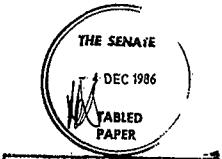

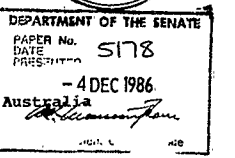

The Parliament of the Commonwealth of Australia

SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

EIGHTY-FIRST REPORT

December 1986

PRINCIPLE (d) AND A.C.T. LAWS

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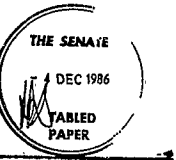

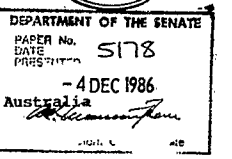

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SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

MEMBERS OF THE COMMITTEE

THIRTY-FOURTH PARLIAMENT

First Session

Senator B. Cooney (Chairman)
Senator A.W.R. Lewis (Deputy-Chairman)
Senator J. Coates
Senator P. Giles
Senator A.E. Vanstone
Senator The Rt. Hon. R.G. Withers

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

CONCLUSIONS AND RECOMMENDATIONS

(i) Principle (d) will be applied to Ordinances in the A.C.T. in the context of the Committee's recognition that these instruments perform the legislative function performed by statutes in other jurisdictions. Accordingly there could be instances where Principle (d) would not be applied to an Ordinance whereas it would be applied to a substantive regulation containing similar provisions. The Committee's Seventy-seventh Report discusses the guidelines which the Committee will follow in applying Principle (d) to Ordinances.

(ii) In those cases where the Committee's recognition of the role of Ordinances inclines it against applying Principle (d), the Committee may nevertheless report to the Senate on any Ordinance which is substantial, socially innovative or makes a marked change in the law.

(iii) Presently there are no statutory bodies in the Australian Capital Territory which provide an opportunity for the people of the Territory to influence the content of the law operating there. In these circumstances the Committee recommends that where possible discussion papers and the advice given to Government in respect of proposed legislation should be released to the public for discussion prior to its being made.

CHAPTER 1

PRINCIPLE (d) AND SIGNIFICANT ORDINANCES

Introduction

1.1. The Committee's function is to scrutinise delegated legislation. This includes Ordinances made for the Australian Capital Territory. Those Ordinances perform functions comparable to statutes in other jurisdictions. Some involve matters of limited moment. Others involve profound, extensive and complex issues. Accordingly, whether the Committee should apply Principle (d) in a particular case can be a nice question. The criminal law Ordinances with which the Committee has recently dealt, illustrate the difficult questions which may arise. One such question is whether Ordinances should ever be used to make crucial changes to the law. The issues which arose during the Committee's review of the Ordinances dealing with the criminal law in the A.C.T. have prompted it to report to the Senate.

A.C.T. Criminal Law

1.2. The Crimes Act 1900 of the State of New South Wales, as amended by numerous Ordinances, sets out the criminal law applicable in the A.C.T. *Section 6 of the* Seat of Government Acceptance Act 1909 provides that "... all laws in force in the Territory immediately before the proclaimed day [1 January 1911] shall, so far as applicable, continue in force until other provision is made". The Crimes Act 1900 (N.S.W.) was such a law and it therefore continued in force in the A.C.T. Section 4 of the Seat of Government (Administration) Act 1910 provides that "[W]here any law of the State of New South Wales continues in force in the Territory by virtue of

section 6 of the Seat of Government Acceptance Act 1909, it shall, subject to any Ordinance made by the Governor-General, have effect in the Territory as if it were a law of the Territory". Section 12 of the Act provides that "[T]he Governor-General may make Ordinances for the peace, order and good government of the Territory".

The Nature of the Problem

1.3. Criminal law Ordinances made over the past year have produced progressive reform in the A.C.T. The Government's ultimate aim is to produce a new Crimes Ordinance. There are problems for the Committee in applying Principle (d) in this situation. On the one hand, the Committee scrutinises delegated legislation "to ensure ... that it does not contain matter more appropriate for parliamentary enactment". In applying this Principle "the Committee is concerned with the preservation of the rights of the Parliament and of parliamentarians" because, at the level of delegated legislation the Committee is "the custodian of the rights of the Parliament".[1] On the other hand, section 12 of the Seat of Government (Administration) Act 1910 empowers the Governor-General to "make Ordinances for the peace, order and good government of the Territory". This is a plenary grant of power using a time-honoured formula of maximum width, which confers a very wide law-making power on the Executive.

The Scope of the Problem

1.4. The year 1985-86 might be described as a milestone year for the reform of A.C.T. criminal law. The bulk of the substantive criminal provisions of the Crimes Act 1900 (N.S.W.), with the exception of offences against the

1 Senator Wood, Senate Hansard, 4 October 1960, page 839

person other than sexual offences, has been rewritten and once that remaining area is reformed, it is proposed to collect the reforms in a new Crimes Ordinance.

1.5. In 1983 the first consolidated reprint of the Act in 20 years was produced. Tables appearing at the end of this reprint indicate that in the 72 years since 1911, 15 amending Ordinances were made whereas in the 3 years between the end of 1983 and November 1986, 11 amending Ordinances have been made. Thus, since 1983 reforms have been so extensive that a further consolidated reprint is necessary.

1.6. These Ordinances have, inter alia:

- extended magistrates' powers to deal summarily with indictable offences;
- increased penalties for summary offences;
- continued to deny a right to trial by jury for certain offences;
- reformed the law relating to property offences;
- reformed the law relating to sexual offences, including the abolition of the common law offence of rape and changes to the law of evidence; and
- reformed the laws relating to forgery.

1.7. The Committee does not recommend that any of this new legislation be disallowed. The object of this Report is to draw to the attention of the Senate the fact that a substantial criminal law reform package intended to become a virtual criminal code, is being put in place in the A.C.T. These are measures which, if made by a Bill before a Parliament, would attract parliamentary debate. There has been some public involvement in the preparation of these proposals and, in the absence of parliamentary debate, wide community consultation is essential. Although the Committee has examined some matters of principle there has been little parliamentary evaluation

of the merits of this important legislation. The next stage in the reform of A.C.T. criminal law will address offences against the person other than sexual offences and the proposed legislation will be very important for the A.C.T.

CHAPTER 2

REFORM OF A.C.T. CRIMINAL LAW

2.1. The following criminal law reform Ordinances have been considered by the Committee.

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

2.2. This Ordinance significantly increased the jurisdiction of A.C.T. magistrates. It also re-enacted in modern form provisions which provided that a person accused of certain property offences did not enjoy an automatic right to trial by jury. Where the value of money or property to which an offence related did not exceed $2,500 a magistrate could impose a sentence of up to 1 year. The magistrate could deal with a charge summarily even where the defendant objected and requested trial by jury. An aggrieved defendant did have the right to apply to the Supreme Court for review of the magistrate's decision to hear the case.

2.3. The Committee viewed the abolition, in delegated legislation, of the right to jury trial, as a very serious step although the Attorney-General had, before making the Ordinance, consulted with the A.C.T. Criminal Law Consultative Committee and the A.C.T. House of Assembly.

2.4. In view of the Committee's strongly felt concerns, the Attorney-General agreed to amend the Ordinance to restore a right to trial by jury since it was "a matter of vital significance to [the Committee] under its Principles".[1]

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1 Senate Hansard, 5 December 1985, page 3073

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

2.5. These Ordinances made fundamental changes to the legal rules defining sexual offences and the evidence that may be adduced in relation to them.

2.6. Having studied the Crimes (Amendment) Ordinance (No. 5) the Committee noted that:

- the crime of rape, as conventionally understood, had been abolished and as an offence sexual intercourse was given a very wide meaning, much of it unrelated to its conventional meaning;
- from the point of view of consent, sexual intercourse was to be viewed as a continuing act of severable components which permitted consent to be withdrawn at any time and consent could be negated by, inter alia, "mistaken belief as to the identity of the person" and "a fraudulent misrepresentation of any fact made by the other person";
- marriage would no longer be a bar to an accusation of a sexual offence against a spouse and the presumption that children below a certain age were incapable of sexual intercourse was abolished; and
- penalities of up to 20 years imprisonment were to be imposed.

2.7. Having studied the Evidence (Amendment) Ordinance (No. 2) the Committee noted that:

- the accused could no longer adduce evidence as to the making of a complaint by the complainant and no longer had a right to adduce evidence relating to the sexual reputation of the complainant;
- the court could direct that the proceedings be in camera and the complainant's identity would not be disclosed without consent; and
- the judge was no longer obliged to warn a jury that it was unsafe to convict on the uncorroborated evidence of the complainant.

2.8. The Explanatory Statement accompanying the Crimes (Amendment) Ordinance (No. 2) stated that the objects of the two Ordinances were:

- to balance the rights of victim and accused to enable the accused to obtain a fair trial whilst avoiding further degradation of the victim thereby creating a situation more conducive to reporting alleged sexual assaults; and
- to restate the range of sexual offences with emphasis on the violence associated with them.

2.9. In correspondence with the Attorney-General the Committee stated

> "On their own these Ordinances are highly significant. However, one of the Ordinances is the 5th in a sequence of Crimes (Amendment) Ordinances. If these and the Evidence (Amendment) Ordinance had come before the Committee (or the community) in one document as a virtual criminal demi-code instead of piece-meal over the past year, it would be clearly seen that a major recodification of A.C.T. criminal law had been undertaken by ministerial instrument without the community, the Committee, or the Parliament having an opportunity to consider the scheme as a whole in the light of the accumulated innovations which it reflects."

2.10. The Attorney-General explained that the Ordinances formed "part of the program of reform of the criminal laws of the A.C.T. which [Senator the Hon. Gareth Evans, Q.C., former Attorney-General] began in September 1983". Some of the stimulus for this review came from the A.C.T. Supreme Court when the then Chief Justice Blackburn said in R v Sykes[2]

> "the criminal law of this Territory is to a degree which is scandalous, in need of review, and all Judges of this court have been saying so for twelve years to my knowledge".

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2 July 1983, unreported

2.11. In preparing the Ordinances, the Attorney-General gave consideration to the 1982 Tasmanian Law Reform Commission Report No. 31 on Rape and Sexual Offences. Consideration was also given to the reforming legislation of other Australian States, the reports of other Australian and foreign jurisdictions, and the views of the A.C.T. Criminal Law Consultative Committee, the A.C.T. House of Assembly and the Office of Status of Women.

2.12. After considering the Ordinances the Committee decided that it should expressly draw them to the attention of the Senate. This was done by the Chairman when he made a statement to the Senate and obtained leave to incorporate the Committee's correspondence in Hansard.[3]

Crimes (Amendment) Ordinance (No. 4) 1985
Crimes (Amendment) Ordinance 1986
(A.C.T. Ordinances Nos. 44 of 1985 and 15 of 1986 respectively)

2.13. These Ordinances contained comprehensive reviews of all property related offences and the laws relating to forgery. The first Ordinance was based on the English Theft Act 1968 (U.K.), its Victorian derivative, the Crimes (Theft) Act 1973 (Vic.) and the later English Theft Act 1978 (U.K.). The second Ordinance was based on the English Forgery and Counterfeiting Act 1981 (U.K.) as well as on decisions of the courts and academic discussions. Prior to being made the Ordinance was considered by the A.C.T. Criminal Law Consultative Committee and the A.C.T. House of Assembly.

