

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

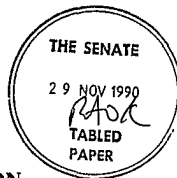
**SENATE STANDING COMMITTEE ON  
REGULATIONS AND ORDINANCES**

**SPECIAL REPORT ON SUBDELEGATION OF POWERS**

**EIGHTY-SEVENTH REPORT**

**NOVEMBER 1990**

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**SENATE STANDING COMMITTEE ON  
REGULATIONS AND ORDINANCES**

**MEMBERS OF THE COMMITTEE**

Senator P.J. Giles (Chair)  
Senator B.K. Bishop (Deputy Chairman)  
Senator M.A. Colston  
Senator W.G. O'Chee  
Senator K.C.L. Patterson  
Senator A.O. Zakharov

## PRINCIPLES OF THE COMMITTEE

(Adopted 1932: Amended 1979)

The Committee scrutinises delegated legislation to ensure:

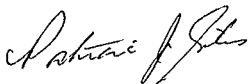
- (a) that it is in accordance with the statute;
- (b) that it does not trespass unduly on personal rights and liberties;
- (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other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

## PREFACE

In the course of its technical legislative scrutiny of all disallowable instruments of delegated legislation tabled in the Senate, the Standing Committee on Regulations and Ordinances became concerned at aspects of subdelegation of powers in delegated legislation. The Committee therefore asked its Legal Adviser, Emeritus Professor Douglas Whalan, to prepare a Special Report on this subject.

The Committee has adopted the Report and believes that it discusses issues that should be drawn to the attention of the Senate. The Report first surveys the formal legal position with respect to subdelegation and the role of the Senate's other legislative scrutiny committee, the Standing Committee for the Scrutiny of Bills. The bulk of the Report then examines the task of the Regulations and Ordinances Committee in its scrutiny of subdelegations. Finally, the Report draws some conclusions relevant to the operations of the Committee.

Subdelegation affects all of the four principles under which the Committee scrutinises delegated legislation. Professor Whalan's Report deals with cases where subdelegation may not be in accordance with the parent Act, where it may breach personal liberties, where it may not provide for suitable review of decisions and where it may provide for matters more suitable for parliamentary enactment. The Report will assist the Committee in its scrutiny on behalf of the Senate to ensure that the standards of delegated legislation are not less than those of Acts.



Patricia Giles  
Chair



## SUBDELEGATION OF POWERS

### Introduction

1. For some time the Committee has been concerned about problems that arise from the subdelegation of powers in subordinate legislation. In particular the Committee has been concerned about the level of officer to whom powers to make important decisions about individuals have been, or should be, delegated.

2. I have been asked to make a comment and I am very happy to do so. However, I am not satisfied that I can suggest an adequate set of principles to the Committee. Perhaps my comments can be a starting point for discussion by the Committee. Since I started to look at the question, I have built up a substantial file of illustrations and notes, some of which I set out in this Report. In fact, I look a little wider than subdelegation alone.

### The Counsel of Perfection

3. The counsel of perfection about delegation was well put by Cecil T. Carr in *Delegated Legislation: Three Lectures* (C.U.P., Cambridge, 1921, p.27), where he said that power to make delegated legislation should be made to

“... a trustworthy authority which commands the national confidence”.

### Delegation Run Riot — The Most Extended Delegation I have Discovered

4. No comment on delegation and subdelegation would be complete without me recalling the most elongated case of delegation that we have discovered during my eight years as Legal Adviser or, as the Senate Standing Orders now put it, “counsel to advise the Committee”. As Committee members will recall, it occurred with the Prescribed Goods (General) Orders as amended (Amendment) being the Export Control Orders No.3 of 1988 where the pattern was this:

An Act was passed; regulations were made under the Act; orders were made under the regulations; the orders delegated certain powers to the Secretary of the Department; the Secretary was empowered to delegate to a Senior Executive Service officer; that officer could in turn delegate the power to delegate to a delegate; and that delegate could delegate the power actually to make a decision.

5. Despite the length of the chain, there appeared to be no weak legal link and the provision was, in my opinion, legally valid. However, such a discovery does make one start to think about what is *appropriate* rather than being merely *legal*. I shall return to this matter later.

