for the A.A.T. to review the technical considerations associated with public health and safety. However, an inquiry mechanism similar to that in the Trade Practices Amendment Bill 1985 could address the concern expressed by the Committee. He proposed therefore to re-examine the discretions in sections 32C and 32D with the intention of making amendments to provide for review, consultation and scrutiny of declarations. The Committee accepted this proposal.

(b) STRICT CRIMINAL LIABILITY

4.104. The Ordinance contained some offence provisions in which the defence of reasonable excuse was available and other provisions where this defence was not made expressly available, raising some doubts that strict criminal liability was imposed. Such a liability would be a serious imposition on a defendent's right to the presumption of innocence. However, the Attorney-General advised the Committee that the offences in question would all require the prosecution to establish mens rea. Nevertheless, it was agreed, in the interests of clarity and certainty, that the offence provisions should be amended so that they all explicitly imposed this fundamental obligation on the prosecution.

(c) POWERS OF ENTRY

4.105. The Minister agreed that the "consent to entry" provision in the Ordinance should reflect the protections which appeared in section 236 of the Credit Ordinance 1985. The Committee considered it highly desirable as a matter of practice and to protect a person whose property was to be entered by consent, to ensure that such consent was fully and freely given and evidenced by a written acknowledgement that this had been the case. The Minister also agreed to delete sub-section 32Y(4) from the Ordinance containing a provision deeming a search warrant, in certain circumstances, to be more sweeping than its express terms allowed.

(d) TELEPHONE SEARCH WARRANTS

4.106. This matter was of particular concern to the Committee. Section 32Z set down the circumstances in which an inspector could apply to a Magistrate by telephone for a search warrant. The Committee noted that power to obtain telephone search warrants was available in the Royal

Commissions Amendment Act 1982, the Radiocommunications Act 1983, the National Crime Authority Act 1984, and the Defence Legislation Amendment Act 1984. Under the Royal Commission and National Crime Authority legislation the application could be made only to a Judge. In the Radiocommunications Act, a Magistrate or a person who is a J.P. could issue the telephone warrant. In the Defence Legislation Amendment Act an authorised officer could do so. The Crimes (Amendment) Ordinance 1984 empowered a Magistrate to grant a telephone warrant, though only police officers could apply for it.

4.107. The use of the telephone is not unknown in judicial procedures. Urgent applications for injunctions or for orders in the nature of habeas corpus have been made and granted on a number of occasions by this means. However, the Committee was concerned about anyone other than a superior Judge exercising the kind of discretion arising in the grant of a telephone warrant where the power was conferred by delegated legislation.

4.108. The Committee was strongly of the view that where a face to face encounter was removed, where the affidavits and other documents justifying an invasion of a person's home or property by State officials could not physically be presented to the person asked to order the invasion of that property, where an atmosphere of intense urgency and grave emergency was created, inevitably, by use of the telephone, then exceptional circumstances prevailed and very great care was needed in weighing the rights of the citizen against the interests of the broader community in effective law enforcement. The Committee considered that a superior Judge could ensure that a compelling case was made out to justify the issue of this exceptional type of warrant in the extraordinary circumstances of an application being made by telephone, without impeding the work of reasonable law enforcement or prejudicing personal safety.

4.109. Superior court judges were, by definition, more qualified and experienced than Magistrates in discharging certain judicial functions. The structure of courts was evidence of the fact that the judicial hierarchy reflected different levels of judicial power and responsibility. The exercise of high responsibility was best confined to persons of high status. Because of its impersonal nature and its association with an atmosphere of crisis and urgency, the power to approve an application by telephone for a search warrant appeared to the Committee to be a matter which should vest in a superior court judge.

4.110. The Attorney-General did not concur with the Committee's observation that superior court judges were more capable than magistrates in holding an appropriate balance between private rights and public interest in regard to the issue of telephone warrants. However, the Committee was not persuaded to withdraw its objection to the provision. The Minister for Territories on the advice of the Attorney-General preferred to delete the telephone search warrant rather than amend it as suggested by the Committee.

4.111. The Minister also agreed to delete the related power of urgent entry because, in the absence of a telephone warrant procedure, urgent entry was the next step if a Magistrate could not be found to issue a normal search warrant. This created an unacceptable precedent and could lead to abuse of power. The urgent entry power, being linked to the telephone warrant power, inevitably fell with it when the Attorney-General would not accept the Committee's view regarding the issue of telephone warrants.

4.112. It was the Committee's intention in its scrutiny of the Ordinance to try to balance the needs of reasonable law enforcement with the individual's rights to privacy. The suggestions it made reflected that balance but in the

final analysis the Minister and the Attorney-General preferred to remove wide powers rather than amend them. (See Senate Hansard, 26 November 1985, page 2221)

4.113. The Minister's undertaking was given on 25 November 1985.

Evidence (Amendment) Ordinance (No. 2) 1985
(A.C.T. Ordinances No. 61 of 1985)

4.114. This is discussed earlier in this Chapter in connection with the Crimes (Amendment) Ordinance (No. 5) 1985.

Excise Regulations (Amendment)
(Statutory Rules 1985 No. 141)

4.115. These Regulations conferred certain discretions on the Collector of Customs. In particular, Schedule 2, Items 1 and 5 provided that certain goods "shall not be used in .... manufacture .... unless the Collector has, on the application of the manufacturer, consented to the goods being so used ....". Although certain decisions of the Collector were subject to review by the Administrative Appeals Tribunal under section 162C of the Excise Act 1901 these decisions were not among them. An unreasonable withholding of consent could result in financial detriment to a manufacturer.

4.116. The Minister for Industry, Technology and Commerce explained that the discretion was a revenue control mechanism to ensure notification to a Collector prior to the use of excisable spirits. It had never been exercised to limit their use. However, he undertook to amend the Regulations to provide a right of appeal for any manufacturer who was refused consent to use goods. The Minister's undertaking was given on 10 October 1985.

Export Control (Orders) Regulations Orders Nos. 1 and 6 of 1985
(Prescribed Goods (General) Orders and Grain, Plants and Plant Products Orders)

4.117. These Orders established a scheme for the export of produce by prescribing goods and providing for registered export establishments. The Orders contained penal provisions none of which provided for a defence of "reasonable excuse" for non-compliance. The Minister for Primary Industry agreed with the Committee that a failure to display a registration certificate or a failure to surrender a revoked export permit could result in conviction even if the certificate or permit had not been received or had been accidentally lost or destroyed. He undertook to amend the Orders to provide that in such circumstances there would be a defence to criminal proceedings. He also agreed that the defence of reasonable excuse should be available in a prosecution for failure to comply with unnecessarily onerous directions of an authorised officer, where compliance would have a significant impact on an exporter.

Export Control Orders Nos. 2 and 7 of 1986
Prescribed Goods (General) Orders as Amended (Amendments)

4.118. Certain of these Orders were the subject of controversy as to their merits and they were eventually disallowed by the Senate. Briefly, they had the effect of reversing a Federal Court decision which held that there was a statutory obligation on the Government to provide meat inspectors at certain export meat establishments. The Orders conferred an unreviewable, national interest, discretion on the Minister to direct when inspectors would be made available. During the disallowance debate, the Chairman of the Committee said:

> "The Committee does not involve itself in considering the merits of the policy behind delegated instruments. .... After considering

> the Orders .... and its legal adviser's report .... the Committee .... did not consider that any of its Principles were infringed. The policy behind the Orders is, of course, beyond the scope of the Committee's concerns." (Senate Hansard, 19 March 1986, page 1220)

Extradition (Republic of South Africa) Regulations (Amendment) (Statutory Rules 1985 No. 158)

4.119. In its Seventy-seventh Report (paragraph 114) the Committee described its scrutiny of previous extradition regulations concerning South Africa. Those regulations infringed the Committee's principles and the Attorney-General undertook to amend both the Extradition (Foreign States) Act and the regulations to better protect individual rights. The Statute Law (Miscellaneous Provisions)(No. 1) Act 1985 amended the Extradition (Foreign States) Act to provide that extradition could not occur if the offence for which a person was sought was one which, had it occurred in Australia, would have attracted a penalty of less than 12 months imprisonment. The regulations were made to apply this and other protective measures to extradition to South Africa.

4.120. The Attorney-General undertook to base his amendments to the provisions on Article 4 of the Model Extradition Treaty which provided inter alia that extradition may be refused for revenue offences. However, the new regulations made it clear that there would be extradition for offences relating to taxation, customs, foreign exchange control and revenue. The Attorney-General had therefore, departed from his original undertaking. He explained that it had been incorrectly assumed that South African extradition law reflected the traditional common law approach which precluded extradition for revenue and fiscal offences and it had been intended therefore to retain a discretion in relation to such offences. However, extradition from South Africa was not so limited

by the traditional approach and, since it was the Government's policy to permit extradition for these offences, the regulations reflected this. The Committee regrets that it was not informed of or consulted about the change although in the circumstances the Committee accepted the explanation.

4.121. The Committee was also concerned about new paragraph 4(5)(b) which contained a double discretion of wide and unusual import. The Attorney-General was given a discretion to refuse to issue a warrant for the surrender of a person to South Africa if, while taking into account the nature of the offence and the interests of the South Africa, he or she was of the opinion that, it would be unjust, oppressive or incompatible with humanitarian considerations to surrender the person to South Africa. It appeared that the Attorney-General could form an opinion that extradition would be unjust but still exercise a lawful discretion to issue a warrant resulting in the extradition of the person.

4.122. The Attorney-General explained that the discretion was to put South Africa on notice that there would always be a final executive discretion to refuse extradition in certain circumstances. It was not intended that the Attorney-General, having formed an opinion that it would be unjust to surrender a person, would nevertheless issue the warrant. It was an established principle of administrative law that a decision-maker must act reasonably. To issue a warrant for surrender having formed the opinion that circumstances of unjustness existed would clearly be an improper exercise of power and subject to the controlling authority of the Federal Court under the Administrative Decisions (Judicial Review) Act.

4.123. In the light of the Attorney-General's legal advice the Committee took the view that there were two administrative discretions contained in paragraph 4(5)(b) of the Regulations but that these could not lawfully be exercised in opposition to each other to the detriment of an individual.

Extradition (Commonwealth Countries) Regulations (Amendment) (Statutory Rules 1985 No. 264)

4.124. The preamble to these regulations stated that the Administrator (on behalf of the Governor-General) had made them under the Extradition (Foreign States) Act 1966. That Act did not confer any power to make extradition regulations concerning countries in the Commonwealth and the regulations were therefore invalid. The Committee asked the Attorney-General for his advice as to whether any individual had been prejudiced by the regulations.

4.125. The Attorney-General agreed that the regulations were invalid. New Statutory Rules (S.R. 1985 No. 287) were quickly made to correct the error. The Attorney-General assured the Committee that between the making of the two sets of regulations no one was prejudiced.

Extradition (Finland) Regulations (Amendment) (Statutory Rules 1986 No. 32)

4.126. These Regulations took into account a Protocol to the Extradition Treaty between Australia and Finland.

4.127. The Protocol made an important change to the Treaty. Previously sub-paragraph 1(f) of Article 5 provided that extradition could be refused where "evidence of criminality" would not have justified the trial under Australian law of the person whose extradition was sought. Under the Protocol, the sub-paragraph was

deleted and inadequacy of "evidence of criminality" would no longer be taken into account in the exercise of the discretion to extradite. The deletion thus limited the range of reasonable measures which would otherwise have protected a person.