Section 116

2.14. The Committee was concerned about provisions in each Ordinance dealing with evidence and proof. Sub-section 116(2) of the Crimes (Amendment) Ordinance

3 Senate Hansard, 9 April 1986, pages 1528-1530

(No. 4) 1985 provided that "proof that [a person] had with him or her an article made or adapted for use in committing theft or burglary shall be evidence that he or she had it ... for that use". Thus, proof of possession amounted artificially to evidence of intention. Conviction could result unless the defendant assumed the evidential burden of rebutting the evidence. Unless the defendant rebutted this artifical evidence of intent, then at no time would the prosecution have to address the issue of mens rea or criminal purpose. Although the prosecutor must prove beyond reasonable doubt that the article was "made or adapted for use in committing a theft or burglary", there was no requirement to prove that the accused actually made or adapted the article or even that he or she knew that it was so made or adapted. Proof that the article was in effect a prescribed article would prevent a defence submission that there was no case to answer. A charge formulated under sub-section 116(2) could be a holding charge when an accused remained silent.

Section 135E

2.15. Sub-section 135E(1) of the Crimes (Amendment) Ordinance 1986 provided that a person shall not make or have a machine, implement or material which the person knows to be designed or adapted for making a false statement, with the intention that the person or another person shall make a false instrument and shall use it to cause prejudice to a person.

2.16. By virtue of sub-section (2), unless a person has a lawful excuse, a person shall not make or have a machine, implement or material which that person knows to be designed or adapted for making a false statement. In a case the prosecution must prove beyond reasonable doubt: that the item was in fact designed or adapted for forgery; that the accused had custody or control of the

item; and that the accused knew it was designed or adapted for forgery. The accused then assumed the evidential burden of showing, on the balance of probabilities, that he or she had a lawful excuse. Unlike sub-section (1) which required the prosecution to prove a criminal intention to make and use a forgery, in proceedings under sub-section (2) there was no need to advert to criminal intention.

2.17. The Attorney-General told the Committee that items such as pens and photocopiers would not fall within the ambit of the provision as they would in general not be designed or adapted to make a false instrument. Thus, it appeared the items in question must, to the knowledge of the accused, be highly specialist articles expressly designed or adapted for the known criminal purpose of forgery. Justification for the possession of such items would clearly be a matter peculiarly within the knowledge of the accused and therefore the provision probably satisfied the test, devised by the Senate Constitutional and Legal Affairs Committee, that an evidential burden should be imposed on a defendant only where the prosecution faces extreme difficulty in circumstances where the defendant is presumed to have peculiar knowledge of the facts in issue.[4]

Significance of Proof and Evidence Provisions

2.18. The Committee has looked closely at the foregoing provisions for three reasons. Firstly, the Senate Constitutional and Legal Affairs Committee has reported that

> "there are numerous provisions in delegated legislation imposing a persuasive burden of proof on defendants. The Committee views this

4 Report on the Burden of Proof in Criminal Proceedings, Parliamentary Paper, No. 319/1982, page xii

> fact with concern, as such legislation can pass into law without the normal parliamentary scrutiny afforded other legislation."[5]

2.19. Secondly, an informal study conducted by the Committee indicated that there may be more than 50 A.C.T. Ordinances and some A.C.T. Regulations containing provisions which either reverse the onus of proof or place an evidentiary onus on a defendant. Thirdly, one of the terms of reference of the inquiry by Mr Justice Watson into Commonwealth criminal law calls for examination of the Senate Committee's Report and of provisions which reverse the onus of proof. The inquiry, which will report not later than 30 June 1987, will inevitably be of significance to A.C.T. criminal law, including the matter of onus of proof.

Offences against the Person other than Sexual Offences

2.20. An Ordinance reforming this area of A.C.T. criminal law has not yet been completed. When it is tabled the Committee will examine it with considerable interest.

Domestic Violence Ordinance 1986
Domestic Violence (Miscellaneous Amendments) Ordinance 1986
(A.C.T. Ordinance Nos. 52 and 53 of 1986 respectively)

2.21. The Domestic Violence Ordinance was designed to modernise this area of the law and it conferred on a Magistrates Court power to issue Protection Orders if the Court was satisfied, on the balance of probabilities, that domestic violence had occurred or was threatened. The Ordinance was a significant measure and one to which the Committee had no objections under its Principles.

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5 ibid., para. 4.19

2.22. The Domestic Violence (Miscellaneous Amendments) Ordinance amended other Ordinances consequentially on the making of the Domestic Violence Ordinance. Included in these were amendments to the Crimes Act 1900 (N.S.W.) as it applied in the A.C.T. One conferred large powers on police officers to enter private property in connection with offences involving violence. This amendment went to the viability of making proper use of the police to deter and remedy domestic violence. However, another amendment conferred on police officers urgent entry powers exercisable in regard to any offence. The provision was designed to reflect and enact the existing common law powers of police officers in such circumstances. The Committee had some reservations that this amendment should have appeared in the Domestic Violence (Miscellaneous Amendment) Ordinance rather than a more appropriate criminal law Ordinance.

2.23. In correspondence with the Committee the Attorney-General undertook to amend relevant sections of the Crimes Act to limit by express reference to a standard of reasonableness the exercise of powers of entry and use of force. He also restated his support for the progressive reform of A.C.T criminal law in preference to delaying reforms until a single legislative document was completed. Finally, he described the extensive consultations which had preceded the making of the Domestic Violence Ordinances.

CHAPTER 3

PARLIAMENTARY SCRUTINY OF DELEGATED LEGISLATION IN THE A.C.T.

> "I wish to stress the point that the [Regulations and Ordinances Committee] believes that the Parliament is really of paramount importance in this country and that, in consequence, anything of a very important and far-reaching nature should be considered by the Parliament in debate."[1]

1932 to 1979

3.1. In April 1930 when it tabled its Report, the Senate Select Committee on the Standing Committee System recommended the creation of the Regulations and Ordinances Committee with responsibility for scrutinising regulations to ascertain, inter alia,

> "(4) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment."[2]

3.2. The adoption of this Principle by the Committee was reported in its Fourth Report.[3] This formula, unchanged until 1979, was applied successfully by the Committee to highlight the important principle that parliamentary government requires Parliament rather than Ministers to make legislation on important questions of government policy. Instances of the Committee's consideration of Principle (d) are referred to in Appendix 2.

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1 Senator Wood, Senate Hansard, 19 August 1971, page 174

2 Journals of the Senate, Session 1929-31, Vol. 1, page 546

3 June 1938, Parliamentary Paper, No. 188/1969

Revision of Principle (d) in 1979

3.3. In 1979 the Senate adopted the Committee's Sixty-fourth Report which contained a reformulation of Principle (d).[4] The Principle now states that "the Committee scrutinises delegated legislation to ensure ... (d) that it does not contain matter more appropriate for parliamentary enactment". Noting that for some years the application of Principle (d) had been a source of difficulty, the Committee conceded that it was very doubtful whether delegated legislation can now be restricted to "administrative detail". The Report referred in particular to legislation such as Ordinances which "by its very nature contains substantive legislation".[5]

3.4. A rule of thumb sometimes suggested for A.C.T. Ordinances was that legislative proposals for the Territory which in a State would have been by Bill before the State Parliament should come before the Federal Parliament. On the other hand, if the proposals amounted to no more than municipal law-making of the kind generally not presented to a State Parliament, then an Ordinance would be the appropriate legislative vehicle. Clearly, such a dichotomy was impractical in the A.C.T. because of the range and substance of legislative proposals put forward by successive Governments in an era when the Federal Parliament clearly faces a heavy legislative workload. Thus, even in 1979, most A.C.T. Ordinances were in some respects the territorial equivalent of State legislation. However, Senator Gareth Evans observed during the 1979 debate on the Sixty-fourth Report, that there "has often been a feeling in the Committee ... that really important subject matters of Territorial Ordinances, matters of

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4 Parliamentary Paper No. 42/1979 and Senate Hansard, 20 and 29 March 1979, pages 737 and 1170

5 para. 5

sensitivity, difficulty or real significance ought to be subject to proper debate and indeed enactment by a properly elected legislative body".[6]

3.5. The Committee recognised that its 1979 revision would produce a subjective criterion of scrutiny. The then Chairman of the Committee, Senator Missen, told the Senate that

> "The revised Principle will simply require the Committee to exercise a judgment whether particular pieces of delegated legislation are more appropriate for parliamentary enactment, and it will be for the Parliament to accept or reject any such judgment."[7]

3.6. The Committee accepted that, to apply Principle (d), detailed criteria should evolve to guide the Committee and assist the Government's legislative drafters. However, the formulation of rules has proved difficult in the face of the Committee's equal concerns to protect the legislative role of Parliament while not unduly impeding the reasonable work of government in the Territory.

3.7. Although the terms of Principle (d) have been revised, previous experience is not redundant and can still offer practical guidelines. The use of Ordinances to achieve substantive reforms to A.C.T. criminal law or the laws of evidence have tended to attract the attention of the Committee.[8]

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6 Senate Hansard, 29 March 1979, page 1174

7 Senate Hansard, ibid., page 1171

8 See, for example, the Senate debate on the disallowance of the A.C.T. Evidence Ordinance 1971, Senate Hansard, 19 August 1971, page 173

3.8. In recent years the Committee has adopted two different approaches to ensuring appropriate parliamentary involvement in significant A.C.T. law-making: firstly, by recommending disallowance under Principle (d), and secondly, by reporting on substantive legislation.

Guidelines for Disallowance

3.9. The Committee's scrutiny of the Credit Ordinance 1985 illustrated the dilemma faced by the Committee in recommending disallowance.[9] The Ordinance was a 167 page ministerial instrument containing 266 sections and 7 schedules which the Committee described as "a root and branch reform of relationships between borrowers and lenders of money".[10] The Acting Minister for Territories was reported in the press as stating that the Ordinance was "among the most fundamental and far-reaching reforms of the law undertaken in this country".[11] The Committee considered that the Ordinance was highly significant, demonstrably innovative and legally complex.[12]

3.10. Although power to make Ordinances was expressed in a plenary grant, that did not immunise such legislation from disallowance. The section of the Seat of Government (Administration) Act which granted the law-making power also provided for disallowance. The Committee concluded that prima facie the Credit Ordinance infringed Principle (d) in that it contained matter more appropriate for parliamentary enactment.

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9 Discussed in the Seventy-seventh Report, Parliamentary Paper, No. 172/1986

10 ibid., para. 51

11 ibid., para. 53

12 ibid., para. 52

3.11. Yet, in the final analysis, and for practical reasons, the Committee did not recommend that the Ordinance be disallowed. The Committee was conscious that it contained many provisions protective of the rights of borrowers and its disallowance would have deprived people of the benefits of the reform.