## Relevant Provisions in the Acts Interpretation Act 1901

6. Three provisions of the *Acts Interpretation Act 1901* deal with delegation. They are as follows:

“34AA. Where an Act confers power to delegate a function or power, then, unless the contrary intention appears, the power of delegation shall not be construed as being limited to delegating the function or power to a specified person but shall be construed as including a power to delegate the function or power to any person from time to time holding, occupying, or performing the duties of, a specified office or position.

34AB. Where an Act confers power on a person or body (in this section called the “authority”) to delegate a function or power:

(a) the delegation may be made either generally or as otherwise provided by the instrument of delegation;

(b) the powers that may be delegated do not include that power to delegate;

(c) a function or power so delegated, when performed or exercised by the delegate, shall, for the purposes of the Act, be deemed to have been performed or exercised by the authority;

(d) a delegation by the authority does not prevent the performance or exercise of a function or power by the authority; and

(e) if the authority is not a person, section 34A applies as if it were.

34A. Where, under any Act, the exercise of a power or function by a person is dependent upon the opinion, belief or state of mind of that person in relation to a matter and that power or function has been delegated in pursuance of that or any other Act, that power or function may be exercised by the delegate upon the opinion, belief or state of mind of the delegate in relation to the matter.”.

7. These provisions are mostly good common sense and reflect the common law fairly closely. Section 34AA permits the delegation of a power to an officeholder instead of delegation to a particular individual. I exaggerate slightly, but, if such a power didn't exist, Ministers and others might spend so much time signing new delegations that they might as well make the decisions. Section 34AB, among other things, places the delegate in the shoes of the person delegating and section 34A underlines this by providing that a delegate has the powers of the person delegating relating to forming opinions or making judgments.

8. Perhaps the most relevant provision in these sections for present purposes is that in section 34AB, which ensures that, where an Act confers power on a person to delegate, the delegation does not automatically confer on the delegate a power to subdelegate. If subdelegation is intended, it must be provided for. This provision (indeed, the whole of section 34AB) was added as recently as 1987.

## **The Scrutiny of Bills Committee is the First Bulwark**

9. The first opportunity to consider and, if needs be, curb delegation is during the passage of primary legislation through the Parliament. The Parliament can, in theory, authorise virtually any degree of delegation that it wishes in an Act. Once that has happened the Regulations and Ordinances Committee is not in a very strong legal position to do a great deal, if the delegation or subdelegation in the subordinate legislation is technically valid.

10. Of course, in practice, the Regulations and Ordinances Committee has used its influence to ensure that even technically legal delegations and subdelegations have been modified to protect individual rights.

11. Under Standing Order 24(1)(a)(iv) the Senate has conferred on the Standing Committee for the Scrutiny of Bills the duty of scrutinizing clauses of Bills or sections of Acts and to report to the Senate whether Bills or Acts

“... inappropriately delegate legislative power”.

12. Thus, in controlling the level and extent of delegation, the Scrutiny of Bills Committee has been given an important task of scrutiny with the chance to draw attention to excessive or inappropriate delegation or subdelegation before it becomes part of the statute law. The Scrutiny of Bills Committee has consistently drawn attention to such instances.

13. I pick two illustrations of many which put neatly the position that the Scrutiny of Bills Committee has taken and which mirrors that taken by the Regulations and Ordinances Committee.

### **A. Delegation to “A Person”**

14. In the first illustration the Scrutiny of Bills Committee *Alert Digest No.18 of 1988* (at p.7) pointed out that an amendment to the *Audit Act 1901* gave

“...the Auditor-General the discretion to authorise ‘a person’ to carry out various functions... . If the delegation were to a member of the Auditor-General’s staff, or to a registered auditor, it may be regarded as acceptable, but as it stands the subclause would permit the Auditor-General to choose anyone at all to act as an ‘authorised person’. *As the Committee has consistently maintained, such powers should be delegated by reference to a particular office, to a specified class of people or to officers above a certain level of seniority.*” (Emphasis added).

15. In the particular case the Minister pointed out (cited in Scrutiny of Bills *Seventh Report of 1989*, p.73) that the independence of the Auditor-General was of great significance, but the general thrust of the Scrutiny of Bills Committee in similar cases has remained constant.

#### **B. Wide Definition of "Magistrate"**

16. The second instance also demonstrates the importance of correlating the activities of the Scrutiny of Bills Committee and the Regulations and Ordinances Committee.