4.128. The Committee was conscious that persons liable to extradition could include innocent persons who may be migrants, refugees, exiles or political dissidents whose rights should not be eroded by delegated legislation without adequate justifications made public in an Explanatory Statement accompanying the Regulations.

4.129. The Attorney-General explained that the sub-paragraph had been deleted to give effect to amendments made by the Extradition (Foreign States) Amendment Act 1985. Amendments to section 17 of the Act would enable Australia to conclude extradition arrangements with countries which required the requesting country to furnish, not evidence of guilt, but merely information as to the allegations. The amendment was of particular significance to civil law countries whose systems had difficulty in adapting to the provision of pre-trial evidence because they did not require the production of prima facie evidence. Thus the deletion of the sub-paragraph was purely consequential since the Act no longer required that prima facie evidence of criminality be provided.

4.130. The Committee was satisfied that the change reflected in the Regulations flowed from amendments to section 17 of the Extradition (Foreign States) Act 1966 which repealed the requirement for the production to a Magistrate of such evidence as would justify the trial in Australia, of the person for the alleged extradition crime. (See Senate Hansard, 3 June 1986, pages 3221-3224)

First Home Owners Regulations (Amendment)
(Statutory Rules 1985 No. 267)

4.131. These regulations were of considerable concern to the Committee because they permitted very serious invasions of personal privacy. Paragraph 29(2)(b) of the First Home Owners Act 1983 provided that an officer could divulge confidential information to any person prescribed by the regulations. New regulation 27 prescribed the Commissioner of Taxation and the Secretary of the Department of Social Security. Paragraph 29(2)(a) of the Act permitted release of confidential information if the Minister or the Secretary certified that this was necessary in the public interest. However, no such protective criterion would apply under the regulations. The type of information which could be released and the reasons for releasing it were not limited in any way, nor were the circumstances specified in which it could be released.

4.132. The Committee was concerned about the implications of the use of delegated legislation to facilitate an interlocking of Government Departments' information systems containing a wide range of confidential information about individuals, married couples and families. When this was conveyed to the Minister for Housing and Construction, he explained that his Department would adopt rigorous standards in determining whether information should be supplied to the Australian Tax Office or the Department of Social Security. For example, it would be clear policy that information would be supplied only in pursuance of a statutory demand for information.

4.133. However, the Committee considered that the Regulations themselves should expressly provide for the rigorous criteria and statutory demands referred to, rather than leave such fundamental protections to the changeable

dictates of policy or administrative guidelines. Such an approach would protect privacy because criteria for release of information would be publicly known, certain of application, definite in content and subject to parliamentary scrutiny if amended. Information transfer was intended to assist with fraud prevention. However, that task would not be hampered by the Committee's proposals that the regulations should contain express limitations and protections.

4.134. The Committee argued that at a time when debate was reaching a head on issues of privacy, fraud detection and the role of the Government's interlocking computer technology, the Committee had a fundamental responsibility to address the basic question of the legislative propriety of delegated legislation which, notwithstanding its legality, placed no legal constraint whatsoever on the interdepartmental release of personal information.

4.135. In the light of the Committee's views the Minister agreed to amend the Regulations to describe the type of information to be divulged and to specify the particular conditions in which releases could lawfully occur. Pending these amendments the Minister agreed to use the public interest certification procedure set out in the First Home Owners Act. (See Senate <u>Hansard</u>, 19 March 1986, pages 1203-1204)

4.136. The Ministers undertaking was given on 19 March 1986.

<u>Fisheries Notice No. 158</u>

4.137. Fisheries Notices which are designed to prohibit the taking of fish in certain circumstances are made subject to tabling and disallowance in Parliament by sub-section 8A(1) of the Fisheries Act. Notice No. 158 prohibited the taking of prawns unless units of fishing

capacity had been properly assigned to a fishing boat. The notice specified "the period commencing on 1 March 1987 as the prescribed period during which" the prohibition would take effect. The specification of a commencement date was not specification of a "period" pursuant to the Fisheries Act. Thus, under sub-section 8(4C) of the Act the prohibition on fishing would operate at all times because there was no "specified period" during which it could otherwise operate. The Committee was concerned that such an outcome was contrary to the wishes of the Minister for Primary Industry who made the Notices.

4.138. Alerted by the Committee the Minister obtained advice from the Attorney-General's Department that the Committee's view was justified. He decided to amend the Notice to correct the problem. (See Senate Hansard, 29 May 1986, pages 2933-2938)

Freedom of Information (Charges) Regulations (Amendment) (Statutory Rules 1985 No. 113)

4.139. These regulations made large increases in the charges payable for information requested under the Freedom of Information Act 1982. Sub-section 3(2) of the Act expressly stated Parliament's intention that:

> ".... any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information".

4.140. The Explanatory Statement offered no explanation or justification for increases, which in places involved rises of 150%. Without explanations it was difficult for the Committee to make any recommendation to the Senate as to whether the Regulations should or should not be disallowed as infringing Principle (a).

4.141. The Attorney-General explained that a major part of the justification for the level of increases was that public servants of an higher than anticipated rank were of necessity involved in processing many requests and the increased fees reflected this.

4.142. The Committee's objective was to satisfy itself that increases in charges, although in some cases considerable, were lawful, soundly based on identifiable criteria and not so unreasonable as to be beyond the intentions of Parliament when it passed the Act. Having considered the matter, the Committee formed the view that the increases are not so large or unreasonable as to infringe any of the Committee's principles. It should not be concluded from this that the Committee appproved or disapproved of the level of increased charges, merely that the Committee could not reasonably have objected to them under its specific Principles. The Regulations were disallowed in the Senate on policy grounds. (Senate Hansard, 13 November 1985)

4.143. During its scrutiny the Committee received correspondence from Senator Alan Missen and the Council for Civil Liberties seeking information on the Committee's attitude to disallowance of the Regulations. The Committee advised that in its view the Regulations were a valid exercise of power and in accordance with the Statute; adequate review rights were available with which to challenge discretionary decisions on charging; there were no sustainable grounds to consider that the Regulations should have been enacted in a Bill rather than as delegated legislation; and finally, the level of increases was not so great as to constitute such a threat to personal rights and liberties that the Committee could have recommended that the Regulations be disallowed on those grounds alone.

Health Authority Ordinance 1985
(A.C.T. Ordinance No. 69 of 1985)

4.144. This Ordinance established the A.C.T. Health Authority. The Minister for Territories informed the Committee that certain provisions required further examination, in particular those dealing with review by the Administrative Appeals Tribunal of decisions concerning the appointment of visiting medical and dental officers. The Committee also drew the Minister's attention to two other aspects of the Ordinance.

4.145. Firstly, no reasons were required to be given under sub-section 44(3) when the Authority refused to appoint a person to be a visiting medical or dental officer. Reasons could be made available under section 13 of the Administrative Decisions (Judicial Review) Act 1977 or under section 37 of the Administrative Appeals Tribunal Act 1976. However, the Committee held the view that a person whose livelihood and professional reputation could be significantly affected by an adverse administrative decision, should automatically be supplied with a full statement of reasons.

4.146. Secondly, a number of provisions concerning personnel matters within the Authority had been taken from the previous Health Commission Ordinance 1975 without amendments which might have reflected the modernisation of personnel management responsibilities over the preceding 10 years. For example, an officer could not retire until he or she attained the minimum age of 60 years. Also, provisions concerning "punishment" were not likely to be as acceptable to a contemporary work force of skilled professionals as they might have been when originally drafted in 1975.

4.147. In the application of its Principles, the Committee does not question the policies that lie behind delegated legislation including industrial relations policies. However, if widely acknowledged personal rights which a contemporary work force might reasonably expect to enjoy from its employer, were inadequately protected, or dealt with insensitively, the Committee could act.

4.148. The Minister undertook to amend section 44 to provide for reasons for decisions. He also explained that a priority working group of employer and employee representatives had been established to advise the Authority over the next twelve months how industrial relations provisions might be updated. The Minister's undertaking was given on 28 May 1986.

Health Insurance (Variation of Fees and Medical Services) (Nos. 37, 38 and 40) Regulations
(Statutory Rules 1985 Nos. 149, 207 and 356)

4.149. As of 1 July 1985 Statutory Rules No. 149 amended the law in relation to the health insurance coverage of non-medically required circumcision. A claim in respect of circumcision of a person under 6 months would be accepted only where the procedure was "medically indicated". Previously there was no such requirement.

4.150. Following protests from the Jewish and Muslim communities in Australia, the Minister for Health reconsidered the amendment. Statutory Rules No.207 were the outcome of that reconsideration. The benefit was restored but only from 1 September 1985.

4.151. The Committee, ordinarily circumspect in its assessment of delegation legislation which is retrospective, was concerned that the absence of retrospectivity to 1 July 1985 had resulted in parents or guardians being

unable to claim for the medical service during the period 1 July to 31 August 1985. This would have been an unfair consequence of the Minister's reconsideration.

4.152. The Minister agreed that medicare benefit should be payable for services performed during the hiatus between the two amendments and he undertook to make an appropriate retrospective determination that circumcision would be treated as if it had been an item in the table of medical services. In the event the Minister made regulations (Statutory Rules No. 356 of 1985) restrospectively restoring the procedure to the list of insured items.

Housing Ordinance Determination by the Commissioner of Housing under the Concessional Home Loan Scheme (9 August 1985)

4.153. This Determination increased fees for concessional home loans. While other instruments determining fees were subject to tabling and disallowance in Parliament, Housing Determinations were not. There was no rational distinction to explain this oversight. The Minister for Territories agreed in principle that Housing Determinations should be treated in the same fashion as other fee determinations but he argued that the matter would best be dealt with after the proposed establishment of an A.C.T. Council and the transfer to it of responsibility for the Scheme.

4.154. The Committee agreed. However, if responsibility for the Scheme is not in fact transferred to the Council the Committee will renew its request that the determinations be made subject to tabling and disallowance in Parliament.

Legal Practitioners (Amendment) Ordinance 1985
(A.C.T. Ordinance No. 29 of 1985)

4.155. The Ordinance was designed to remove doubts, concerning the Constitution of the A.C.T. Law Society. These doubts had arisen because of a drafting error in sub-section 6(5) of the Legal Practitioners Ordinance 1972. To correct this the Ordinance was made retrospective to 10 February 1972.

4.156. The Committee sought further information from the Attorney-General to enable it to decide whether such extensive retrospectivity had caused prejudice to the rights of solicitors or citizens.

4.157. The Attorney-General explained that sub-section 6(5) of the principle Ordinance had provided that the Constitution of the Society was to be that which was "in force immediately before the commencement of the Ordinance". The Ordinance commenced on 14 December 1970. Section 6(5) had been inserted into the principle Ordinance in 1972 by a new Part and it had been intended that the Constitution referred to be that "in force immediately before the commencement of this Part". The oversight in drafting had only recently been discovered and the Constitutional documents in existence prior to 1970 differed from those in existence prior to 1972. Thus the amendment had to be made retrospective to 1972 in order to provide that, since that date, the Constitution of the Society, on the basis of which its affairs were intended to be, and had in fact been conducted, was the Society's lawful Constitution. On the mistaken assumption that that document was the legal Constitution, it had been twice amended and without decisive and retrospective action to point to a definitive document the legality of the Society's affairs would remain in doubt.

4.158. The Attorney-General assured the Committee that the question of retrospectivity had been considered in detail. On the basis of the information available, it had been concluded that retrospectivity was not only beneficial but essential, and there was nothing to indicate that any person could be prejudiced. He had also consulted the President of the Law Society who agreed that there was no prejudice to any individual, solicitor or citizen as a result of the retrospectivity.