3.12. Although in its scrutiny of the Credit Ordinance the Committee decided not to press for disallowance, it did not then, and does not now, abandon its adherence to Principle (d). It has stated its view that until the advent of full representative self-government the Committee will continue to examine A.C.T. Ordinances in the light of its Principles including Principle (d) and it will look carefully at 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 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.[13]

13 ibid., para. 15

3.13. The issue is one in which the Committee must exercise a collective judgement as to whether the Executive has made a regulation or ordinance on a matter or in circumstances which call for parliamentary debate and decision.[14]

3.14. In its Seventy-eighth Report[15] on the Artificial Conception Ordinance 1985 the Committee demonstrated that it regards Principle (d) as essential to the effectiveness of its scrutiny role. That Ordinance provided for the parentage of artificially conceived children but left unanswered many sensitive questions concerning the rights and privacy of all parties involved in the new biological technology. The Committee considered that

> "it would not be appropriate for matters of this kind to be the subject of legislation by a Minister whether in the A.C.T. or elsewhere ... [A]s far as the A.C.T. is concerned questions concerning the rights and liberties of those on whom the new biological sciences are practiced, and of those children who are thereby created, should in future be dealt with in legislation made by the Federal Parliament rather than by means of an Ordinance. Such an approach would better reflect the seriousness of the legal and ethical issues raised by these new procedures."[16]

Guidelines for Reporting to the Senate

3.15. In its Seventy-first Report[17] the Committee informed the Senate that it was "considering the most appropriate means of drawing the Senate's attention to matters which, while not necessarily warranting disallowance under the Committee's principles, are nevertheless of such significance as to merit substantive discussion in the

14 ibid., para. 17

15 Parliamentary Paper, No. 171/1986

16 ibid., paras. 31 and 32

17 Parliamentary Paper, No. 47/1982, para. 24

Senate". This proposal had its genesis in a recommendation made by the Senate Standing Committee on Constitutional and Legal Affairs in its Report on The Evidence (Australian Capital Territory) Bill 1972.[18] That Committee recommended that territory legislation, which in the States would usually be made by Act of a State Parliament or by a municipal corporation, should normally be made by Ordinance. However, that Committee also recommended that if the Regulations and Ordinances Committee reported that an Ordinance was "socially innovative or affects fundamental rights and liberties, then such an Ordinance should be made the subject of a substantive debate in the Senate".[19]

3.16. The Committee considers there is merit in a proposal to report to the Senate on substantive or reforming measures whose appearance in delegated legislation should be the subject of parliamentary note. To complement its retention of Principle (d) for use in appropriate cases, the Committee has decided therefore, that without recommending disallowance it will report to the Senate on territory or other delegated legislation which is substantive and innovative and which the Committee considers should be the subject of special note by the Senate.

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18 Parliamentary Paper No. 237/1977, page 32

19 ibid.

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS OF THE COMMITTEE

4.1. For some time there has been a need for reform of the criminal law in the Australian Capital Territory. That is now being undertaken by way of Ordinances made through the relevant officials and the relevant Minister. There is however, no law reform body for the A.C.T. established by statute to assist in this undertaking. The A.C.T. Law Reform Commission established in 1971 was abolished in 1977. The A.C.T. Criminal Law Consultative Committee has been in existence since 1980. It is a body which includes judges, practising lawyers, academics and public servants. Although it has no statutory basis it plays an important role in advising Government about criminal law in the A.C.T. There is no comparable body dealing with civil law. In this situation the quality of law-making in the A.C.T. might well be assisted by wider public discussion. That process could be improved by publication of Government discussion papers and, if appropriate, public release of the advice given to Government by the Criminal Law Consultative Committee.

4.2. The importance of the issue raised in paragraph 4.1 has been accentuated by the abolition of the House of Assembly in the Australian Capital Territory. This has heightened the need to provide the opportunity for public discussion of proposed legislation.

4.3. In considering whether to apply Principle (d) to Ordinances the Committee recognises that these instruments perform in the Australian Capital Territory the same function as statutes in self-governing jurisdictions. Accordingly they are instruments whose ambit has to be and is intended to be wider than that of

regulations. Given this character of Ordinances the Committee may not move to disallow a particular Ordinance when it would so move if a regulation contained similar provisions. If however, the Ordinance is a significant one which is substantive, socially innovative or reforming, the Committee may make a detailed report to the Senate about it without recommending disallowance.

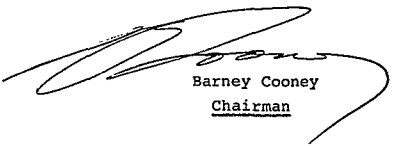
4.4. The following is a summary of the Committee's position.

(i) Principle (d) will be applied to Ordinances in the A.C.T. in the context of the Committee's recognition that these instruments perform the legislative function performed by statutes in other jurisdictions. Accordingly there could be instances where Principle (d) would not be applied to an Ordinance whereas it would be applied to a substantive regulation containing similar provisions. The Committee's Seventy-seventh Report discusses the guidelines which the Committee will follow in applying Principle (d) to Ordinances.

(ii) In those cases where the Committee's recognition of the role of Ordinances inclines it against applying Principle (d), the Committee may nevertheless report to the Senate on any Ordinance which is substantial, socially innovative or makes a marked change in the law.

(iii) Presently there are no statutory bodies in the Australian Capital Territory which provide an opportunity for the people of the Territory to influence the content of the law operating there. In these circumstances the Committee recommends that where possible discussion papers and the advice given to Government in respect of proposed

legislation should be released to the public for discussion prior to the making of any important Ordinance.



Barney Cooney
Chairman

December 1986

APPENDIX 1

COMMITTEE CORRESPONDENCE ON A.C.T. CRIMINAL LAWS

PARLIAMENT OF AUSTRALIA · THE SENATE
STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

15 October 1985

Lionel Bowen, M.P.
Attorney-General
Parliament House
CANBERRA A.C.T. 2600

At its meeting on 10 october 1985, the Committee considered the Crimes (Amendment) Ordinance (No. 3) 1985 (ACT Ordinance No. 40 of 1985 tabled in Parliament on 11 September 1985). The Committee is concerned about the possibility that the Ordinance empowers a Magistrate in certain circumstances to deny a defendant the right to a jury trial where a defendant has not consented to this procedure.

Under new section 477, a Court of Petty Sessions is given jurisdiction to try defendants charged with any common law offence or any other offence punishable by imprisonment for up to 14 years, if money or property not exceeding $10,000 is involved, or up to 10 years in any other case. Sub-section 477(6) provides that where the defendant pleads not guilty, the court is of the opinion that the case can properly be disposed of summarily and the defendant consents, then the court may hear and determine the case and, if appropriate, sentence or otherwise deal with the defendant. Paragraph 477(6)(c) qualifies the obligation to obtain the defendant's consent by limiting that requirement to charges that are not "prescribed charges". Sub-section 477(13) provides that a "prescribed charge" is one relating to money or other property the value of which does not exceed $2,500. Thus, the effect of the Ordinance appears to be to abolish the right to have a trial by jury where the property involved does not exceed $2,500. This consequence does not appear to be spelt out in the Explanatory Statement.

The Committee views abolition, in delegated legislation, of the right to a jury trial, as a very serious step notwithstanding that the Ordinance merely brings the jurisdication of the ACT Court of Petty Sessions into line with that of Magistrates Courts in New South Wales and Victoria.

The Committee acknowledges that criteria are set out in sub-section 477(8) to which the ACT Magistrate must have regard before deciding to dispose of a case summarily. While these criteria include "any relevant representations made by the defendant" there is no question that consent is necessary. A defendant, desirous of a jury trial on a serious charge where the actual damage caused is below the prescribed financial limit, would have to challenge any adverse exercise of a Magistrate's

discretion under paragraph 477(6)(b) (or paragraph (c) where the cost of damage to property is disputed by the defendant) by resort to paragraph 219B(f) of the Court of Petty Sessions Ordinance 1930. In certain cases the right to trial by jury in the first instance may be dependent on the judgment of the person who quantifies the cost of damage to property. In certain offences involving damage to official property this could result in the prosecutor effectively determining whether a defendant has a right to a jury trial. In such cases, the defendant could be placed in the invidious position of being obliged to argue that, notwithstanding the views of the prosecution, the damage caused by an offence which he or she denies having committed, exceeds the prescribed limit.

Although the Committee does not doubt the integrity of ACT prosecutors and the competence of ACT Magistrates to avoid any injustice, that may not be an adequate answer to the issue of principle at stake which the Committee must address.

The Ordinance limits the right to trial by jury and this may have unforeseen consequences for the administration of justice in accordance with important traditional rights and liberties. The Committee would appreciate your comments and advice on all of these issues.

Unfortunately in this matter, the time for giving Notice of Motion of disallowance expires on 5 November 1985 and the Committee next meets on 17 October 1985 which is too soon for you to reply, and on 7 November 1985, which is too late for the Committee to act. However, if a satisfactory reply or suitable undertakings to amend the Ordinance were received on or before 31 October 1985, it may be possible for the Committee to meet on 5 November 1985 and avoid giving Notice of Motion.

John Coates

John Coates
Chairman

DEPUTY PRIME MINISTER
ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

4 NOV

Dear John,

I refer to your letter of 15 October 1985 regarding a defendant's right to trial by jury and the effect on that right of the Crimes (Amendment) Ordinance (No 3) 1985.

Before dealing with the substantive measures which you raise, I feel it is appropriate to point out that the subject Ordinance was approved by the ACT Criminal Law Consultative Committee, established in 1980 to assist the Inter-Departmental Coordinating Committee on Law Reform in the ACT, which is chaired by Mr Justice Kelly of the ACT Supreme Court and has as its other members the Chairman of the Australian Law Reform Commission, 2 Magistrates including the Chief Magistrate, representatives from the ACT Bar Association and ACT Law Society, academics as well as Departmental Officers.

Thereafter the Ordinance was referred by my colleague the Minister for Territories to the ACT House of Assembly for consideration. It was there considered by its Finance and Legislation Committee which, after consulting officers of my Department, recommended approval to the full House. The Ordinance was, in fact, approved unanimously by the democratically elected House of Assembly.

So seen, this Ordinance could not be regarded as falling into the same category as other delegated legislation made without prior consideration by elected representatives. If the ACT House of Assembly had had legislation making powers, this Ordinance would have been law by virtue of its unanimous passage by that House. I raise this matter because, as you are aware, the issue of self-government for the ACT is a very live and sensitive one, and careful consideration should be given to any action which the members of the House may perceive as denigrating their position.