17. Late last year (*Seventeenth Report of 1989*, p.5) the Scrutiny of Bills Committee raised the problem that the definition of "magistrate" in the Goat Fibre Levy Collection Bill included justices of the peace. This meant that justices of the peace could issue search warrants and the view of both Scrutiny of Bills and Regulations and Ordinances Committees has been that search warrants should be issued by qualified judicial officers.

18. The Minister replied that

"This clause was drafted to include justices of the peace because goat production occurs widely in the pastoral zone. In some of these remote locations it may not be possible to contact a magistrate."

The Scrutiny of Bills Committee continued to draw attention to the clause, but it became law.

19. Then the Goat Fibre Levy Collection Regulations (Statutory Rules 1989 No.386) were made and included a discretionary form of warrant. The two-hatted (some officials may well think two-headed monster!) Legal Adviser to both Committees, remembering the absolutely vital need for remote justices of the peace to be able to rush up a search warrant at the drop of only one hat, drew attention to the fact that the use of the form of warrant in the regulations was not mandatory.

20. Committee members will recall that the Committee raised the matter and an explanation has recently been received, in which a sentence appears, which, at least to the two-headed monster, looks just a teeny bit like having one's cake and eating it too, when the two explanations are put together. It reads

"Also, I do not believe that the possibility of a Justice of the Peace issuing a search warrant in a remote location justifies the proposed mandatory constraint on the form of the warrant for other legal officers."

21. In this case, in a sense the primary battle to protect the rights of people against an unfair or wrongly issued or just plain "shonky" search warrant had been lost with the passing of the Act. But at least the Regulations and Ordinances Committee had the chance to ensure that the warrant was in an acceptable form.

22. Thus there would be some protection against the delegation of power that could harm individuals.

## **The Task of the Regulations and Ordinances Committee**

23. I have just indicated the need for the Scrutiny of Bills and Regulations and Ordinances Committees to complement one another and have given an example of the need for this complementarity.

### **A. The Questions Asked**

24. In performing its function in this area of delegation and subdelegation, there are at least three partly inter-related questions that the Committee could perhaps keep in mind and which seem to me to have obtruded over the years that I have been Legal Adviser. They are these:

(1) Are particular delegations or subdelegations of authority legally within power?;

(2) Are there delegations and subdelegations that are technically legally valid, but which, by fulfilling the Committee's duties under the Standing Orders (that is, by applying the old Committee principles), are seen by the Committee to be inappropriate in the particular instance?; and

(3) Even if the delegations are legally within power, what level of delegation or subdelegation should the Committee allow to occur before intervening to seek amendments to delegated legislation?

25. I deal with each of these questions in turn, although there is, as I have suggested, an element of over-lap.

### **B. Legally Invalid Delegations**

#### *(1) The Move Away from the Statutory Rule*

26. There has been a number of instances in the last few years where the Committee has raised questions about the validity of delegated legislation. Indeed, on looking at the Reports of the Committee over its history of 58 years, there seem to have been more invalidity cases raised in the last few than in the past.

27. There could be a number of reasons for this, but one is almost certainly the move away from the making of delegated legislation by the classical Statutory Rule to making legislation by a variety of determinations, declarations, orders, principles and many other kinds of instrument.

28. Not only is the quality control over the making of legislation dispersed, but also many of the instruments are quite deliberately made at one or more removes from the parent Act. Thus the opportunities for error are much greater.

## (2) *Subdelegation of Powers*

29. I commented above that it is, of course, possible for the Parliament to confer on a delegate a power to subdelegate. But unless the power is given specifically, we also saw that section 34AB(b) provides that where

“... an Act confers power on a person or body ... to delegate a function or power ... the powers that may be delegated do not include that power to delegate ...”.

30. *The most common form of invalidity encountered has been delegated legislation that is invalid because, instead of the body or person holding the delegation actually making the delegated legislation, there is a subdelegation of the power to make that legislation. This takes a variety of forms.*

### (a) *Incorporation of other Documents — A Slightly Fishy Example*

31. For instance, there can be invalid subdelegation by incorporation of other instruments as they may exist from time to time. Section 49A of the *Acts Interpretation Act 1901* permits the incorporation of the provisions of an Act or regulation as it is “in force from time to time”, but does not permit the incorporation of any other document as it is “in force from time to time”.