Meat (Amendment) Ordinance 1986
(A.C.T. Ordinance No. 26 of 1985)

4.159. The Committee identified two matters of concern. Firstly, paragraph 14 of this Ordinance required an authorised person inspecting premises to produce "written evidence" of his or her authority "if required by the occupier". The Committee considered that inspectors should produce a proper photographic identification card like that required under sub-section 327(2) of the A.C.T. Electricity (Amendment) Ordinance 1985. A proper provision would deter impostors, reassure occupiers and remind inspectors of their responsibility. "Authorised persons" under the Meat Ordinance included inspectors under the Public Health Ordinance 1928 and, on an administrative basis, this group already carried plastic ID cards issued by the A.C.T. Health Authority. The Minister therefore undertook to amend the Meat Ordinance to give legal effect to these administrative arrangements so that all authorised persons would be required to carry a proper photographic identity card. The Minister's undertaking was given on 25 November 1985.

4.160. Secondly, the Committee considered that an identification card should automatically be produced by the inspector rather than merely on request. The Minister for Health thought that automatic production of ID cards might detract from the emphasis which health inspectors placed

on their educative rather than their enforcement role. Production of proof of identity on request was in conformity with provisions of the widely adopted National Health and Medical Research Council Model Food Legislation. In the particular circumstances of this case the Committee accepted the Minister's explanation on this point.

Meat Regulations (Amendment)
(A.C.T. Regulations 1985 No. 15)

4.161. Under these Regulations the Chairman of the A.C.T. Health Authority had a discretion to grant a person a full or conditional permit to slaughter live-stock at an abattoir. However, there was no provision for appeal against an unjustified refusal to grant a permit. Although this discretionary power was not new it was restated in the Regulations. The award of a permit would obviously be commercially valuable and a person should have been able to appeal against an unjustified refusal or unreasonable conditions.

4.162. The Minister for Health undertook to refer the question to the Attorney-General's Department for appropriate action in making the discretion subject to A.A.T. review. The Minister's undertaking was given on 4 October 1985.

Migration Regulations (Amendment)
(Statutory Rules 1985 No. 261)

4.163. These Regulations increased fees for certain entry permits to Australia. New sub-regulation 29AB(2) specified a fee of $100 for a non-citizen entry visa. Sub-regulation 29AB(5) provided that no fee would be payable where an authorised officer either had determined that a person was a refugee or had certified that it would be reasonable, having regard to humanitarian considerations, not to impose the fee.

4.164. Because of the vulnerability of refugees or persons requiring humanitarian considerations the Committee sought assurances about the effectiveness of Departmental procedures in ensuring that no arbitrary classifications of migrants could result in the unfair imposition of an entry fee.

4.165. The Minister for Immigration and Ethnic Affairs explained that eligibility under Refugee and Special Humanitarian Programs was determined on a case by case basis having regard to Government policy and public guidelines. Decisions on eligibility were discretionary. However, he was confident that processing procedures, subsequent case audits, and refund payments would ensure that fees were not charged unfairly or arbitrarily.

4.166. Although no external review procedures existed the Committee accepted the Minister's assurances about the thoroughness of administrative procedures. The Committee noted that the Minister had expressly certified that persons who under public guidelines qualified as being within the Refugee and Special Humanitarian Programs were to be exempt from fees.

Navigation (Limitation of Shipowners' Liability) Regulations (Statutory Rules 1985 No. 317)

4.167. The Navigation Act 1912 provided that a claim could be lodged with a Court for determination of a shipowner's maritime liability by reference to the tonnage of the ship. Regulations provided rules for the measurement of tonnage. However, sub-regulation 3(3) provided that where tonnage could not be measured, the Minister would estimate the dimensions of the ship and the tonnage that would correspond to those dimensions. In proceedings the Court would accept such an estimate "unless it is proven

to be incorrect". The Committee queried whether this provision amounted to a technical reversal of the onus of proof in those proceedings.

4.168. The Minister for Transport explained that in some cases a ship, not having been previously measured for tonnage in the way called for by the Convention on Limitation of Liability for maritime claims, could not be measured by normal methods. For example, it might have been lost at sea. To avoid costly disputes between parties as to the limit of maritime liability, section 336 of the Navigation Act had provided for the Minister to estimate the tonnage. That estimate was open to challenge by either party. Previously the challenger was required to "prove the contrary", an unreasonably difficult task since no alternative estimate could be proved correct.

4.169. The regulations lessened the onus by requiring that the estimate be proven incorrect. This could be achieved by demonstrating that the Minister had wrongly taken, or failed to take, into account some attribute of the ship. (See Senate Hansard, 10 April 1986, page 1551)

Northern Prawn Fishery Management Plan (Plan of Management No. 3, Northern Prawn Fishery)

4.170. This instrument provided a scheme of management for the Northern Prawn Fishery. The Committee raised a number of concerns with the Minister of Primary Industry.

4.171. Firstly, the Plan provided for A.A.T. review of certain discretionary decisions, the adverse exercise of which could have a serious effect on a person's livelihood in the fishing industry. A further discretion under paragraph 10.4 concerning the financial commitment and intentions of applicants for fishing units should also have been made reviewable. The Minister agreed to amend the Plan to provide for this.

4.172. Secondly, although the Plan was to come into force on 1 March 1986, under paragraph 3 acts done after 1 January 1986 for the purpose of the Plan could be regarded as if done under the Plan. The Minister assured the Committee that no decisions prejudicial to any individuals were taken during the period of retrospective operation.

4.173. Thirdly, section 9A of the Fisheries Act provided that the Minister or the Secretary "may" by notice cancel a master fisherman's licence if there were reasonable grounds to believe that there had been contravention of a licence condition or performance of a prohibited act. However, paragraphs 35 and 36 of the Plan provided that the Minister "shall" cancel the licence where the holder had two or more convictions for fishing offences.

4.174. Cancellation of a licence would mean that a person and possibly a crew would have lost a source of livelihood. The Act gave the Minister a discretion to cancel and this had to be exercised fairly. Principles of administrative law required that some measure of natural justice be afforded to the licence holder, for example an opportunity to make representations in mitigation, justification or excuse. If, in the light of such matters and the requirements of ministerial policy concerning the management of the fishery, the Minister decided to cancel the licence, the merits of that cancellation decision could be reviewed by the A.A.T. under section 16A of the Fisheries Act. The Tribunal could consider whether, given the purpose and object of the Act and of the fishery management policy, the merits of the case justified the individual's loss of livelihood.

4.175. However, the Plan made it mandatory that the licence of a person with two convictions for Commonwealth fishing offences be cancelled. The mandatory nature of the Plan

purported to override the discretionary nature of the Act. The Minister's policy was permanently to exclude double offenders from possession of certain kinds of licence.

4.176. General principles appeared to suggest that the Minister should have been prepared to make an exception to general policy if the circumstances of a particular case warranted special treatment. In this context questions arose as to the amplitude of the Minister's power to make Plans and whether that power was so wide that he could make a Plan adopting a fixed rule never to exercise a discretion in favour of a particular class of person.

4.177. The Minister explained that paragraphs 35.1 and 36.1 of the Plan set out criteria to which he would have regard when making decisions to cancel a master-fisherman's licence. The criteria reflected decision-making powers provided by the Act but did not of themselves provide such powers. Paragraphs 35.1 and 36.1, provided the Minister with guidelines on which to base decisions and to which a review tribunal could have reference.

4.178. The Attorney-General's Department had advised the Minister that the paragraphs of the Plan were not invalid. They specified the manner of exercising powers conferred by the Act when a person had been twice convicted for having done acts in relation to the fishery. Such acts were detrimental to the objective, specified in the Plan, of conserving prawn stocks.

4.179. However, in the light of the Committee's concerns the Minister considered that the interests of fairness would be better served if the paragraphs were amended so that the kinds of previous convictions to be taken into account would be expressly limited to more serious offences. (See Senate Hansard, 29 May 1986, pages 2933-2938)

4.180. The Minister's undertaking was given on 27 May 1986.

Northern Prawn Fishery Management Plan (Amendment) (Plan of Management No. 4)

4.181. A certificate of entitlement to fishing units could be issued by the Director of Fishing and was evidence of such entitlement. Paragraph 45.2 conferred on the Director a discretionary power to issue replacement certificates on being satisfied that no improper use had been made of a lost certificate. The certificate was a valuable document. An honest and genuine inability to produce it, and an arbitrary refusal to issue a replacement, could have had serious effects on a unit holder's livelihood. An opportunity to seek A.A.T. review of the decision would not impede the Director nor undermine the security of the system. On the contrary, the existence of an avenue of review was likely to reinforce the special value of a certificate, re-emphasise the need for its secure handling and underwrite the quality of the Director's primary decision.

4.182. The Minister for Primary Industry undertook to amend the Plan to provide for merits review by the A.A.T. of the Director's discretionary decision. The Minister's undertaking was received on 27 May 1986.

Passport Regulations (Amendment)
(Statutory Rules 1985 No. 277)

4.183. A new Regulation 16 empowered the Minister for Foreign Affairs to delegate to "an officer of the Department" the Minister's power to review discretionary decisions to extend the period of validity of passports and to issue or renew other identity documents. The Regulations did not expressly restrict these delegations to an identified and appropriately senior level of officials. Without

identification of the class of officials to be delegates, it could be possible for the same official to take a decision and then, as a ministerial delegate, review that decision. This would have been an abuse of the process of internal ministerial review which was designed to underwrite the soundness of primary decisions which could infringe on a person's rights to freedom of movement. The Committee's view was that delegations of ministerial powers should have been confined to senior officers not otherwise directly engaged in taking the primary decisions under review.

4.184. The Minister explained that under section 11C of the Passports Act 1938, delegations of ministerial powers to issue passports were made by ministerial instruments which named senior executive service officials. A directive already issued by the Minister stated that the reviewing delegate should have taken no part in making the decision to be reviewed. However, the Minister responded to the Committee's concern about the integrity of the review procedure and undertook to amend the Regulations expressly to restrict delegation of powers to specific classes of senior officials who had no role in making the primary decision.

4.185. The Committee is pleased to report that Passport Regulations Amendment (Statutory Rules 1986 No. 25) implemented the Minister's undertaking.

Perpetuities and Accumulations Ordinance 1985 and Limitation Ordinance 1985
(A.C.T. Ordinances Nos. 65 and 66 of 1985)

4.186. The Limitation Ordinance dealt comprehensively with limitation law in the A.C.T. It terminated the operation of provisions of Imperial Acts and N.S.W. Acts as they were in force in the A.C.T. pursuant to the Seat of Government (Acceptance) Act 1909. The Perpetuities and

Accumulations Ordinance modified the operation of certain common law rules and terminated the operation of one Imperial Act.

4.187. In its Seventy-sixth Report (December 1985) the Committee had concluded that when an Ordinance terminated some law other than another ordinance (i.e. an Imperial or N.S.W. Act) doubts existed as to whether disallowance of the terminating Ordinance would revive the laws it had terminated. Without automatic revival of those laws an hiatus would arise and in the knowledge of this the Parliament could be deterred from exercising its proper powers of disallowance if it objected to the Ordinance.

4.188. The Attorney-General wrote to the Committee undertaking that if the Senate disallowed a provision of the Ordinances which terminated the operation of an Imperial Act or a New South Wales Act, he would cause another Ordinance to be made which would expressly revive the terminated Acts. The Committee considered this to be an important and welcome assurance from the Attorney-General. In the event no objection was taken to either of the Ordinances.