Turning now to the substantive matters raised by you, I would point out that under the repealed section 476, which the subject Ordinance replaced, provision already existed for the Court of Petty Sessions to determine indictable property related offences without the consent of the accused provided that the value of the property involved did not exceed $500. The latter amount was fixed on 19 April 1974 and the effects of inflation have continually eroded that jurisdiction of the Court. The new provisions recognize this erosion, and restore the jurisdiction of the Court of Petty Sessions. Additionally, they ensure that an accused cannot affect the decision to prosecute by insisting on a costly jury trial for a relatively trivial offence.

It should also be noted that, notwithstanding the prescribed penalty for the offence, where such an offence is dealt with pursuant to the questioned provisions the maximum penalty that may be imposed is 1 year or a fine of $2 000 or both - see para 477 (10) (a).

Unlike section 476 which the Ordinance replaces, the new provisions no longer identify specific property related offences. The reason for the more general approach is that the recently enacted Crimes (Amendment) Ordinance (No 4) 1985 - expressed to become law on 1 January 1986 - will repeal all the existing property related offences in the Crimes Act 1900 of NSW in its application to the ACT. The new theft and criminal damage provisions, intended to reflect the commercial realities of the 20th century, no longer draw distinctions between the nature of the property stolen or damaged. Other irrelevant distinctions have also been abolished.

Notwithstanding this more general approach, because of the matters as to which the Magistrate must be satisfied before he or she exercises this jurisdiction, the practical effect is only to restore the eroded jurisdiction. Before a Magistrate can deal summarily with an offence without the consent of an accused he or she must be satisfied that:

- the charge relates to money or property and is punishable by 14 years imprisonment or less. This test excludes automatically serious offences such as armed robbery or aggravated burglary;

- that the amount of the money or the value of the property to which the charge relates does not exceed $2 500. Both prosecution and defense can present evidence on this question;

- it is proper to dispose of the case summarily. In forming this opinion the Magistrate must have regard to the matters specified in sub-section 477 (8). (The repealed section 476 did not include a similar provision). Included in these matters is whether, bearing in mind the degree of seriousness of the case, the maximum penalty, to which I have already adverted, which may be imposed is adequate.

In closing, I reiterate that I do not believe that the new Ordinance, in practical terms makes substantial changes. In the vast bulk of cases I believe that an accused would wish to avail himself or herself of the lower penalties which may be

imposed. In the small number of cases where an accused would wish to insist on a jury trial I do not believe it is inappropriate that the Magistrate should make a judgment as to where the balance should be drawn between the competing interests of the accused and of society, particularly as that decision can be reviewed.

Yours sincerely,

(Lionel Bowen)

Senator John Coates,
Chairman,
The Senate Standing Committee
on Regulations and Ordinances,
Parliament House,
CANBERRA ACT 2600.

PARLIAMENT OF AUSTRALIA · THE SENATE
STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

19 November 1985

The Hon. Lionel Bowen MP,
Attorney General,
Parliament House
CANBERRA A.C.T. 2600

Dear Mr Attorney,

Re: Crimes (Amendment) Ordinance (NO. 3) 1985

Thank you for your letter of the 4th November 1985 and for your consideration of this matter. Unfortunately the Committee has yet been left with a feeling which is not altogether comfortable.

It appears that under the new legislation and subject to the valuation threshold, the range of offences which may be dealt with summarily without the consent of the accused has been widened beyond the previous position to include common law offences and property offences punishable on indictment by up to 14 years imprisonment. Under the former Section 477A of the Crimes Act 1900 (NSW) the consent of the accused was required before a Magistrate had jurisdiction to try a common law offence involving property valued at no more than $2,000. Section 69 of the Victorian Magistrates' Court Act requires the consent of the accused before the Magistrate can try a charge under the Theft Act in a summary way. It may be that Victorians are over-delicate in such matters. However it may be that where a person's reputation is at stake and where a person is at risk of serving a prison sentence for a crime against the Theft Act, society can well be forgiven for being over-delicate.

The last sentence on the first page of your letter of 4th November, 1985, reads as follows:

> "Additionally they (the new provisions under discussion) ensure that an accused cannot affect the decision to prosecute by insisting on a costly jury trial for a relatively trivial offence."

The offences being spoken of are offences which when tried on indictment can bring punishments of up to 14 years imprisonment. There are some who might express the opinion that such offences ought not be described as "relatively trivial". Certainly legislatures around Australia have seen fit to visit quite severe penalties on people convicted of such "relatively trivial offences". Section 222 and Section

227 of the Companies Code impose disabilities on people who are or may wish to be directors or promoters of corporations. Section 132B and Section 132F of the Conciliation and Arbitration Act 1904 impose comparable disabilities on people who are or may wish to be officers in organisations. Under Section 227(2)(b) of the Companies Code and under Section 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 are subject to being denied important offices in corporations within the meaning of the Companies Code and in organisations registered under the Conciliation and Arbitration Act. Both the Companies Code and the Conciliation and Arbitration Act operate in the A.C.T. The Committee wonders why an offence for which a magistrate may impose a sentence of imprisonment of up to a year can be described as "a relatively trivial offence" when considered within the context of the Crimes (Amendment) Ordinance (No. 3) 1985 and yet an offence involving fraud or dishonesty punishable on conviction for a period of not less than 3 months can be considered so serious that a convicted person should be denied office either in a corporation within the meaning of the Companies Code or in an organisation within the meaning of the Conciliation and Arbitration Act.

The Committee understands that you are concerned about the cost of jury trials (see the last sentence on the first page of your letter of 4th November, 1985). On the other hand it is concerned that people's reputation and their ability to hold the offices mentioned above are discounted because of cost factors. Is it more heinous to be convicted of stealing $2,501.00 than it is of stealing $2,499.00? Is a person's ability to obtain employment likely to be greater if he steals $2,400.00 than if he steals $2,600.00? Or is his reputation and therefore his ability to get work sullied no matter what the amount involved? The Victorian law seems to meet the issues these questions raise. The Ordinance now under discussion does not do so satisfactorily.

The Committee would be grateful to have your comments on the matters raised in this letter. The right to trial by jury is now so traditional and so embedded in our law that any confinement to it should be imposed only after the most anxious consideration.

Yours faithfully,

Barney Cooney
Chairman

DEPUTY PRIME MINISTER
ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

M85/4852:MJ

4 DEC 1985

Dear Barney,

I refer to your letter of 19 November 1985 concerning the Crimes (Amendment) Ordinance (No.3) 1985 and to my previous correspondence with Senator Coates concerning this Ordinance.

I very much appreciate the concern that you have expressed about what you see as the removal from accused persons of a right to trial by jury for what may be described as more minor offences, that is, for offences relating to money or other property where the value of the money or of the property does not, in the opinion of the Court, exceed $2500. I have also noted the remarks that you have made on behalf of the Committee, particularly in relation to offences under the Companies Act 1981 and under the Conciliation and Arbitration Act 1904, as well as the remarks that you have made concerning the way in which these matters are handled in Victoria.

By way of comparison with the Victorian situation, and in passing, I would note that in New South Wales it is possible for some theft type offences to be dealt with summarily and without the consent of the defendant. In New South Wales, under section 501 of the Crimes Act 1900, a Court of Summary Jurisdiction may, without the consent of the accused, deal summarily with offences involving false pretences, larceny or theft where the value of the money or property involved is not, in the opinion of the Court, in excess of $2000.

In relation to the matter that you have raised concerning the Crimes (Amendment) Ordinance (No.3) of 1985 I believe that it is important to have particular regard to the history of the provisions that give the Court of Petty Sessions in the A.C.T. jurisdiction to dispose summarily of offences. The former s.476 of the NSW Crimes Act, as applied to the A.C.T., conferred on a magistrate power to determine indictable property offences, without the consent of the accused, where the value of the property involved did not exceed $500. Until the recent amendments the monetary limit on the jurisdiction of the Court had not been amended since 1974. Furthermore, s.476 identified specific property related offences which were to be the subject of this summary jurisdiction.

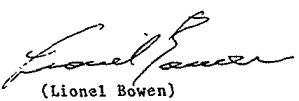
The Crimes (Amendment) Ordinance (No. 4) of 1985 will create new theft and criminal damage provisions which no longer draw distinctions between different types of property stolen or damaged. This more general approach to property offences is reflected in the new s.477. Basically what is sought to be done by s.477 is to make an economic adjustment, to increase from $500 to $2500 the maximum value of property or money involved in the offences which the court may dispose summarily without the consent of the accused. Where the value of the property exceeds $2500 but not $10,000, however, the matter may be disposed of summarily provided the consent of the accused has been obtained.

In respect of matters falling below the $2500 limit I think it is important to note that there are a number of conditions that must be satisfied before a magistrate may dispose summarily of the charge. These include the requirement that the magistrate be satisfied that the case can properly be disposed of summarily, having regard amongst other things to any representations made by the defendant and any other circumstances which appear to the court to make it more appropriate for the case to be dealt with on indictment rather than summarily.

In conclusion, I would make the point that the position under the new s.477 does not appear to be significantly different from that which pertains in New South Wales under s.501 of the Crimes Act 1900 nor from that which existed under the now repealed s.476 for offences against Territory law, except that the monetary limit imposed on the exercise of summary jurisdiction without consent has been raised to take into account inflation.

Having regard to these matters I trust that the Committee will feel more comfortable about the Ordinance.

Yours sincerely,



(Lionel Bowen)

Senator Barney Cooney,
Chairman,
Standing Committee on Regulations
and Ordinances,
Parliament House,
CANBERRA A.C.T. 2600.

DEPUTY PRIME MINISTER
ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

17 DEC 1985

M85/4852

Dear Barney,

I am writing to confirm my undertaking of 5 November 1985 to the Committee concerning the Crimes (Amendment) Ordinance (No 3) of 1985.

In accordance with my undertaking I have approved a draft Crimes (Amendment) Ordinance (No 6) of 1985. This draft Ordinance provides for the deletion of all references in the new section 477 to 'a prescribed charge'. The effect of this deletion will be that the section will now provide that the ACT Court of Petty Sessions must obtain the consent of an accused person prior to dealing with an indictable offence relating to property where the value of the property does not exceed $2,500.

Yours sincerely,

(Lionel Bowen)

Senator Barney Cooney,
Chairman,
Standing Committee on Regulations
and Ordinances,
Parliament House,
Canberra ACT 2600

PARLIAMENT OF AUSTRALIA · THE SENATE
STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

6 January 1986

The Hon. Lionel Bowen, M.P.
Attorney-General,
Parliament House,
CANBERRA A.C.T. 2600

Dear Attorney-General,

At its meeting on 5 December 1985, the Committee considered your letter of 4 December 1985. The Committee also considered your undertaking, conveyed by Ms. Forgie, to amend the Crimes (Amendment) Ordinance (No. 3) 1985 in order to give all accused persons to whom the Ordinance applies the right to elect to be tried by a jury.

The Committee was delighted to receive your undertaking and pays tribute to you for your readiness to accommodate its concern about this fundamental issue. I reported your undertaking to the Senate on 5 December 1985 (Senate Hansard, 5.12.85, page 3076) and in doing so was pleased to withdraw the Committee's notice of motion of disallowance.

Yours sincerely,

Barney Cooney
Chairman

PARLIAMENT OF AUSTRALIA · THE SENATE

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

VI

18 February, 1986

The Hon. Lionel Bowen, M.P.
Attorney-General,
Parliament House,
CANBERRA A.C.T. 2600

Dear Attorney-General,

At its meeting on 13 February 1986 the Committee considered the Evidence (Amendment) Ordinance (No. 2) 1985 (A.C.T. Ordinance No. 61 of 1985 tabled in the Senate on 3 December 1985) and the Crimes (Amendment) Ordinance (No. 5) 1985 (A.C.T. Ordinance No. 62 of 1985 tabled in the Senate on 3 December 1985).

The Committee notes that these Ordinances make quite fundamental changes to the rules concerning the giving of evidence in sexual offence proceedings and in relation to the substance of the law of rape and other sexual offences in the A.C.T.

In the Evidence (Amendment) Ordinance the following points may be noted -

- the accused may no longer seek to adduce evidence relating to the making or terms of a complaint by the complainant;
- the court may direct that the proceedings be in camera;
- the complainant's identity shall not be disclosed without the complainant's consent;
- the judge need no longer warn a jury that it is unsafe to convict a person accused of a sexual offence on the uncorroborated evidence of the complainant.
- an accused no longer has a right to adduce evidence relating to the sexual reputation of the complainant. Admission of such evidence is subject to the judge's discretion; and
- in an unsworn statement from the dock the accused may not refer to the complaintant's sexual reputation or experience.

In the Crimes (Amendment) Ordinance the following points may be noted -

- the crime of rape as conventionally understood has been abolished; sexual offences have been signficantly reduced and rationalised;

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- sexual intercourse is given a very wide meaning, much of it unrelated to its conventional meaning;

- from the point of view of consent, sexual intercourse is viewed as a continuing act but of divisible or severable components which permit consent to be withdrawn at any time;

- penalities of up to 20 years imprisonment are imposed;

- consent to prima facie voluntary sexual intercourse is to be negated by inter alia "mistaken belief as to the identity of the person" and "a fraudulent misrepresentation of any fact made by the other person".

- the presumption that young people below a certain age are incapable of engaging in sexual intercourse is abolished;

- marriage will no longer be a bar to an accusation of and conviction for offences related to sexual intercourse.

The Committee notes that these Ordinances make quite fundamental changes in the criminal law of the A.C.T. with regard to the very serious and very difficult area of sexual offences. On their own these Ordinances are highly significant. However, one of the Ordinances is the 5th in a sequence of Crimes (Amendment) Ordinances. If these and the Evidence (Amendment) Ordinance had come before the Committee (or the community) in one document as a virtual criminal demi-code instead of piece-meal over the past year, it would be clearly seen that a major recodification of A.C.T. criminal law had been undertaken by ministerial instrument without the community, the committee, or the Parliament having an opportunity to consider the scheme as a whole in the light of the accumulated innovations which it reflects.

The Committee notes that with respect to the two Ordinances presently under examination the Explanatory Statement makes no reference to there having been any consultations with the A.C.T. House of Assembly, or the local Criminal Law Consultative Committee. This may be merely an oversight from the Statement rather than a reflection of any failure to consult. The Committee would welcome your description of the extent to which consultations across the community and the legal profession pointed to agreement on these major proposals which have now become law wihout Parliamentary debate or sanction.

The Committee notes that in making these Ordinances you have placed considerable reliance on the Tasmanian Law Reform Commission Report No. 31 on Rape and Sexual Offences (No. 84, 1982) although there are a number of other published authorative reports on sexual crimes which have made recommendations somewhat at variance with some of those in Report No. 31 (for example, in connections with the abolition of the common law offence of rape). The Committee seeks your advice on whether, after full parliamentary debate, the Tasmanian Legislative Assembly implemented the recommendations of its own law reform experts.

As you will be aware Principle (d) of the Committee's terms of reference requires it to scrutinise delegated legislation to ensure that it does not contain matter more appropriate for Parliamentary enactment. Given that there are few areas of law socially or politically more significant than criminal law the progressive promulgation of what may reasonably be seen as a criminal code (including sexual offences and property offences) must give the Committee pause in considering the application of Principle (d) to these Ordinances.

The Committee would be very grateful to have your comments and advice on these matters in particular whether any consideration was given to bringing these two far reaching reform proposals before the Parliament.

Yours sincerely,

Barney Cooney
Chairman

DEPUTY PRIME MINISTER
ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

M85/4852

4 MAR 1986

Dear Barney,

I refer to your letter of 18 February 1986 concerning the Evidence (Amendment) Ordinance (No. 2) 1985 and the Crimes (Amendment) Ordinanace (No. 5) 1985, a comprehensive review of the ACT laws relating to sexual offences.

These Ordinances form part of the programme of reform of the criminal laws of the ACT, which my predecessor began in September 1983. The importance of a review of the criminal law was emphasised by (the then) Chief Justice Blackburn on 6 July 1983 in the case of Queen V Sykes when he said,

> "the criminal law of this Territory is to a degree which is scandalous, in need of review, and all Judges of this court have been saying so for twelve years to my knowledge".

The reform of the criminal law of the ACT has been undertaken in two parts. The first part, now substantially completed, involved a tidying up of archaic or non operative provisions as well as adopting some desirable reforms made interstate. The second part involves substantial reform of the laws covering particular classes of offences. So far, two Divisions of the Crimes Act 1900 (NSW) in its application to the ACT, have been the subject of such substantial review. The first was a review of property offences, which was implemented by the Crimes (Amendment) Ordinance (No. 3) 1985. The second was the review of sexual offences, implemented by the two Ordinances under discussion. Therefore, although there have been five Crimes (Amendment) Ordinances during 1985, only two of these implement reviews of laws covering the whole of particular class of offences.

The programme for ACT criminal law reform certainly involves review, and, where appropriate, revision, of the whole of the Crimes Act 1900 NSW in its application to the ACT. However, it should be noted that that Act, in its application to the ACT, is not a code. It is not technically correct, therefore, to refer to the programme as "a major recodification". In all non-code jurisdictions, including the ACT, nearly all the criminal law is contained in legislation: this has been the situation for most, if not all, of this century.

You have expressed concern over the extent of consultation on the two Ordinances. I would point out that these Ordinances were given extensive consideration both by the ACT Criminal Law Consultative Committee and the ACT House of Assembly. The Committee considered these reforms not only at one of its ordinary meetings, but also at two specifically convened extraordinary meetings. Late in 1984, the draft ordinances were referred to the ACT House of Assembly which requested its Standing Committee on Finance and Legislation to consider them. That Committee presented a report to the House of Assembly in September 1985. It recommended that the Ordinances be agreed to, subject to certain minor amendments. The Ordinances were subsequently amended in accordance with these recommendations. I would also point out that the Office of the Status of Women was fully consulted at the outset and supported the proposals. I understand that the Office of Status of Women also undertook wide consultation amongst interested groups within the community.

In preparing the draft Ordinances, consideration was given to the Tasmanian Law Reform Commission report No 31 on Rape and Sexual offences. Consideration was also given to recent reforms that had been implemented in NSW and Vic., together with reports from other Australian and foreign jurisdictions. As to your request for advice on whether the Tasmanian Legislative Assembly has implemented the recommendations of the above report I have been advised that while no legislation has been enacted giving effect to the recommendations a draft Bill is currently being prepared for consideration by the Tasmanian Government containing provisions that will give effect to some of the recommendations of the Commission, namely

- providing that a husband can be found guilty of the crime of rape against his wife, where the parties were not cohabiting at the time of the offence;

- removing the presumption that males under the age of fourteen could not commit rape;

- providing for the suppression of names of victims, and offenders in incest cases.

In view of the wide consultation, I believe the two Ordinances cannot be regarded as falling into the same category as other delegated legislation made without prior reconsideration by elected representatives. As indicated in my letter of 4 December 1985, to your predecessor, concerning the Crimes (Amendment) Ordinance (No. 3) 1985, if the ACT House of Assembly had had legislation making powers, this Ordinance would have been law by virtue of its unanimous passage by that House. As you are aware, the issue of self-government for the ACT is a very live and sensitive one, and it would not be appropriate for the criminal law of the ACT to be contained in a Commonwealth statute.

Yours sincerely,

(Lionel Bowen)

Senator Barney Cooney,
Chairman,
Standing Committee on Regulations
and Ordinances,
Parliament House
CANBERRA ACT 2600.

PARLIAMENT OF AUSTRALIA · THE SENATE VII

STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

M85/4852
Your ref: M86/2716:VB

19 March 1986

The Hon. Lionel Bowen, MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General,

At its meeting on 13 March 1986, the Committee considered your letters of 4 March 1986 and 11 March 1986 in connection with the Evidence (Amendment) Ordinance (No. 2) 1985, the Crimes (Amendment) Ordinance (No. 5) 1985 and the Artificial Conception Ordinance 1985. The Committee expresses its appreciation for the very detailed and thorough explanations you have given in connection with these Ordinances.

After the discussing the issues, the Committee decided that it should not recommend disallowance of any of these instruments under principle (d) of its terms of reference. The existing notice of motion of disallowance given in respect of the Artificial Conception Ordinance will accordingly be withdrawn and no notice will be given, on behalf of the Committee, regarding the other two Ordinances.

However, the Committee has decided that, prior to withdrawing its notice of motion in connection with the Artificial Conception Ordinance, it will table in the Senate a report on its scrutiny of this particular instrument.

Yours sincerely,

Barney Cooney
Chairman

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PARLIAMENT OF AUSTRALIA · THE SENATE
STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

15 October 1985

Lionel Bowen, M.P.
Attorney-General,
Parliament House,
CANBERRA, ACT 2600

At its meeting on 10 October 1985 the Committee considered the Crimes (Amendment) Ordinance (No. 4) 1985 (ACT Ordinance No. 44 of 1985).

The Committee would appreciate your comments and advice on two matters. Firstly section 98(1) is retrospective in operation in that it provides that "a reference to stolen property shall be read as a reference to ..... any property stolen or obtained by blackmail before or after the commencement of the [present Ordinance]..." The Committee would welcome your advice on whether this retrospectivity is necessary and what consequences it may have for accused persons and the administration of criminal justice.

Secondly, section 116 creates the offence of possessing articles "for use in the course of ... any theft or burglary". Sub-section 116(2) appears to be a provision reversing the onus of proof in relation to certain elements of this offence. The Committee seeks your comments on whether this reversal is necessary and what its consequences might be for accused persons and the administration of criminal justice.

John Coates
John Coates
Chairman

DEPUTY PRIME MINISTER
ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

M85/4852:BH

Dear John,

I refer to your letter of 15 October 1985 concerning the Crimes (Amendment) Ordinance (No.4) 1985 (A.C.T. Ordinance No. 44 of 1985).