Postal Services (Australia Post Stock) Regulations
(Statutory Rules 1985 No. 107)

4.189. Sub-section 75(1) of the Postal Services Act 1975 (the Act) gave the Australian Postal Commission (the Commission) power to borrow money necessary for the performance of its functions. Amendments to the Act had made it lawful for the Commission to issue Commonwealth guaranteed inscribed stock to finance capital expenditure on buildings, vehicles and electronic equipment.

4.190. The Regulations provided for the issue of inscribed stock to raise loans. Since the Explanatory Statement accompanying the Regulations gave no explanation as to

how the funds would be used, it was impossible for the Committee to conclude that this borrowing would be necessary.

4.191. The Minister for Communications explained that the Regulations were intended to establish procedural controls to safeguard the Commonwealth as guarantor for the payment of interest and principal. The Minister indicated that future Explanatory Statements accompanying his Regulations would give a clear explanation of their purpose and legislative basis. This was an important undertaking because traditionally the Committee has relied on such statements when applying its Principles to legislation. The Committee has in the past sought improvements in the quality of explanatory statements (Seventy-third Report, December 1982).

Public Service Board Determinations No. 62 of 1985

4.192. Under Public Service Board Determination 1984/19 a Trainee Technical Officer in the Department of Defence was paid less than he or she would have received if employed under the Naval Defence Act 1910. Determination No. 62 was designed to remunerate such Trainee Officers either at the maximum rate of a fully Trained Officer or at the rate of the trainee's actual previous salary under Naval Defence Act 1910 employment, whichever was the lesser.

4.193. The Determination provided that a Trainee Officer previously employed under the Naval Defence Act 1910, would be paid an allowance equal to the amount by which the rate of the officer's new salary exceeds the previous salary. Since the new salary rate was lower than the previous salary it was clear that the words "is less than" should have replaced the word "exceeds" in the Determination. The Public Service Board undertook to correct this drafting error and did so in a retrospective

P.S.B. Determination No. 85 of 1985. Retrospective application was necessary to ensure that no individual officer was prejudiced by the effects of the original error.

Radiocommunicatons (Licensing and General) Regulations
(Statutory Rules 1985 No. 195)

IDENTITY CARDS

4.194. This legislation was designed to regulate radiocommunications by requiring licences for the use of transmitting equipment. Inspectors could request a licence for examination, but a licensee was not obliged to produce it unless "upon making the request, the inspector produces evidence of his (sic) authority". It is protective of citizens' rights that officials who possess enforcement powers under delegated legislation should produce a photographic identification card when obliged to show evidence of their authority. A requirement merely to produce "evidence of authority" is too imprecise a requirement which could lend itself to abuse by impostors. The law-abiding citizen should be placed in no doubt as to who may exercise, and when they may exercise, legitimate enforcement powers which would otherwise amount to a trespass on personal rights to privacy and freedom from interference.

4.195. The Committee noted that section 68 of the Radiocommunications Act 1983 (the Act) empowered the Minister to issue an identity card in an approved form. The Minister informed the Committee that, in practice, inspectors produced the photographic identity card issued under section 68. However, he undertook to amend the Regulations to underpin this practice with legislative authority.

TELEPHONE SEARCH WARRANTS

4.196. Section 71 of the Act provided that an inspector could apply by telephone to a Magistrate for a search warrant where circumstances of urgency made such an application necessary. Sub-section 3(1) of the Act defined Magistrate to include a Justice of the Peace. However, only a Justice of the Peace holding "a prescribed office" was given a Magistrate's powers to issue telephone search warrants. Regulation 20 therefore prescribed the offices of clerk and deputy clerk of a court of summary jurisdiction exercising criminal jurisdiction. Thus, court officials who were also Justices of the Peace could issue telephone search warrants.

4.197. As far as delegated legislation is concerned, it is the Committee's view that Magistrates rather than Justices of the Peace should be be empowered to issue normal search warrants. However, the granting of telephone search warrants to government officials should be the responsibility of superior judges. Only senior police officers or senior law enforcement officials should be empowered to apply for such warrants. Those officers should identify themselves and be present at all times when a telephone search warrant is being executed. Provisions in delegated legislation for the grant of telephone search warrants should reflect the seriousness of the decision involved, the personal remoteness of the decision-maker from those officials who seek large powers to enter private property, and the implications of the possible failure of normal law enforcement and surveilance procedures which has resulted in recourse to a telephone search warrant.

4.198. The offices of petty sessions clerk or deputy clerk were not an appropriate level on which to confer power to authorise large and intrusive powers. It was necessary to elevate and restrict responsibility for the granting

of telephone warrants to a more senior level. This would emphasise the remarkable nature of the telephone search warrant power and the care with which it should be sought and granted.

4.199. The Minister for Communications informed the Committee that recourse to telephone warrants would be rare and that inspectors in less populated areas could obtain appropriate warrants from Magistrates in cities. In view of the Committees's concern he undertook to repeal regulation 20 in order to reconsider the issue of telephone search warrants. The Minister's undertakings were given on 9 October 1985.

Rates (Amendment) Ordinance 1986
(A.C.T. Ordinance No. 2 of 1986)

4.200. This Ordinance provided that for the purpose of assessing rates, improvements to land would be taken into account in determining the unimproved value, whether these improvements were made by a private developer or by the Commonwealth. Prior to the Ordinance, a decision of the Administrative Appeals Tribunal had held that only improvements made by the Commonwealth could be considered. Improvement work had invariably been done by the Commonwealth, but with the recent involvement of private contractors questions of equal treatment arose. The Ordinance was designed to resolve these. However, it was not clear whether applications for review already pending before the Administrative Appeals Tribunal would be affected by any retrospective operation of the Ordinance.

4.201. The Minister for Territories explained that the Ordinance would not operate retrospectively. It would not affect persons who had already appealed to the A.A.T. He

assured the Committee that appeals still before the Tribunal would be contested on the basis of the law as it stood before the Ordinance came into force.

Remuneration Tribunals (Miscellaneous Provisions) Regulations (Amendments)
(Statutory Rules 1985 Nos. 188 and 239)

4.202. These Regulations retrospectively provided that a person who held a specified full-time office and who also held a part-time office was entitled to remuneration for that part-time office. The periods of retrospectivity were almost 2 years and 15 months respectively and the Explanatory Statements did not quantify the cost of the retrospectivity, explain why it had arisen or otherwise justify its presence in delegated legislation.

4.203. The Committee has a long-standing concern about retrospective legislation. Its classic statement on retrospectivity was delivered in its Twenty-fifth Report (November 1968) and has been often repeated. The Committee holds the view that:

> "Delay in the promulgation of regulations providing for the payment of monies denies to either House of the Parliament the right to approve or disapprove of the expenditure at the time of expenditure". (Paragraph 3)

4.204. Sub-section 7(11) of the Remuneration Tribunals Act provided that a full-time Commonwealth employee was not entitled to receive remuneration for a part-time public office unless authorised by regulations. The Special Minister of State explained that requests for these exceptions were not forwarded until after the appointments had been made. Thereafter consultations and drafting caused delays. However, retrospectivity was necessary because the officers concerned were not responsible for the time taken in processing the

regulations. The Minister undertook to ensure that in future reasons for retrospectivity would be given in the Explanatory Statement.

Southern Bluefin Tuna Fishery Management Plan (Amendment) (Plan of Management No. 5)

4.205. Certain mandatory provisions of the Plan appeared to fetter a discretion conferred on the Minister by the Fisheries Act 1952. The issues that arose from this were similar to those discussed in relation to the Northern Prawn Fishery Management Plan. The Minister for Primary Industry assured the Committee that for similar reasons the Southern Bluefin Plan was valid and not in conflict with the Act under which it was made.

4.206. However, he undertook to amend the Plan to provide for A.A.T. review of discretions exercised by the Director of Fisheries when deciding whether to issue replacements for lost certificates of fishing units. The Minister's undertaking was given on 12 June 1986.

Student Assistance Regulations (Amendment) (Statutory Rules 1985 No. 372)

4.207. These regulations retrospectively omitted certain colleges from schedules of approved institutions because it was believed the colleges had ceased to exist. Provided the colleges had ceased to exist no later that the date of retrospectivity (1 January 1985) no one would be prejudiced. The Explanatory Statement however, did not make it clear that they had in fact ceased to exist before that date although it did state that the retrospective changes would not adversely affect pre-existing rights.

4.208. The Committee raised this question with the Minister for Education who explained that on consulting relevant departmental files it had been discovered that one of the colleges had technically ceased to exist (through a change of name) later on 5 February 1985 and not on 1 January 1985.

4.209. The Minister undertook to amend the regulations retrospectively to correct this error while also ensuring that this new retrospectivity would not prejudice the existing rights of any person. The Minister's undertaking was received on 2 June 1986.

Superannuation (Salary) Regulations (Amendment)
(Statutory Rules 1985 No. 326)

4.210. These regulations provided rules for determining when "shift allowance" would be regarded as "salary" for the purpose of calculating superannuation payments.

4.211. Under the Regulations a person authorised by the Commissioner for Superannuation could form an opinion whether it was likely that a worker, who had been receiving shift allowance but who had died or became incapacitated, would have continued to receive such allowances for a prescribed qualifying period of time. The exercise of this discretion could determine part of the superannuation entitlements of invalid workers or the dependents of deceased workers.

4.212. Decisions of the Commissioner and delegates, made under the Superannuation Act, were reviewable by the Administrative Appeals Tribunal. A flaw in the Act limited the Commissioner's capacity to delegate only powers under the Act. Thus, when regulations conferred further discretions on the Commissioner, no authority existed under the Act to empower the Commissioner to delegate power to take these new decisions. To overcome

this problem, the office of an "authorised person" (who was invariably also a delegate) was created to take certain decisions under the Regulations. However, not being decisions of the Commissioner or a delegate, they were not subject to review by the A.A.T. This fact had been realised in 1979 in the A.A.T. case of Re McLindin and the Acting Commissioner for Superannuation (1979 2 ALD 261) where the Tribunal, dealing with an earlier set of regulations, held that the relevant decision had not been taken by the Commissioner or his delegate "but by .... (the authorised person) acting in his own right".

4.213. In its Fourth Annual Report (1980) the Administrative Review Council had recommended that the Act be amended to provide for A.A.T. review of decisions taken by authorised officers. This recommendation was repeated annually from 1980 until 1985 in the A.R.C.'s Fifth, Sixth, Seventh, Eighth and Ninth Reports, without the amendment being made. During that time, 10 Statute Law Bills were introduced and passed, any one of which could have been a suitable vehicle for what was technically a very simple amendment to protect appeal rights.

4.214. The amendment had been included in draft Superannuation Legislation Amendment Bills which, for varying reasons had not been introduced into the Parliament.

4.215. The Committee considered that legislative action was necessary to protect the appeal rights of persons who might be in vulnerable circumstances because of invalidity or the death of a bread winner. Principle (c) of its terms of reference referred expressly to its responsibility to ensure that delegated legislation did not make rights dependent on unreviewable discretions.

4.216. The Minister told the Committee that, when next the Act was amended, he would extend the Commissioner's delegation power to include delegation of discretions conferred by regulations. Because of earlier delays, the undertaking to act when next the Act was amended failed to satisfy the Committee that speedy remedial action would be taken. The Committee therefore pressed the Minister to give an undertaking that he would adopt a more reliable vehicle for his amendment, for example, by using a Statute Law Bill.