Section 98 provides a definition for the term "stolen property" for the purpose of the newly inserted Part IV of the Crimes Act 1900 N.S.W. in its application to the A.C.T. (Crimes Act 1900). This definition is of relevance to the new offence of handling stolen property (section 113), delivery of stolen property held by dealers (section 118) and disposal of stolen property (section 119).

It should be noted that these new offences do not come into effect until January 1986. Currently sections 188, 189 and 189A of the Crimes Act 1900 create offences of receiving stolen property. Without the retrospective definition contained in new section 98(1), a person who after 1 January 1986 receives property which was stolen prior to that date will not be subject to criminal sanctions where he would have been had he received the property before 1 January 1986.

Accordingly new sub-section 98(1) does not operate to render criminal, acts and omissions that occurred prior to the commencement of the new provision but merely ensures that there is no lacuna in the law with respect to items stolen prior to commencement.

As you are aware new sub-section 116(1) creates an offence where a person has with him or her any article for use in connection with any theft or burglary. Sub-section 116(2) is not a provision that reverses the onus of proof but merely provides that where the prosecution can prove that the alleged

offender had with him or her an article that was made or adapted for the use in committing a theft or burglary such is to be evidence that he or she had this article with him or her for that particular use. Where the prosecution can prove the above matter the accused is then only required to adduce sufficient evidence to put this matter in issue.

Yours sincerely,

(Lionel Bowen)

Senator John Coates,
Chairman,
The Senate Standing Committee
on Regulations and Ordinances,
Parliament House,
CANBERRA A.C.T. 2600

PARLIAMENT OF AUSTRALIA · THE SENATE
STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

13 November 1985

Lionel Bowen, M.P.
Attorney-General,
Parliament House,
CANBERRA ACT 2600

At its meeting on 7 November 1985 the Committee considered your letter of 5 November 1985 concerning the Crimes (Amendment) Ordinance (No. 4) 1985 (A.C.T. Ordinance No. 44 of 1985). Two points were raised at the Committee's meeting.

Firstly, the Committee accepted your assurance that new sub-section 98(1) of the Ordinance merely ensures that there is no lacuna in the law with respect to items stolen prior to commencement of the Ordinance. The Committee appreciates your advice and thanks you for your assistance on this point.

Secondly however, the Committee remained concerned about what it views as an apparent reversal of onus of proof in sub-section 116(2) of the Ordinance.

The sub-section provides that where the prosecution proves that a person had an article made or adapted for committing theft or burglary, that proof shall be evidence that the person had the article for that criminal use. In order to avoid the risk of conviction, a defendant must give evidence that he or she did not have the article for such a use. Thus, an evidential burden of proof is placed on the accused. An accused who fails to give evidence in rebuttal could be found guilty of the offence and liable to imprisonment for 3 years.

Although section 116 does not refer to intention, liability for the offence of having an article for a particular use clearly hinges on an accused's intention to use the article for theft or burglary. Thus, once the prosecution proves the possession of relevant articles, that proof is evidence of intention. To be acquitted the accused has to give evidence that he or she had no criminal intention. That evidence has to be of such calibre as will make the accused's innocence once more a live issue in the trial. Without that evidence, the accused could be found guilty of the offence, although the prosecution would not at any stage have discharged, nor been required to discharge, any onus of proving beyond reasonable doubt that the accused intended to commit the crime. Such an outcome may well be contrary to principle.

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 considered the evidential burden of proof as referring to

> "...one party's duty of producing sufficient evidence for a tribunal to call upon the other party to answer." (para. 2.2)

The Committee noted that

> "... in relation to the accused it means that the matter must be taken as proved against him unless there is sufficient evidence to raise an issue on the matter." (para. 2.2, my emphasis)

The Committee quoted from Cross on Evidence on the question of how much evidence would satisfy the evidential burden. Cross considered that when the accused bears the evidential burden

> 'it is only necessary for there to be such evidence as would, if believed and uncontradicted, induce a reasonable doubt in the minds of a reasonable jury as to whether his version might not be true... In the words of Lord Devlin, the evidence must be enough to "suggest a reasonable possibility".'.

In the case of Section 116 an accused's silence, his or her mere assertion of innocence or sworn statement of a lack of criminal intent would not be sufficient to satisfy this test, yet traditionally an accused is presumed to be innocent until proven guilty.

In Cameron v Holt [1979-1980] 142 CLR 351 at 347, Barwick C.J. expressed the view that

> "after Woolmington v. Director of Public Prosecutions it always remains for the Crown to establish guilt however much during the course of a trial what has been referred to at times as an evidential burden of proof has shifted to the accused, that is to say, in cases where the Crown's evidence raises a sufficient prima facie case to lead to the expectation, particularly where the facts are in the possession of the accused, that the accused would provide evidence to negate or weaken the case which theretofore has been made by the Crown. But in the long run, the Crown must establish guilt.".

In its Report, the Senate Committee recommended that

> "(a) As a matter of legislative policy, provisions imposing an evidential burden of proof on defendants should be kept to a minimum.

(b) In order to enable this legislative policy to be achieved, such provisions should be imposed only in the following circumstances:

(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."

It is difficult to see how sub-section 116(2) could qualify under either limb of paragraph (b). The test refers to extreme difficulty or expense. It would not be a task of such magnitude for the prosecution to prove beyond reasonable doubt that a person in a street or in a building with, for example, large bunches of master keys or housebreaking tools had those articles for a criminal purpose, namely theft or burglary. The Committee having weighed its principles against the needs of reasonable law enforcement, does not consider that such a requirement would unduly place the prosecution at an unfair disadvantage. It is a normal daily requirement in the courts for prosecutors to establish criminal intent in order to obtain convictions.

On Friday 8 November 1985, the Committee gave protective notice of motion of disallowance of the Ordinance, to enable it to correspond further with you and seek a redrafting of the provision.

John Coates

John Coates
Chairman

DEPUTY PRIME MINISTER
ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

MAS/4852
4 DEC 1985

Dear John,

I refer to your letter dated 13 November 1985 concerning the Crimes (Amendment) Ordinance (No 4) 1985 and in particular, concerning the new sub-section 116(2) which was inserted by that Ordinance.

I have noted the concerns that you have expressed in relation to what you see as an apparent reversal of onus of proof in sub-section 116(2). I do not believe that there has been a reversal of the onus of proof and would like to set out my views about how section 116 operates.

As you are aware, sub-section 116(1) creates an offence of possessing an 'article for use in the course of, or in connection with, any theft or burglary' and sub-section 116(2) provides that where a person is charged with this offence, proof that the person had with him or her an article made or adapted for use in committing a theft or burglary is to be evidence that the person had it for that use.

The purpose of sub-section 116(2) is to provide an evidentiary aid to the Crown in establishing an element of the offence created by sub-section 116(1). In order for the Crown to rely on this provision it must first prove, on the criminal standard of proof, that the article which is the subject of the charge was in fact made, or has been adapted, for use in committing a theft or burglary. Once the Crown has proved either of these things, sub-section 116(2) then provides, in effect, that the fact so proved is evidence, to be weighed against all other evidence available, that the person had the relevant article in his or her possession for that particular purpose. In this regard, I note that the sub-section does not go on to require the Court to accept the evidence as proof of this purpose even where no evidence to the contrary is adduced by the defendant.

The court may, for example, in light of the all the circumstances find the evidence adduced by the prosecution to be unconvincing or it may find that the accused had no present intention of using a "housebreaking implement", the distinction being between cases of "mere possession" of such an implement and cases of possession of an implement for the purpose prescribed by sub-section 116 (1).

The effect of sub-section 116(2) is, I believe, to enable the Court to infer the intention of the accused from the objective facts, this being a usual method of establishing mens rea or 'purpose'. Notwithstanding the provisions of sub-section 116(2), the onus remains on the Crown throughout the proceedings to prove, beyond reasonable doubt, that the defendant had possession of the article in question for use in a burglary or theft.

/...

While there is no legal requirement on the accused to adduce any contrary evidence where the Crown has established (on the criminal standard of proof) that he or she had possession of an article to be used to commit a theft or burglary, it is true that the accused would be at considerable risk if he or she failed to rebut the resulting inference of purpose. The accused may consider, as a matter of tactics, such evidence to be necessary where the prosecution has established the character of the article in question, as required by the sub-section. The evidence need not be given by the accused and may be established through cross-examination of a Crown witness.

While I agree that in a practical sense this sub-section may require the defendant to explain his or her intended use of the article the subject of the charge it does not in law place an evidential burden of proof on the defendant.
I note also that sub-section 116(2) is not a novel provision, being derived, in substance, from section 25 of the United Kingdom Theft Act. A provision in similar terms is also to be found in sub-sections 91 (1)-(3) of the Crimes Act 1958 (Vic).

Yours sincerely,

(Lionel Bowen)

Senator John Coates
Chairman
The Senate Standing Committee
on Regulations and Ordinances
Parliament House
Canberra ACT 2600

PARLIAMENT OF AUSTRALIA · THE SENATE
STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

6th January, 1986

Your ref: M/85/4852

The Hon. Lionel Bowen M.P.,
Attorney General,
Parliament House,
CANBERRA. ACT 2600

Dear Mr. Attorney,

Re: Crimes (Amendment) Ordinance (No.4) 1985

Thank you for your letter of 4th December, 1985 concerning the Crimes (Amendment) Ordinance (No.4) 1985. The Committee does not press its objection to sub-section 116(2) of the Ordinance. As you pointed out in your letter the provisions of the sub-section are not novel. For example similar provisions appear in section 25 of the Theft Act 1985 (U.K.) and in sub-section 91(1) to (3) of the Crimes Act 1958 (Vic.)

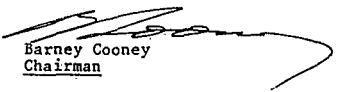
The Committee has reservations about this type of legislation. Where a person has with her or with him an article which beyond reasonable doubt has been made or adapted for use in the carrying out of a crime, then suspicion must arise against such a person that she or he intended the commission of that crime. However it does not follow that as a matter of fact the person in possession of the article intended to use it for a crime. Indeed she or he may not even have realised that it was so made or adapted. Nonetheless in the absence of evidence from the accused as to intent, that issue is presumed against her or him.

In your letter of 4th December, 1985, you referred to this question of criminal intent when you noted that "the purpose of sub-section 116(2) is to provide an evidentiary aid to (the prosecution) in establishing an element of the offence created by subsection 116(1)". This element is central to any crime in which intent is an issue. Intent is an issue in the crime created by Section 116. Without the provision reversing the onus of proof the prosecution would have to establish intent beyond reasonable doubt.

The Committee is uneasy about this provision and similar ones in other jurisdictions. It has thought it appropriate to invite the Senate Standing Committee on Constitutional and Legal Affairs to consider the question and to invite the Australian Law Reform Commission to comment about it.

I enclose copies of the letters sent respectively to the Chairman of the Australian Law Reform Commission and to the Chairman of the Senate Committee.