4.217. The Minister agreed that failing the successful introduction of another Superannuation Bill during the Budget Sittings 1986, with which he proposed, inter alia, to amend the delegation power, he would place an alternative amendment in the next Statute Law Bill expressly making decisions of authorised persons reviewable by the A.A.T. The Committee accepted this undertaking, since the Autumn Statute Law Bill had already been introduced into the Parliament. (See Senate Hansard, 6 May 1986, pages 2419-2422) The Minister's undertaking was given on 6 May 1986.

Telecommunications (General) By-laws Amendment No. 42

4.218. By-law 203E provided for applications to be made to the Commission to connect private networks to public networks. By-laws set out the information to be supplied and provided the Commission with discretionary powers to grant or withdraw authorisations to interconnect. However because an authority to interconnect could have been commercially valuable there should have been some mechanism for the merits of decisions to be reviewed.

4.219. The Commission explained that Telecom's Charter was to ensure nation-wide access to its services at affordable costs. This necessarily required a degree of cross-subsidisation which was paid for out of revenue

from long distance trunk calls. An unscrupulous customer whose private telecommunications network was interconnected with the public network could avoid trunk call services and deprive the Commission of vital revenue.

4.220. To avoid such problems the Commission could place limitations on the sharing of private networks and could proscribe the carriage of third party traffic. Decisions of this type involved fundamental policy considerations going to the basis of the Commission's national role. Such issues might not be amenable to independent merits review.

4.221. The Committee was concerned firstly, about the absence of strict legislative criteria for taking decisions and secondly, about the possibility that unmeritorious and unchallengeable decisions could be taken by a public authority with very great power over the provision of important services. In view of the serious implications of the complex issues raised the Committee invited representatives of the Commission to an *in camera* hearing. Following the hearing the Committee considered that the Commission should amend the By-laws to incorporate all major criteria for interconnect decisions which could reasonably be identified and expressed including, for example, the major criteria described in the Commission's own policy and conditions guidelines.

4.222. The Committee considered that, having specified the criteria according to which decisions would be made, the fundamental policy nature of those decisions required that Telecom should retain a final discretion which would not lend itself to independent merits review.

4.223. However, the Commission undertook to amend the By-laws to provide a right to seek reconsideration of adverse interconnect decisions by the Commission. As there was

no independent element in this process, the criteria and reconsideration procedures would be drawn in as detailed a form as was reasonable to reflect Telecom's desire to exclude arbitrariness or unfairness in the discretionary decision-making process. (See Senate Hansard, 26 November 1986, page 2222)

4.224. The Committee is pleased to report that Telecommunications (General) By-laws Amendment No. 48 implemented the Commission's undertaking.

Telecommunications (General) By-laws Amendments Nos. 43 and 44

4.225. Amendment No. 43 empowered Telecom to endorse PABX equipment suppliers in order to open up competition for supply between Telecom and existing nominated suppliers. Telecom could refuse to endorse or withdraw an endorsement which would otherwise be a valuable acquisition for a supplier. The Committee considered that the A.A.T. should have been able to review any unjustifiable refusal to endorse. The Commission undertook to amend the By-laws so that supplier endorsement decisions would be subject to A.A.T. review. The Committee is pleased to report that Telecommunications By-laws No. 48 implemented the Commission's undertaking.

4.226. Amendment No. 44 provided for the introduction of Telecom's Telememo message service. Subscriber access was by application to Telecom. In this case however, the service would operate in a competitive environment where private concerns offered alternative electronic message services which would be sufficient incentive to avoid arbitrary refusal of the service.

Telecommications (Staff) By-laws Amendment No. 46

4.227. This By-law repealed a previous by-law, which dealt with the loss of employees' recreation leave credits, and gave the Telecommunications Commission discretion to determine the fate of such credits. Unlike the previous by-law, such determinations would not be subject to tabling and disallowance in Parliament.

4.228. The Commission informed the Committee that the By-law had been made as a result of staff concern about the formerly inflexible leave credit arrangements which could result in arbitrary loss of credits. The discretionary determinations procedure was designed to avoid this.

Trustee Companies (Amendment) Ordinance 1985
(A.C.T. Ordinance 1985 No. 34)

4.229. The Ordinance created offences of engaging in prohibited business (section 24) and failure to pay unclaimed monies to the Attorney-General (section 28). However, the defence of reasonable excuse was not available as it was in sub-sections 31A(2) and 31B(4), which made a trustee company liable for failures to supply information and audit facilities.

4.230. The Attorney-General explained that sections 24 and 28 related to activities which were uniquely within a trustee company's own control and a reasonable excuse for non-compliance could not realistically arise as it could do where the company was required to supply information which was held by a third party who refused to part with it.

World Cup Athletics (Security Arrangement) Ordinance 1985
(A.C.T. Ordinance No. 46 of 1985)

4.231. The Committee received this Ordinance in draft form with a letter from the Special Minister of State explaining that to facilitate security at the World Cup Athletics meeting in Canberra from 4-6 October 1985, it was proposed to give the federal police power to search, and demand the name and address of, suspicious persons. The Minister anticipated that it would not be possible to table the Ordinance in Parliament before it commenced.

4.232. The Minister's letter was dated 29 August 1985. The Ordinance operated from 28 September to 8 October 1985. Parliament was sitting from 10 to 19 September and again from 8-17 October 1985. The Ordinance was tabled in the Senate on 10 October 1985, two days after it had ceased to operate and one month after it could have been tabled on 10 September 1985.

4.233. To preserve its freedom of action and freedom from compromise when it comes to report to the Senate on legislation it has considered, it is only in exceptional circumstances that the Committee will examine and comment on draft legislation. This practice does not prevent the drafter from consulting the Committee's secretariat informally. However, the Committee itself will determine in all cases what recommendation if any it will make to the Senate.

4.234. Since the sun-set clause had terminated the operation of the Ordinance before it had been tabled and before it could have been considered by Parliament, the Committee decided not to make any comment on the provisions of the Ordinance. It noted however, that in a matter where there must have been a considerable lead-time for the preparation of security arrangements for games of world significance, the limited life of the legislation was

already spent before it had been tabled in Parliament and before it could be subject to scrutiny. This was not satisfactory. Although in this case, the Minister did not intend to prevent scrutiny, the Committee recommends that such a situation should not be allowed to recur.

CHAPTER 5

MINISTERIAL UNDERTAKINGS IMPLEMENTED

Introduction

5.1. The Committee commends Ministers, who in the light of reasoned persuasion, have been willing to meet the Committee's concerns about the risks which some instruments of delegated legislation have posed to rights and liberties. Without their co-operation the Committee's work could be much more frustrating. The Committee is satisfied that the co-operative attitude of Ministers has been absorbed by relevant Departments and reflects a real concern about the need to protect personal rights from inadvertent erosion or misplaced administrative enthusiasm.

5.2. Ministerial undertakings are conveyed to the Committee, sometimes immediately on receipt of the Committee's concerns, sometimes after some persuasion by the Committee. However, no undertaking is viewed lightly by the Committee for the simple reason that an undertaking is accepted as an alternative to recommending disallowance. The questions which the Committee raises are focused, directly or indirectly, on fundamental issues pertaining to the rights of the individual and the rights of Parliament. A ministerial undertaking in response to the Committee's scrutiny is therefore equally focused directly or indirectly on such issues.

5.3. Where in response to a ministerial undertaking a protective notice of motion is withdrawn in the Senate in relation to an instrument, the withdrawal is effective only because an undertaking has been given. To give a ministerial undertaking, the implementation of which is not immediately expedited could, without more, be viewed

as a discourtesy to the Senate. This is so because the Senate has consented to the withdrawal of a notice of motion which would otherwise have resulted in disallowance of the instrument. It is equally a discourtesy to the Committee which, having received an undertaking in a sense publicly vouches for a Minister's bona fides by withdrawing a notice of disallowance. In common parlance, the Committee has gone guarantor for the implementation of the undertaking. To continue the metaphor, like any guarantor the Committee has confidence in the Minister and trusts that the promise will be honoured within a reasonable time.

5.4. Where an objectionable legislative provision results in the actual infringement of rights which short term administrative remedies cannot prevent, then time is of the essence and urgency is not an unreasonable expectation by the Committee. It is difficult to foresee circumstances where more than 6 months would be needed to draft amending legislation and bring it into force. In most cases no more than 6 months would be a very reasonable period. The alternative to speedy implementation of ministerial undertakings is the development of legislative procedures under the Acts Interpretation Act to provide for the retabling of unamended instruments 6 months after a notice of disallowance has been withdrawn in response to a promise to protect rights. The Committee has no concluded view on such a procedure and trusts that responses from Ministers and Departments ensure that it need never have a concluded view on this matter.

5.5. In its Fifty-eighth Report[1], the Committee voiced strong criticism of "inordinate delays" in carrying out undertakings given by Ministers, pointing out that it was a matter of concern to the Senate that provisions

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1 Parliamentary Paper, No. 215/1977.

offensive to the Committee's Principles remained in force for lengthy periods in spite of the Minister's agreement to take remedial action. Because the Committee and the Senate became powerless to change the legislation once the time for disallowance has passed, the Committee indicated that only firm assurances about reasonable promptness in carrying out undertakings would deter the Committee from persisting with disallowance motions.

5.6. This Report had a salutary effect and many outstanding undertakings were implemented before the Committee in its Sixty-second Report[2] again raised the matter. In that Report the Committee succinctly restated the nature of its concern, saying:

> "A highly unsatisfactory situation arises when undertakings by Ministers are not carried out promptly and expeditiously, in that provisions recognised to be defective are allowed to stand and the public effectively lack the protection which the disallowance procedure and the Committee are designed to give." (paragraph 5)

5.7. It is the Committee's view, that in the absence of compelling justifications, where undertakings are not implemented within 6 months, Ministers could be invited to explain to the Senate why it is necessary for rights and liberties to remain in jeopardy when promises have been given to safeguard them. Alternatively where undertakings have not been implemented and fresh problems arise in new legislation the Committee could consider whether it would be justified in accepting any further undertakings in lieu of disallowance. The Committee has a responsibility to the Senate, to the citizen and to itself to ensure that rights having been infringed by legislation are not further undermined by administrative delays.

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2 Parliamentary Paper, No. 203/1978.

5.8. The ministerial undertakings described below and in Chapter 6 arise from previous reports. As Chapter 4 of this Report discloses, some Ministers have responded to the Committee by carrying out undertakings.

Listed in the 75th Report (September 1984)

Quarantine (Animals) Regulations (Amendment)
(Statutory Rules 1983 No. 70)

5.9. In 1984 the Minister for Health gave an undertaking to provide that determinations of "recognised exporter status" would be objectively and not subjectively based. The Minister's undertaking was implemented by the Quarantine (Animals) Regulations (Amendment) (Statutory Rules 1985 No. 313).

Listed in the 77th Report (March 1986)

Credit Ordinance 1985
(A.C.T. Ordinance No. 5 of 1985)

5.10. The Minister for Territories had power, by issuing a gazetted instrument, to exempt credit providers from the Ordinance the terms of which were designed to protect consumers. The Committee requested that this power be exercised by regulations which would be subject to tabling and disallowance in Parliament. The Committee requested that section 29 of the Ordinance be redrafted to clarify the nature of the obligation on a supplier to inform a credit provider of recission. The Committee also asked that the search warrant provision be redrafted to limit the possible use of force to that which would be "reasonable". The Committee objected to the way in which certain search warrants could be "deemed" to confer wider power than was disclosed on the face of the document. The Minister undertook to repeal this provision.