Yours sincerely,



Barney Cooney
Chairman

PARLIAMENT OF AUSTRALIA · THE SENATE
STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

- 4 SEP 1986

The Hon. Lionel Bowen, M.P.
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney-General,

At its meeting of 21 August 1986, the Committee considered the Crimes (Amendment) Ordinance 1986 (being A.C.T. Ordinance No. 15 of 1986 tabled in the Senate on 10 June 1986). The Committee seeks your views on consultations prior to making the Ordinance and also in regard to a possible reversal of the onus of proof in sub-section 135E(2).

Firstly, the Committee notes from the Explanatory Statement accompanying the Ordinance that the instrument is "part of the ongoing review of the criminal laws of the Territory and contains a comprehensive review of the laws relating to forgery". The Statement does not further explain the sources of the proposed reforms nor does it indicate whether the Ordinance has been made following extensive consultation with A.C.T. legal authorities and experts or the House of Assembly prior to its abolition.

As you know the Committee has a responsibility to the Senate to consider whether any particular instrument of delegated legislation contains matter more appropriate for enactment by a bill introduced into Parliament. It is one part of the process of exercising this judgment for the Committee to consider the origins of a law reform proposal, for example, in Law Reform Commission Reports or in State Acts along similar lines, and the degree of consultation and community and expert involvement in the evolution of the proposals prior to their appearance as delegated legislation.

The Committee has previously commented on the fact that piecemeal enactment of a new criminal code for the A.C.T. is underway, essentially in the hands of public servants, without the benefit of the discipline which analysis and debate in Parliament represents in such an important enterprise.

The Committee would be grateful if you could expand on the useful technical details discussed in the Explanatory Statement by describing the background to the reform.

Secondly, the Committee is troubled by the terms of sub-section 135E(2) which, when read in association with the more serious offence in sub-section 135(1), appears to reverse the onus of proof of guilt by placing on a defendant an onus of proof of innocence.

Sub-section 135E(1) provides that a person shall not, with the intention of committing forgery, make or possess a machine, implement or paper which is, and is known to be, designed or adapted for forgery. The penalty is 10 years imprisonment. Clearly a criminal intention must be established, beyond reasonable doubt, before conviction can arise.

In contrast sub-section 135E(2) appears to be designed to suit the purposes of a holding charge or a plea bargaining charge. In virtually identical terms to sub-section (1), sub-section (2) provides that a person shall not, without reasonable excuse, make or possess a machine, implement or paper which is, and is known to be, designed or adapted for forgery. The penalty here is 2 years imprisonment. The offence is constituted merely by the action of making or possessing a designed or adapted thing.

It appears that intention, beyond the purely mechanical intention to make or possess the appropriate thing, is irrelevant to the prosecutor. It will, however, be vital to the accused who will have to prove his or her innocence of unlawful intent by giving evidence of a lawful excuse. This will be the case unless the sub-section can be construed as placing an obligation on the prosecutor to prove the whole offence, one element of which is an absence of reasonable excuse. A court may not accept such a construction nor may it, in the face of the wide words used in the provision, agree with the statement in the Explanatory Statement that the offence is directed to "those machines which are specifically designed or adapted to make a false instrument ... (excluding) items such as a pen, photocopier or ordinary paper which may be incidentally used to make a false instrument ...". The expression "designed or adapted" in sub-section 135E(2) is not qualified by the word "specifically" as it is in the Statement.

The Committee is concerned that, as it stands, sub-section 135E(2) may make mere possession of every day items and specialist artists' materials unlawful unless or until a person can prove to the police, the prosecutor or the court that he or she had a "lawful excuse" for possessing such materials. The offence could be used for the purpose of holding in custody certain persons who are found in possession of specialist materials in circumstances where the police may wish to make some point but lack any evidence whatsoever of intention or even motivation to commit the crime of forgery.

The Committee considers that it is necessary that the machinery of reasonable law enforcement, particularly in regard to so serious a crime as forgery, should not be impeded by unmeritorious technical points. It does not however, regard its concern over the possible reversal of onus in

sub-section 135E(2) as technical or unmeritorious. The Committee is most reluctant to be seen to condone in the new A.C.T. criminal code which is being made on an executive basis, a series of offences which do not require the prosecution to prove beyond reasonable doubt the usual constituent elements of a crime, namely, an objectively anti-social act performed in association with an intention to do that very act.

Sub-section 135E(2) of the Crimes (Amendment) Ordinance 1986 contains the second recent example of delegated legislation which appears to dispense with the fundamental requirement of proof of criminal intention. After considerable reflection, the Committee decided to accept your explanations in relation to the apparent reversal of onus in sub-section 116(2) of the Crimes (Amendment) Ordinance (No. 4) 1985 (A.C.T. Ordinance No. 44 of 1985, your letter of 4 December 1985 and the Committee's reply of 6 January 1986, file reference M85/4852). In the final analysis in that case the Committee considered that it could not ignore the fact that, as drafted, the provision creating the offence of going equipped for theft was not a novel one and was not unlike similar provisions in the Crimes Act 1958 (Vic) and the Theft Act 1986 (U.K.). In addition, sub-section 116(2) of the earlier Ordinance provided that proof, beyond reasonable doubt, that a person had an article made or adapted for theft or burglary (i.e. proven, beyond reasonable doubt to be an article so made or so adapted for such a purpose) would be evidence of intention to use the article for committing such an offence. Such as they are, none of those protective conditions apply in sub-section 135E(2) of the Ordinance now under consideration.

The sub-section probably places on the prosecution an obligation to show, beyond reasonable doubt, that the machine, implement, paper or other material was known to be and was in fact designed or adapted for the making of a false instrument. Since, in the Committee's view, many everyday items could fall within the scope of the provision, that will not be an onerous or protective burden of proof. It may be that the expression "designed or adapted" requires some refinement if sub-section 135E(2) is to be justified as being an evidentary reversal where the accused posesses peculiar knowledge to explain an otherwise unusual possession.

Without some adjustment the Committee would be disturbed at the possibility that, at the very least, certain types of non-criminal but otherwise non-conforming and controversial artists could be victimised by the terms of the sub-section as it is currently drafted. The Committee would be very appreciative of your comments and advice on the two issues raised by it in this letter.

Yours sincerely,

Barney Cooney
Chairman

DEPUTY PRIME MINISTER
ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

M86/12914:SM

9 OCT 1986

Dear Barney,

I refer to your letter dated 4 September 1986 concerning the Crimes (Amendment) Ordinance 1986.

As you are aware this Ordinance is part of the ongoing review of the criminal laws of the Territory, initiated by my predecessor and which I have continued. I have already indicated that the programme for ACT Criminal Law reform involves review, and, where appropriate, revision of a whole subject matter. This Ordinance is the third review of a whole subject matter contained in the Crimes Act 1900, NSW in its application to the ACT and is closely related to the earlier reform of all the property related offences (Crimes (Amendment) Ordinance (No.4) of 1985).

The reform of this area of the law was extensively studied in England by the Criminal Law Revision Committee, who recommended the replacement of the entirety of the existing law in relation to forgery and counterfeiting with a comparatively short and easily understood new Statute. In due course, the Committee's recommendation, with some minor amendments, were enacted as the Forgery and Counterfeiting Act 1981.

This Act, as well as decision of the courts and academic discussions were considered in the preparation of Crimes (Amendment) Ordinance 1986.

You have expressed concern over the extent of consultation on the Ordinance. I would point out that the Ordinance was given extensive consideration initially by the ACT Criminal Law Consultative Committee and was then referred to ACT House of Assembly for its consideration. The House of Assembly approved, without amendment, the Ordinance late last year. As you are aware this consultative process was and has been the generally accepted consultative process for ACT laws until June 1986 when the ACT House of Assembly ceased to exist.

You have also expressed concern that sub-section 135E(2), when read in association with sub-section 135E(1), appears to reverse the onus of proof.

In my view sub-section 135E(1) and (2) each create a separate and distinct offence. They do however, both relate to having custody or control of a machine etc which is, and which the accused knows is designed or adapted to make a false instrument. That is for both offences the onus is on the prosecution to prove both custody and knowledge that the machine was designed to make a false instrument.

The offence created in sub-section 135E(1) is the more serious offence and contains the additional element of the accused intending to use the machine etc to make a false instrument for the purpose of inducing a third person to accept it as genuine so that the third person or another person will do or omit to do an act to their prejudice. Again the onus is on the prosecution to prove these additional factors.

Where a person is charged with an offence under sub-section 135E(2) the onus is still on the prosecution to prove that the accused;

(a) had custody or control of a machine etc

(b) which was designed or adapted and

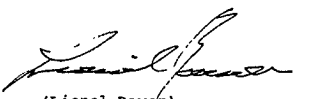
(c) which the accused knew was designed or adapted for making a false instrument.

In my view it is unnecessary to qualify the expression 'designed or adapted' in this sub-section by the term 'specifically' as items such as pens, photocopiers etc could not fall within the ambit of the provision as they would in general not be designed or adapted to make a false instrument as defined in section 135A. The word 'specifically' has been inserted in the Explanatory Statement merely for the purpose of describing the effect of the provision.

Where the prosecution has discharged its onus on each of the elements under sub-section 135E(2) (set out above), I agree that the onus then lies on the accused to prove that he had a lawful excuse to possess the machine etc; the subject of the charge (see section 417 of the Crimes Act 1900, NSW in its application to the ACT). I would again emphasise that the question of lawful excuse does not arise until the Crown has proved on the criminal onus, the other elements of the offence the question of a lawful excuse is in general a matter which lies peculiarly within the knowledge of the accused and can be easily proved by him or her.

Sub-section 135E(2) is not designed as a holding charge or a plea bargaining charge and I find it difficult to envisage the possibility that non-conforming or controversial artists could be victimised by the terms of the sub-section.

Yours sincerely,



(Lionel Bowen)

Senator B. Cooney, M.P.,
Chairman,
The Senate Committee on Regulations
and Ordinances,
Parliament House,
CANBERRA ACT 2600

PARLIAMENT OF AUSTRALIA · THE SENATE
STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

2/XXII

Your reference: M86/12914: SM

17 OCT 1986

The Hon. Lionel Bowen, M.P.
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Minister,

At its meeting on 16 October 1986 the Committee considered your letter of 9 October 1986 concerning the Crimes (Amendment) Ordinance 1986 (A.C.T. Ordinance No. 15 of 1986). The Committee thanks you for the explanation you have given on the question of the onus of proof arising under sub-section 135E(2) concerning the offence of possessing a machine for forgery.

After considering the question the Committee agreed to accept the explanations given in your letter. The Committee has however, decided to prepare a short report to the Senate on the issue of possible reversals of the onus of proof in A.C.T. Ordinances and the progressive development in delegated legislation of a criminal code for the A.C.T. The Committee will table this report at the time it gives notice of its intention to withdraw its protective notice of motion of disallowance.

The Committee has previously reported to the Senate on matters or developments which it regards as significant while not recommending that any disallowance action be pursued. (See, for example, Chapter 3 of the Committee's Seventy-fifth Report (Parliamentary Paper, No. 303/1984) and the Seventy-eighth Report, April 1986.