5.11. The Minister's undertaking to make these amendments was implemented by the Credit (Amendment) Ordinance 1985 (A.C.T. Ordinance No. 60 of 1985).

Co-operative Societies (Amendment) Ordinance 1985
(A.C.T. Ordinance No. 4 of 1985)

5.12. Decisions of the Registrar of Co-operative Societies could remain valid notwithstanding a failure to supply a Society with either written reasons for an adverse decision or a notification of A.A.T. review rights. A wide discretion was also given to the Registrar to not approve proposed actions by Societies depending on the existence of merely possible risks, rather than probable risks.

5.13. A failure to notify of a decision and the reasons for it is a serious matter which should have the effect of invalidating a decision. Where notification is not viewed as an essential condition subsequent to the making of the decision, rights are at risk as is the case with the notification of review rights, which is the subject of a study by the Administrative Review Council.

5.14. The Minister for Territories undertook to amend the Ordinance to reduce the Registrar's discretion to consideration of probabilities and to protect the validity of the decision only where a notification of review rights has not been given. This undertaking was implemented by the Co-operative Societies (Amendment) Ordinance (No. 3) 1985.

Extradition (Republic of South Africa) Regulations
(Statutory Rules 1985 No. 14)

5.15. These regulations did not adequately protect the rights of presumptively innocent persons sought for trial by the South African authorities. The Committee requested that

the regulations be amended to provide for extradition only where the alleged offender would have been liable to a penalty of imprisonment for not less than one year had the offence been committed in Australia. The Committee also requested that the regulations contain personal protections of the kind found in Extradition Treaties, relating to political and military offences, limitation periods, special courts, religious, political or ethnic motivations behind extradition requests and the imposition of cruel, inhuman or unjustifiable penalties by South Africa.

5.16. The Attorney-General implemented his undertakings to achieve protections of the kind sought by the Committee by amending the Extradition (Foreign States) Act 1966 (new paragraph 4(1A)(b) inserted by Schedule 1 of the Statute Law (Miscellaneous Provisions) (No. 2) Act 1985) and by making the Extradition (Republic of South Africa) Regulations (Amendment)(Statutory Rules 1985 No. 158).

National Crime Authority Regulations (Amendment)
(Statutory Rules 1983 No. 3)

5.17. Regulation 7 provided for service of a witness summons to appear before the National Crime Authority. Sub-paragraph 7(1)(a)(iii) authorised a member of the Authority to direct that service be either by leaving the summons with an identified person considered likely to bring its contents to the notice of the individual summonsed, or, by sending it by registered post to an address known to be frequented by the individual summonsed.

5.18. This kind of vicarious service put at risk the rights and liberties of the person and the third party through whom the summons was to be communicated. The Committee considered that the substituted service power should be exercised by a superior judge rather than an N.C.A.

member. Further service should be not on persons who are "apparently" over an age limit, but on persons who "are or are reasonably believed to be" above that age.

5.19. The Special Minister of State undertook to amend the regulations and this undertaking was fulfilled by the National Crime Authority Regulations (Amendment) (Statutory Rules 1986 No. 29).

Supervision of Offenders (Community Service Orders) Ordinance 1985 (A.C.T. Ordinance No. 10 of 1985)

5.20. This Ordinance authorised an officer to give directions to an offender to perform community service work in pursuance of a court order under the Crimes (Amendment) Ordinance 1985. The officer could require an offender to do work in conflict with his or her religious beliefs if no other option was practicable. There was no requirement that genuine conscientious objections, including conscientious beliefs other than religious ones should be taken into account. To meet this possible problem the Minister for Territories agreed to amend the Ordinance to place an obligation on an authorised officer to consult with an offender before giving directions about community work.

5.21. The Supervision of Offenders (Community Services Orders) (Amendment) Ordinance 1985, (A.C.T. Ordinance No. 64 of 1985) implemented the Minister's undertaking.

CHAPTER 6

UNDERTAKINGS NOT IMPLEMENTED

6.1. A number of undertakings referred to in Chapter 4 have not yet been implemented. This Chapter lists only undertakings outstanding from previous reports and not those outstanding under this Report.

Listed in 75th Report (September 1984)

Workmen's Compensation (Amendment) Ordinance 1983
(A.C.T. Ordinance No. 69 of 1983)

6.2. This Ordinance provided that a single medical referee, by issuing a final certificate as to whether a person was disfigured by a work related injury, could determine employees' compensation rights. There was no right of appeal to a medical board.

6.3. The Minister for Territories agreed to amend the Ordinance to provide that only a unanimous panel of medical referees should issue such a final certificate. In June 1986, the Minister wrote to the Committee indicating that the amendments were being dealt with as a matter of priority.

Listed in the 77th Report (March 1986)

Credit Ordinance 1985
(A.C.T. Ordinance No. 5 of 1985)

6.4. Section 250 of the Ordinance made it lawful for a person to sign another person's name on important credit documents without that vicarious signature being witnessed or qualified by reference to the signatory's status as an authorised agent of the person. This could

have the effect of reversing the onus of proof in proceedings. A person would have to prove that he or she did not authorise a signature since the vicarious signature on its own would make a presumptive statement about the existence of an authority to sign on behalf of someone. Persons in vulnerable circumstances could be prejudiced by this. The Committee requested that signing under authority should be witnessed, and the agent should sign as an agent and not as if he or she were the subject person.

6.5. The Minister for Territories undertook to amend the Ordinance. However, in October 1985 he wrote to the Committee about practical difficulties which had come to light concerning the signing of credits documents. The Committee indicated that as long as section 250 remained in its present form it was objectionable. The undertaking to amend it should be honoured unless the section were to be repealed and re-enacted in a different and protective way.

N.S.W. Acts Application Ordinance 1984
(A.C.T. Ordinance No. 41 of 1984)

6.6. The Ordinance provided the definitive texts of certain N.S.W. Acts as they applied in the A.C.T. Sections 15 and 16 of the Games, Wagers and Betting-houses Act 1901 (N.S.W.) conferred necessary powers to effect entry to premises but they were drafted in a very wide and unqualified way in that the degree of force that might be used to enter premises was not limited to what would be reasonable in the circumstances. The Minister for Territories undertook to take appropriate action to qualify the power.

CHAPTER 7

OTHER MATTERS

Legal Adviser

7.1. The Committee records its appreciation of the assistance it receives from Professor Douglas Whalan, of the Faculty of Law, Australian National University, who as the Committee's Legal Adviser scrutinises and advises on material that comes before it. The depth of legal skill and acumen which he brings to this task, after a life time devoted to academic scholarship and university administration, are an immense contribution to the quality, the consistency and the effectiveness of the Committee's work. However, those are paradoxically the least of his attributes in the Committee's eyes. Even more important than legal ability of a high order, is the capacity to assess and balance in a mature and responsible way the vital demands of equity, fairness, justice, personal rights, personal liberties and legislative and parliamentary propriety, against the competing needs and requirments of reasonable law enforcement, judicial procedures and proprieties and efficient public administration. The Committee admires Professor Whalan's forensic skills, his sense of fair play and his deep commitment to the important work of the Committee.

7.2. It was with obvious reluctance therefore that the Committee has been very pleased to grant Professor Whalan leave of absence from his appointment during 1987 while he takes up long overdue sabbatical leave to pursue academic research. The Committee wishes him well during his leave.

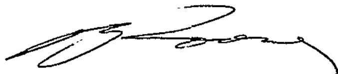
7.3. During the absence of Professor Whalan the Committee will be served by no lesser a friend of the Parliament and the Committee. Professor Dennis Pearce of the Faculty of Law, Australian National University has agreed to be the Committee's temporary adviser. As a distinguished author of authoritative reference works on delegated legislation, statutory interpretation and administrative law, and as a former Legal Adviser to the Senate Standing Committee on the Scrutiny of Bills Professor Pearce is already known to and valued in the Senate.

Review of Policy Decisions

7.4. In May 1986 the Committee invited Professor J. L. Goldring, Professor of Law at Macquarie University, to advise it on A.A.T. review of ministerial policy decisions.

Committee Staff

7.5. Finally, the Committee thanks Senate staff who, at various times during the past year, have assisted with its work, including Peter O'Keeffe, Margaret Murphy, John Carter, Jan Wood and Helen Reid.



Barney Cooney
Chairman

October 1986

APPENDIX 1

INDEX TO LEGISLATION CONSIDERED IN CHAPTER 4

A

Air Navigation (Charges) Regulations (S.R. 1985 No. 30)
Australian Meat and Live-stock Orders (Nos. M24/85, MQ14/85, MQ15/85 and MQ16/85)

B

Banks (Shareholdings) Regulations (S.R. 1985 No. 336).
Blood Donation (Acquired Immune Deficiency Syndrome) Ordinance 1985 (A.C.T. Ordinance No. 27 of 1985)
Blood Donation (Acquired Immune Deficiency Syndrome)(Amendment) Ordinance 1985 (A.C.T. Ordinance No. 55 of 1986)
Bookmakers Ordinance 1985 (A.C.T. Ordinance No. 43 of 1985)

C

Christmas Island Assembly (Election) Regulations 1985 (Territory of Christmas Island Regulations No. 1 of 1985)
Commonwealth Employees (Redeployment and Retirement) Regulations Amendment (S.R. 1985 No.310)
Credit (Amendment) Ordinance (No. 2) 1985 (A.C.T. Ordinance No. 60 of 1985)
Crimes (Amendment) Ordinance (No. 3) 1985 (A.C.T. Ordinance No. 40 of 1985)
Crimes (Amendment) Ordinance (No. 4) 1985 (A.C.T. Ordinance No. 44 of 1985)
Crimes (Amendment) Ordinance (No. 5) 1985 (A.C.T. Ordinance No. 62 of 1985)
Customs Regulations (Amendment) (S.R. 1985 No. 75)
Customs Regulations (Amendment) (S.R. 1985 No. 126)

D

Defence Determinations Nos. 64 and 65 of 1985
Defence Determinations Nos. 8 and 14 of 1986
Defence Force Discipline Regulations (S.R. 1985 No. 125)
Defence Force Discipline Rules (S.R. 1985 No. 128)
Defence Force Regulations (Amendment) (S.R. 1985 No. 88)
Defence (Inquiry) Regulations (S.R. 1985 No. 114)

E

Electricity (Amendment) Ordinance 1985 (A.C.T. Ordinance No. 20 of 1985)
Evidence (Amendment) Ordinance (No. 2) 1985 (A.C.T. Ordinance No. 61 of 1985)
Excise Regulations (Amendment) (S.R. 1985 No. 76)
Excise Regulations (Amendment) (S.R. 1985 No. 127)

Excise Regulations (Amendment) (S.R. 1985 No. 141)
Export Control (Orders) Regulations Orders No. 1 and No. 6 of 1985 (Prescribed Goods (General) Orders and Grain, Plants and Plant Products Orders)
Export Control Orders Nos. 2 and 7 of 1986 Prescribed Goods (General) Orders as Amended (Amendments)
Extradition (Republic of South Africa) Regulations (Amendment) (S.R. 1985 No. 158)
Extradition (Commonwealth Countries) Regulations (Amendment) (S.R. 1985 No. 264)
Extradition (Finland) Regulations (Amendment) (S.R. 1986 No. 32)

F

First Home Owners Regulations (Amendment)(S.R. 1985 No. 267)
Fisheries Notice No. 158
Freedom of Information (Charges) Regulations (Amendment) (S.R. 1985 No. 113)