The purpose of this letter is simply to inform you of what the Committee proposes and to thank you for your letter.

Yours sincerely,

Barney Cooney
Chairman

PARLIAMENT OF AUSTRALIA · THE SENATE
STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

3 - OCT 1986

The Hon. Gordon Scholes, M.P.
Minister for Territories
Parliament House
CANBERRA ACT 2600

Dear Minister,

At its meeting on 25 September 1986, the Committee considered the Domestic Violence (Miscellaneous Amendments) Ordinance 1986 (being A.C.T. Ordinance No. 53 of 1986, tabled in the Senate on 16 September 1986). The Committee seeks your comments on one large and three lesser matters of concern to it.

Firstly, the Long Title to this Ordinance appears to be somewhat misleading. The Ordinance is entitled "An Ordinance to amend certain Ordinances in connection with the making of the Domestic Violence Ordinance 1986". However, under the Ordinance powers are being conferred on the police through amendments to the Crimes Act 1900 (N.S.W.) which make no reference to their being confined to domestic violence situations and which are not, strictly speaking, merely consequential changes.

While the amendments do go to the viability of making proper and reasonable use of the police to deter and remedy domestic violence, the powers conferred on the police by the Crimes Act amendments in this Ordinance will be exercisable in a wide range of circumstances unrelated to domestic violence. Certainly the general entry power in section 349A appears to be exercisable only where violence has occurred or is imminent, ("for the purpose of giving assistance to a person ... who has suffered or is in imminent danger of suffering, physical injury ..."). However, the urgent entry power in section 349C confers on police officers a very wide power which may be exercisable in regard to any offence whatsoever, whether it is related to domestic violence, any violence or otherwise. The Explanatory Statement accompanying the Ordinance, states at page 2 that section 349C reflects the common law powers of police to enter premises without a warrant.

It appears to the Committee that the Ordinance reflects changes to the law which evidence the building up of a very substantial code of new criminal law for the A.C.T. in a piecemeal way, and perhaps without as much community involvement or scrutiny as the measures deserve. The Committee notes that throughout 1985 and 1986 there has been a continuing reform and modernisation of the criminal law of the A.C.T. to the extent that with the exception of offences against the person (other than sexual offences) the substantive provisions of the Crimes Act 1900 (N.S.W.) have been extensively rewritten and made law. The anticipated consolidated reprint of the Crimes Act, in the form of a renamed Crimes Ordinance, may well amount to a new criminal code for the Territory. The amendments in this Ordinance appear to be another part of that process. The Committee would welcome your comments on this aspect of the Miscellaneous Amendments Ordinance.

Secondly, new section 349A in conferring entry powers does not limit and qualify, by reference to an express standard of reasonableness, either the preventative action there referred to or the necessity for it to be performed. Thirdly and similarly the precedent drafting in section 235 of the Credit Ordinance 1985, which the Committee had hoped would be followed in subsequent relevant Ordinances, is not reflected in new sub-section 349B(1) concerning assisted and forceful entry onto premises in execution of a warrant to prevent the commission of offences. The Committee would respectfully suggest that the formula in section 235 appears to a useful one because it leaves no doubt on the face of the legislation that while large and intrusive powers are necessarily available for law enforcement purposes these must be exercised in a reasonable way. When a large power is qualified by express reference to reasonableness in its execution, law enforcement is not diminished and rights are protected.

Fourthly, under section 349A a police officer may enter premises in response to an invitation from "a person who is apparently a resident" of the premises. The Committee is somewhat concerned about the imprecision of this drafting in so important a provision, because it may not impart a sufficient degree of objective reasonableness into the making of a judgment which can allow the police to enter a private home. The Committee respectfully asks you to consider as a preferable formula the words "a person who is, or is reasonably believed to be, a resident ...".

The Committee would very much welcome your views on all of these matters.

Yours sincerely,

Patricia Giles
Acting Chair

DEPUTY PRIME MINISTER
ATTORNEY-GENERAL
PARLIAMENT HOUSE
CANBERRA A.C.T. 2600

M86/14458:MJ

29 OCT 1986

Dear Pat,

I refer to your letter dated 8 October 1986 in which you raise a number of matters of concern to the Senate Standing Committee on Regulations and Ordinances arising out of the Domestic Violence (Miscellaneous Amendments) Ordinance 1986.

The Committee expresses concern that amendments to the Crimes Act 1900, which are not confined to matters relating to domestic violence, have been included in the Domestic Violence (Miscellaneous Amendments) Ordinance 1986. You say that the long title is misleading. That Ordinance together with the Domestic Violence Ordinance 1986 implements all of the Australian Law Reform Commission's report on Domestic Violence. It is for this reason that the Crimes Act amendments have been included in the Domestic Violence (Miscellaneous Amendments) Ordinance. The amendments have received considerable media coverage and my Department has been heavily involved in training sessions and seminars for workers in the area and interested community groups. I do not believe that any confusion as to the application of these amendments is likely to arise from their inclusion in that Ordinance.

It is true that the incorporation into the Crimes Act 1900 of the police powers of entry and arrest, rather than in the Police Ordinance and Crimes Act 1914, as recommended by the Commission, is consistent with my stated goal of ultimately locating the major substantive and procedural criminal law applicable to the ACT in a single piece of legislation which reflects current community standards and jurisprudence. Such a task must necessarily be undertaken gradually and has to date, in my view, been undertaken in a systematic and consistent manner with considerable consultation including, whilst that body was in existence with the ACT House of Assembly. As the Committee is aware, the revision of the criminal laws of the ACT, with the exception of offences

against the persons (not being sexual offences), is now largely complete. It would not have been desirable, in my view, to delay enacting the reforms which have already become law until such time as the total review was complete and a composite new Crimes Ordinance made. The fact that the reforms initiated to date have worked well in practice and have, to my knowledge, attracted no criticism controverts any allegations of piecemeal reform and lack of community involvement.

It should also be noted that at least two other jurisdictions are studying the ACT sexual offences laws as part of the reform of their laws. Additionally, the ACT theft Ordinance has been referred to the Victorian Chief Justice's Law Reform Committee for study as a basis of the reform of that State's laws.

The consultation and co-operation in the preparation of the Domestic Violence Ordinances is virtually unprecedented. In addition to the consultation undertaken by the Law Reform Commission in producing its report, there was extensive consultation with the judiciary, the AFP and a large number of interested community groups. The legislation was also the subject of detailed consideration by the ACT Criminal Law Consultative Committee. I am of the view that the resultant Ordinances reflect the benefit of that broadly based consultation and are a well balanced legislative response to a tragic social problem.

I thank the Committee for its careful consideration of the Ordinance and for the suggested amendments to sections 349A and 349B of the Crimes Act 1900. As I have indicated to your Committee in the past, I am of the view that concepts of reasonableness are implicit in provisions of this type. However, I agree that the Committee's formulation has presentational advantage. Accordingly, I have asked my Department to include the amendments the Committee has suggested to 349A and 349B in an Ordinance amending the Crimes Act 1900 which is currently being prepared and which will be made this year.

Yours sincerely,

(Lionel Bowen)

Senator P. Giles,
Acting Chair,
Senate Standing Committee on
Regulations and Ordinances,
Parliament House,
CANBERRA ACT 2600

APPENDIX 2

PRINCIPLE (d) IN THE HISTORY OF THE COMMITTEE

The question whether Principle (d) of the Committee's terms of reference should be applied to particular delegated legislation has been discussed in 15 of the Committee's previous 80 reports (excluding the Seventy-seventh Report referred to at page 16). The matters which arose are summarised below.

1. In its First Report (1932), the Committee expressed the view that policy on censorship of films should appear in, and be implemented by, substantive regulations and not departmental regulations. (para. 7)

2. In its Second Report (1933), the Committee stated that it was extremely undesirable that aspects of the Air Force should be governed by regulations, while similar matters concerning the Navy and the Army were governed by statute. (para. 7)

3. In its Third Report (1935), the Committee again criticised the lack of an adequate Act covering the Air Defence Forces. The Committee stated that Air Force regulations were not confined to administrative detail but dealt with substantive matters which should appear in a parliamentary enactment. (para. 10)

4. In its Fourth Report (1938), the Committee stated that an important matter of policy such as trade diversion should have been the subject of parliamentary enactment rather than subordinate legislation. (para. 13)

5. In its Eighth Report (1952), the Committee suggested that it would be more in the parliamentary tradition if an important question of Government policy, such as far-reaching import restrictions, were to have been given effect to by parliamentary enactment. (para. 24)

6. In its Tenth Report (1956), the Committee recommended disallowance of Air Force Regulations which were intended to alter the law substantially and should therefore have appeared in an Act. (para. 4)

7. In its Eleventh Report (1957), the Committee recommended disallowance of Customs Regulations which restricted the right to trade. The Report stated "The Committee is of the opinion that this policy should pass into law, if at all, only in the form of a Statute through Parliament undergoing the process of free parliamentary debate and scrutiny; it

is of such fundamental character as to be inappropriate to enactment by Cabinet or an individual Minister by regulation". (para. 9)

8. In its Sixteenth Report (1960), the Committee referred to regulations under the Public Service Act authorising salary increases of over £15 million. The Committee expressed the opinion that when increases exceeded even some much lesser figure they should have been authorised only by an Act. (para. 11)

9. In its Twenty-seventh Report (1968), the Committee stated that a new annual defence force allowance was not an administrative detail but an important innovation more appropriate to substantive legislation. (para. 5)

10. In its Thirty-fourth Report (1970), the Committee advised the Senate that innovations in the Bankruptcy (Offences) Rules ought to have been enacted by statute rather than by delegated legislation. The subject matter was not concerned with administrative detail but was more appropriate for substantive legislation. (para. 11)

11. In its Thirty-sixth Report (1971), the Committee stated that the matters contained in the Evidence Ordinance were sufficiently important to have warranted enactment by the whole Parliament. (paras. 9 and 10)

12. In its Thirty-eighth Report (1971), the Committee stated that important rights of compensation were not matters of administrative detail but matters of substantive legislation more appropriate to parliamentary enactment. (para. 10)

13. In its Fifty-third and Fifty-fourth Report (1976), the Committee stated that the Misrepresentation Ordinance 1976 and the Manufacturers Warranties Ordinance 1975 made substantial amendments to the law which if they were appropriate for enactment as law at all, in the opinion of the Committee should more appropriately have been enacted by Parliament. (paras. 14 and 12)

14. In its Seventy-first Report (1982), the Committee stated that the Attorney-General had agreed that a requirement in regulations for a statutory authority to report annually to Parliament should more appropriately have appeared in the enabling legislation. (para. 30)

Prior to 1979 under Principle (d) the Committee's scrutiny was to ascertain whether regulations and ordinances were concerned with "administrative detail" not amounting to substantive legislation more appropriate for Parliament. Since 1979 the Committee's scrutiny has been to ensure that delegated legislation does not contain matter more appropriate for parliamentary enactment.