H

Health Authority Ordinance 1985 (A.C.T. Ordinance No. 69 of 1985)
Health Insurance (Variation of Fees and Medical Services) (Nos. 37, 38 and 40) Regulations (S.R. 1985 Nos. 149, 207 and 356)
Housing Ordinance Determination by the Commissioner of Housing under the Concessional Home Loans Scheme (9 August 1985)

L

Legal Practitioners (Amendment) Ordinance 1985 (A.C.T. Ordinance No. 29 of 1985)
Limitation Ordinance 1985 (A.C.T. Ordinance No. 66 of 1985)

M

Meat (Amendment) Ordinance 1985 (A.C.T. Ordinance No. 26 of 1985)
Meat Regulations (Amendment)(A.C.T. Regulations 1985 No. 15)
Migration Regulations (Amendment)(S.R. 1985 No. 261)

N

Navigation (Limitation of Shipowners' Liability) Regulations (S.R. 1985 No. 317)
Northern Prawn Fishery Management Plan (Plan of Management No. 3, Northern Prawn Fishery)
Northern Prawn Fishery Management Plan (Amendment) (Plan of Management No. 4)

P

Passport Regulations (Amendment) (S.R. 1985 No. 277)
Perpetuities and Accumulations Ordinance 1985 (A.C.T. Ordinance No. 65 of 1985)
Postal Services (Australia Post Stock) Regulations (S.R. 1985 No. 107)
Public Service Board Determination No. 62 of 1985

R

Radiocommunications (Licensing and General) Regulations (S.R. 1985 No. 107)
Rates (Amendment) Ordinance 1986 (A.C.T. Ordinance No. 2 of 1986)
Remuneration Tribunals (Miscellaneous Provisions) Regulations (Amendment)(S.R. 1985 Nos. 188 and 239)

S

Southern Bluefin Tuna Fishery Management Plan (Amendment) (Plan of Management No. 5)
Student Assistance Regulations (Amendment) (S.R. 1985 No. 372)
Superannuation (Salary) Regulations (Amendment)(S.R. 1985 No.326)

T

Telecommunications (General) By-laws Amendment No. 42
Telecommunications (General) By-laws Amendments Nos. 43 and 44
Telecommunications (Staff) By-laws Amendment No. 46
Trustee Companies (Amendment) Ordinance 1985 (A.C.T Ordinance No. 34)

W

World Cup Athletics (Security Arrangements) Ordinance 1985 (A.C.T. Ordinance No. 46 of 1985)

APPENDIX 2

ISSUES ARISING IN LEGISLATION 1985-86

Issue	Legislation
consent to entry	Bookmakers Ordinance 1985 Electricity (Amendment) Ordinance 1985
contempt of court powers	Defence (Inquiry) Regulations (S.R. 1985 No.14)
declaration of military practice areas	Defence Force Regulations (Amendment)(S.R. 1985 No.88)
delegation of powers and discretions	Passport Regulations (Amendment) (S.R. 1985 No.277) Superannuation (Salary) Regulations (Amendment)(S.R. 1985 No.326)
discretion, ministerial	Extradition (Republic of South Africa) Regulations (Amendment)(S.R. 1985 No.158)
double penalty	Christmas Island Assembly (Election) Regulations No.1 of 1985
draft legislation	World Cup Athletics (Security Arrangements) Ordinance 1985
drafting errors	Banks (Shareholdings) Regulations (S.R. 1985 No.336) Public Service Board Determination No.62 of 1985
explanatory statements inadequacy of	Commonwealth Employees (Redeployment and Retirement) Regulations (Amendment)(S.R. 1985 No.310) Postal Services (Australia Post Stock) Regulations (S.R. 1985 No.107) Remuneration Tribunals (Miscellaneous Provisions) Regulations (Amendment)(S.R. 1985 Nos.188 and 239)
exemption, ministerial	Credit (Amendment) Ordinance (No. 2) 1986

extradition	Extradition (Commonwealth Countries) Regulations (Amendment)(S.R. 1985 No.264) Extradition (Finland) Regulations (Amendment)(S.R. 1986 No.32) Extradition (Republic of South Africa) Regulations (Amendment) (S.R. 1985 No.158)
fees, imposition	Migration Regulations (Amendment)(S.R. 1985 No.261)
fettering of ministerial discretion	Northern Prawn Fishery Management Plan (Plan of Management No.3, Northern Prawn Fishery) Southern Bluefin Tuna Fishery Management Plan (Amendment) (Plan of Management No.5)
identity cards	Bookmakers Ordinance 1985 Meat (Amendment) Ordinance 1985 Radiocommunications (Licencing and General) Regulations (S.R. 1985 No.107)
immunity from suit	Blood Donation (Acquired Immune Deficiency Syndrome) Ordinance 1985
internal review procedures	Passport Regulations (Amendment) (S.R. 1985 No.277)
jury trial, right to	Crimes (Amendment) Ordinance (No.3) 1985
notification of decisions	Bookmakers Ordinance 1985 Customs Regulations (Amendment) (S.R. 1985 No.126) Excise Regulations (Amendment) (S.R. 1985 No.127)
notification of reasons	Air Navigation (Charges) Regulations (S.R. 1985 No.130) Health Authority Ordinance 1985
personal rights and conditions of employment	Health Authority Ordinance 1985
policy and merits	Customs Regulations (Amendment) (S.R. 1985 No.75) Excise Regulations (Amendment) (S.R. 1985 No.76)

	Export Control Orders Nos. 2 and 7 of 1986 Prescribed Goods (General) Orders as Amended (Amendments)
privacy and confidentiality	First Home Owners Regulations (Amendment)(S.R. 1985 No.267)
religious discrimination	Defence Force Discipline Regulations (S.R. 1985 No.125)
retrospectivity	Commonwealth Employees (Redeployment and Retirement) Regulations (Amendment)(S.R. 1985 No.310) Crimes (Amendment) Ordinance (No.4) 1985 Defence Determinations Nos.64 and 65 of 1985 Defence Determination No.8 of 1986 Health Insurance (Variation of Fees and Medical Services) Regulations (S.R. 1983 Nos.149, 207 and 356)) Legal Practitioners (Amendment) Ordinance 1985 Northern Prawn Fishery Management Plan (Plan of Management No.3, Northern Prawn Fishery) Rates (Amendment) Ordinance 1985 Remunerations Tribunal (Miscellaneous Provisions) Regulations (Amendment)(S.R. 1985 Nos.188 and 239) Student Assistance Regulations (Amendment) (S.R. 1985 No.372)
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review of discretions	Australian Meat and Live-stock Orders (Nos. M24/85, MQ14-16/85) Bookmakers Ordinance 1985 Customs Regulations (Amendment) (S.R. 1985 No.126) Electricity (Amendment) Ordinance 1985 Excise Regulations (Amendment) (S.R. 1985 No.127) Excise Regulations (Amendment) (S.R. 1985 No.141)

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ultra vires	Extradition (Commonwealth Countries) Regulations (Amendment)(S.R. 1985 No.264)
	Fisheries Notice No.158
	Northern Prawn Fishery Management Plan (Plan of Management No.3, Northern Prawn Fishery)
	Southern Bluefin Tuna Fishery Management Plan (Amendment) (Plan of Management No.5)

APPENDIX 3

INSTRUMENTS MADE UNDER ACTS AND SUBJECT TO DISALLOWANCE OR DISAPPROVAL BY EITHER HOUSE OF THE PARLIAMENT

Instruments	Enactments
regulations (statutory rules)	various acts, subject to Acts Interpretation Act 1901.
ordinances of territories	Ashmore and Cartier Islands Act 1933 S.6 Australian Antarctic Territory Act 1954 S.12 Christmas Island Act 1958 S.10 Cocos (Keeling) Islands Act 1955 S.13 Coral Sea Islands Act 1969 S.7 Heard Island and McDonald Islands Act 1953 S.11 Norfolk Island Act 1979 S.28A Seat of Government (Administration) Act 1910 S.12
regulations of territories	Various Ordinances, subject to Acts of Territories as above Various Ordinances, subject to Seat of Government (Administration) Act 1910
rules of court	Family Law Amendment Act 1983 S.75
rules (bankruptcy proceedings)	Bankruptcy Act 1966 S.315
rules (records and inspection)	Bankruptcy Amendment Act 1980 S.172
rules (Tenure Appeal Board and Disciplinary Appeal Board)	Australian Broadcasting Corporation Act 1983 S.83
rules of procedure	Defence Force Discipline Act 1982 S.149
rules (punishments)	Defence Legislation Amendment Act 1984 S.36

rules (proceedings of the Compensation Board)	Overseas Telecommunications Act 1946 S.73
by-laws	Aboriginal Councils and Associations Act 1976 S.30 Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978 S.10 Australian National Airlines Act 1945 S.69 Australian National Railways Commission Act 1983 S.79 Australian Shipping Commission Amendment Act 1983 S.21 Defence Acts Amendment Act 1981 S.9. Federal Airports Corporation Act 1986 S.72 Postal Services Act 1975 S.115 Postal and Telecommunications Amendment Act (No. 2) 1983 SS 27, 28, 29. Telecommunications Act 1975 S.111
orders under regulations	Environment Protection (Nuclear Codes) Act 1978 S.15 Meat Inspection Act 1983 S.36 Protection of the Sea (Discharge of Oil from Ships) Act 1981 S.22 Protection of the Sea (Powers of Intervention) Act S.24
orders (export licenses and meat quotas)	Australian Meat and Live-stock Corporation Amendment Act 1982 S.16M(1)
orders (Broadcasting Tribunal, conduct of broadcasting)	Broadcasting Act 1942 S.17
orders (planning, technical services)	Broadcasting Act 1942 S.125E
orders (technical services, interference, examinations)	Broadcasting and Television Act (No. 2) 1976 S.15
orders (application of duties)	Customs Tariff Act 1966 S.36
orders (control and administration of rifle ranges)	Defence Act 1903 S.123G

orders (Minister for Defence, restricted areas)	Defence (Special Undertakings) Act 1952 S.15
orders (administrative procedures)	Environment Protection (Impact of Proposals) Act 1974 S.7
orders (codes of practice, nuclear activities)	Environment Protection (Nuclear Codes) Act 1978 S.10
orders (special situations, nuclear activities)	Environment Protection (Nuclear Codes) Act 1978 S.14
orders (handling of explosives)	Explosives Act 1961 S.16
orders (prescribed goods, inspection, seizure, trade descriptions)	Export Control Act 1982 S.25
orders (instruments of the the Attorney-General)	Foreign Proceedings (Excess of Jurisdiction) Act 1984 SS.15,17
orders (eligibility of immigrants and refugees)	Health Legislation Amendment Act 1983 S.8
orders (federal road safety standards)	Interstate Road Transport Act 1985 S.35
orders (Minister for Transport, shipping law codes)	Navigation Amendment Act 1912 S.426
orders (navigation, construction stowage safety)	Navigation Amendment Act 1979 S.91
orders (under regulations and articles of international convention)	Protection of the Sea (Prevention of Pollution from Ships) Act 1983 S.34
orders (emergency prohibitions or restrictions on transmitters)	Radiocommunications Act 1983 S.41
emergency orders	Australian Capital Teritory Electricity Supply Amendment Act 1982 S.6 Radiocommunications Act 1983 S.42
declarations by Minister on significant areas and objects	Aboriginal and Torres Strait Islander Heritage (Interim Protection) Act 1984 S.15
declarations that the Approved Defence Projects Protection Act 1947 applies	Atomic Energy Act 1953 S.60

declarations (classification of machinery and components, specification and value and percentages)	Bounty (Metal Working Machines and Robots) Act 1985 SS.6,7,8
declarations (Ministerial dispensation)	Crimes (Foreign Incursions and Recruitment) Act 1978 S.9
declarations (rebate of diesel fuel duty)	Customs and Excise Legislation Amendment Act (No. 2) 1985 SS.9,19
declarations of international instruments	Human Rights Commission Act 1981 S.31
declarations (imports and exports of wildlife)	Wildlife Protection (Regulation of Exports and Imports) Act 1982 S.9
determinations (release of information)	Census and Statistics Amendment Act (No. 2) 1981 S.10
determinations (terms and conditions of employment)	Commonwealth Teaching Service Act 1972 SS.20, 23
determinations (remuneration, benefits and allowances)	Defence Act 1903 S.58C
interim determinations (conditions of employment)	Defence Amendment Act 1979 S.13
determinations (inconsistent regulations)	Defence Amendment Act 1979 S.14
determinations (import parity pricing)	Excise Tariff Amendment Act (No. 2) 1983 S.4
determinations (plans of management)	Fishing Legislation Amendment Act 1985 S.6
determinations (variations of tables)	Health Insurance Amendment Act 1977 S.4
determinations (health services)	Health Legislation Amendment Act 1984 S.9
determinations (definition of "basic private" and "basic table")	Health Legislation Amendment Act 1985 S.13
determinations (acute cases)	Health Legislation Amendment Act (No. 2) 1985 S.27

determinations (Medical services outside Australia)	Health Legislation Amendment Act (No. 2) 1985 S.40
determinations (Medical Participation Review Committee)	Health Legislation Amendment Act (No. 2) 1985 S.40
determinations (wholesale LPG prices)	Liquified Petroleum Gas (Grants) Amendment Act 1984 S.5
determinations (fees)	Quarantine Amendment Act 1984 SS.25, 86E
determinations (terms and conditions of employment)	Public Service Act 1922 S.82D
determinations (parliamentary allowances, academic salaries)	Remuneration Tribunals Act 1973 SS.7, 12DD
determinations (fees)	Seat of Government (Administration) Act 1910 S.12 (9A)
determinations (salaries)	Trade Commissioners Act 1933 S.11A
directions (substitutes and limitations)	Customs Tariff Act 1982 S.25
directions (goods consisting of separate articles)	Customs Tariff Act 1982 S.26
directions (cost of goods, value of labour and materials)	Customs Amendment Act 1983 S.5
directions (registered organisations)	Health Legislation Amendment Act (No. 2) 1982 S.19
directions (Health Insurance Commission)	Health Legislation Amendment Act 1983 S.73
directions (functions and powers of Clerk)	High Court of Australia Act 1979 S.19
directions of Minister	Parliament House Construction Authority Act 1979 S.9
directions (variations in recurrent expenditure)	States Grants (Tertiary Education Assistance) Act 1984 S.31

directions (variations in State entitlements), additional conditions	States Grants (Tertiary Education Assistance) Act 1984 SS.36,42,46
proclamation of property for listing	World Heritage Property Conservation Act 1983 S.15
notices (classification of machines)	Bounty (Computers) Act 1984 S.5
notices (diesel fuel rebate)	Customs Act 1901 S.164(1) Excise Act 1901 S.78A(SA) as amended by Customs and Excise legislation Amendment Act (No. 2) 1985
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plans (spectrum plans)	Radiocommunications Act 1983 S.18
plans (frequency bands)	Radiocommunications Act 1983 S.19
principles (determination of quotas)	Dairy Industry Stabilization Act 1977 S.11A Dairy Industry Stabilization Amendment Act 1978 S.5
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principles (approval of nursing homes)	Health Legislation Amendment Act (No. 2) 1983 SS.48, 74
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guidelines (payment of Medicare benefits)	Health Insurance Amendment Act 1984 S.3
guidelines (allocation of fuel)	Liquid Fuel Emergency Act 1984 S.41
guidelines (transmitter licences)	Radiocommunications Act 1983 S.25
standards (performance and compliance of devices)	Radiocommunications Act 1983 S.9
suspension of member of statutory authority	Automotive Industry Authority Act 1984 S.21
suspension of member of a statutory authority	Steel Industry Authority Act 1983 S.18
suspension of Commissioner or Second Commissioner	Taxation Laws Amendment Act 1984 S.295
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modifications or variations of Canberra planning	Seat of Government (Administration) Act 1910 S.12A
instruments of revocation (guidelines for medical and hospital benefits plans)	National Health Act 1953 S.73E
instruments applying to relevant Acts	Companies and Securities (Interpretation and Miscellaneous Provisions) Act 1980 S.4
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rates of levy	Bass Strait Freight Adjustment Levy Amendment Act 1985 S.5

APPENDIX 4

EXTRACT FROM SENATE STANDING ORDER 36A AND SESSIONAL AMENDMENTS

Senate Standing Order 36A

(1) A Standing Committee, to be called the Standing Committee on Regulations and Ordinances, shall be appointed at the commencement of each Parliament.

(2) The Committee shall consist of seven Senators ....

(3) The Committee shall have power to send for persons, papers and records, and to sit during Recess; and the Quorum of such Committee shall be four unless otherwise ordered by the Senate.

(4) All regulations, ordinances and other instruments, made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to such Committee for consideration and, if necessary, report thereon. Any action necessary, arising from a report of the Committee, shall be taken in the Senate on Motion after Notice.

Sessional Amendments

(1) That the Standing Committee on Regulations and Ordinances have power to appoint sub-committees consisting of 3 or more of its members for the purpose of attending Delegated Legislation Conferences and that the quorum of a sub-committee be 2 members.

(2) That the Committee, or any sub-committee appointed pursuant to paragraph (1), have power to move from place to place. (See Journal No. 94, 14 April 1986)

(3) That, notwithstanding anything contained in the Standing Orders, the Standing Committee on Regulations and Ordinances shall be empowered to meet with a quorum of 3 members until such time as a Senator has been appointed to fill the vacancy caused by the resignation of Senator Tate. (See Journal No. 109, 30 May 1986)

APPENDIX 5

MEMBERSHIP OF THE COMMITTEE 1982 - 1986*

Note: Prior to 1966 the Committee was appointed at the beginning of each session. Since 1966 it has been appointed at the beginning of each Parliament, which is determined by the duration of the House of Represenatatives. Where a session or a Parliament was terminated, the Committee is assumed to have remained in existence until the day before the opening of the following session of Parliament. In the case of a dissolution of the Senate, the Committee terminates at the dissolution. Where members were appointed to successive Committees, the period between the end of one Committee and the appointment of the next is not shown.

The following Senators have served as Chairman of the Committee:

Lewis, A. W. R.	04.12.80 - 04.02.83
Coates, J.	05.05.83 - 14.11.85
Cooney, B. C.	14.11.85 -

The following Senators have served as members of the Committee:

Archer, B. R.	10.05.84 - 20.02.85
Bonner, N. T.	17.08.78 - 04.02.83
Carrick, the Hon. Sir John	22.04.83 - 19.02.86
Coates, J	25.08.81 -
Cook, P. F. S.	22.04.83 - 20.02.84
Cooney, B. C.	26.02.85 -
Durack, P.	19.08.71 - 11.04.74
	24.02.76 - 18.08.76
	22.04.83 - 10.05.84
Foreman, P. J.	09.09.81 - 04.02.83
Giles, P.	11.09.85 -
Harradine, B.	10.05.84 - 29.05.84
Lewis, A. W. R.	17.08.78 -
Missen, A. J.	16.10.74 - 12.02.75
	18.08.76 - 04.02.83
Richardson, G. F.	22.04.83 - 20.02.85
Robertson, A. E.	26.02.85 - 31.05.85
Tate, M. C.	22.04.80 - 20.02.85
	31.05.85 - 14.11.85
Vanstone, A. E.	26.02.85 -
Walters, M. S.	09.09.81 - 04.02.83
Withers, R. G.	19.02.86 -
Zakharov, A. O.	10.05.84 - 29.05.84
	26.02.85 - 11.09.85

* For list of Chairmen and members 1932-81 see Seventy-first Report, 50th Anniversary of the Committee, 11 March 1982.

APPENDIX 6

PROCEDURES OF THE COMMITTEE

In several previous Reports the Committee has briefly described its procedures (see for example the Twenty-sixth Report, paragraphs 5-10, and the appendices to the Forty-third Report and the Fiftieth Report.[1] The Committee's procedures have not altered in a significant way since those Reports. The Committee here restates them.

Senate Standing Orders 36A(4) (see Appendix 4) provides that all instruments of a legislative character made under the authority of Acts of Parliament, and subject to disallowance or disapproval by the Senate stand referred to the Committee for consideration and, if necessary, report.

Copies of instruments come to the Committee's secretariat either directly from Departments or from the Government Printer within a short time of being made. Each week the secretariat sends a copy of each new instrument to its Legal Adviser who within a week comments on the instruments with reference to the Committee's Principles. When Parliament is sitting the Committee meets each Thursday morning and considers the Adviser's report. Early in the week each member of the Committee receives this report as well as copies of correspondence to and from Ministers and heads of statutory authorities. The members also receive a copy of each instrument to which the Legal Adviser's report relates.

After considering the legislation the Committee raises with relevant Ministers, issues of concern to it under its Principles. The Committee may request a written explanation of some detail or, in cases where provisions obviously infringe its Principles, the Committee will seek an undertaking from the Minister that the offending legislation not be used until appropriate amendments are made. Sometimes the Committee asks that officers appear before it at an *in camera* hearing to give information about complex or significant matters. If there is any delay in responding to the Committee, a protective notice of motion will be given in the Senate by the Chairman in order to preserve the Committee's rights of scrutiny notwithstanding the lapse of 15 sitting days. When satisfactory explanations or ministerial undertakings are received these protective notices are withdrawn in the Senate with an accompanying explanation from the Chairman. The Chairman usually makes a brief statement to the Senate outlining the origins of the Committee's concern and seeking leave to incorporate in *Hansard* for information and reference copies of relevant correspondence. Where undertakings are not implemented quickly the Committee may recommend to the Senate that a Minister be invited to explain the delay to the Chamber.

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1 *Parliamentary Papers* Nos. 188/1969, 220/1972 and 271/1974.

Ministers and officials are helpful to the Committee and ready to accommodate its concerns. As a result, for some 15 years, there has not been a need to vote in the Senate on a disallowance motion moved by the Committee. This is now a long tradition which no Minister wishes to be the first to depart from, particularly bearing in mind the fact that since 1932 the Senate has, without exception, supported the Committee when it has moved for the disallowance of an instrument.

It is the Committee's usual procedure to submit a report to the Senate on instruments either disallowed on its motion, or which the Committee regards as particularly significant in terms of its Principles. The Committee usually includes in appendices to such reports, copies of correspondence. Periodic reports on legislation are also tabled from time to time along with recommendations concerning the Committee's Principles and the Senate's disallowance powers.

APPENDIX 7

INDEX TO REPORTS 1982 -1986

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Notes:

1. Particular Acts, Regulations and Ordinances are entered under these headings. Other instruments are entered in the alphabetical list.

2. References are as follows; report no./paragraph cr appendix.

3. An index for the First to the Seventieth Reports inclusive, is contained in the Seventy-first Report, (50th Anniversary of the Committee).

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