32. As I said at a recent seminar, it is possible, if you were so minded (or perhaps out of mind!) to incorporate the whole of the Income Tax Acts in an instrument, but not the rules of your favourite rugby league club or A.F.L. club (as they now are) as “in force from time to time”.

33. This form of invalidity by incorporation is not common, but the question did arise, for example, with the Export Control (Fish) Orders as amended (Amendment), being Export Control Orders No.2 of 1988. In that instance, there was incorporation by reference of “any relevant NH and MRC standards” and several similar sorts of documents. The Committee raised the matter and the Minister conceded that the reference could be only to standards already in existence and agreed that, in the future, this would be made clear by giving specific references to the actual documents involved.

### (b) *Other Examples of Delegation*

34. I have selected a number of illustrations of other kinds of subdelegation that have arisen in the last few years which have raised questions of invalidity.

#### (i) *Wheat Tax Regulations*

35. The classic illustration, which one can just possibly classify under delegation because of the power conferred on an industry body in the making of legislation,



was the Wheat Tax Regulations case. Another excuse for mentioning it is that this case did involve Statutory Rules, which, as I have said, is most unusual these days.

36. There the Wheat Tax Regulations (Amendment) (Statutory Rules 1987 No. 182) were made and referred to consultation with a named industry body. Consultation with a differently named body was a statutory precondition to validity. Even although it was suggested that all that had happened was that the body had changed its name, there was such a strong argument made by the Committee that the regulations were invalid and the collection of large sums of money could be affected, that the Minister undertook to amend the *Wheat Tax Act 1957*. This was done by the *Statute Law (Miscellaneous Provisions) Act 1987*.

37. There are several other clearer examples of delegation and subdelegation proper.

(ii) Health Insurance Regulations

38. The first of these, also involving Statutory Rules, were the Health Insurance Commission Regulations (Amendment) (Statutory Rules 1983 No.88).

39. The Commission was given certain functions by the *Health Insurance Commission Act 1973* and the Act also authorised the making of regulations prescribing the manner in which the Commission must carry out its functions. A regulation was made providing that the Commission must carry out its functions

"... in such a manner as to comply with any directions given from time to time by the Minister."

40. The Committee was concerned that this regulation fettered the powers of the Commission and involved a subdelegation to the Minister, as the regulation didn't *prescribe* the manner of carrying out the functions, but stated that the manner of execution was to be in accord with directions of the Minister issued from time to time.

41. The matter was resolved with the passing of the *Health Legislation Amendment Act 1983*, which validated any previous actions and repealed the offending regulation.

(iii) Navigation (Orders) Regulations Order No.8 of 1987

42. An illustration from the more common non-Statutory Rules area appeared in the Navigation (Orders) Regulations Order No.8 of 1987. Instead of the Order actually fixing fees, the Order provided that fees should be fixed by the Commonwealth Interdepartmental Committee on Fees and Allowances. It was conceded that the provision may well be invalid as it involved subdelegation to another body and the Minister undertook to delete the provision.

(iv) Export Control (Orders) No.15 of 1987

43. The *Export Control Act 1982* authorised the making of regulations giving the Minister power to make Orders. The regulations were made and the Minister made the Export Control (Orders) No.15 of 1987. The Orders purported to give the Secretary power to determine periods of time during which a person had to give notice of intention to export live animals with the information to be included in a notice of intention to export. The Committee could find no legal authority for Orders to subdelegate power to the Secretary to issue other legislative or quasi-legislative instruments. As the Orders appeared to subdelegate a prescriptive power to determine general rules rather than make administrative decisions on particular cases, it appeared to be invalid.

44. The Attorney-General's Department agreed and the Minister undertook to amend the offending Orders.

(v) Australian Meat and Livestock Corporation Order  
No. MS12/1988

45. Another rather odd and very technical example occurred where the Australian Meat and Livestock Corporation Order No. MS12/1988 involved the statutory body in using its powers to make delegated legislative powers to subdelegate to itself, in its *executive* capacity, power to exercise the delegated legislative powers. The offending Order was amended to remove the invalidity.

(c) *The Legislative/Administrative Dichotomy*

46. This last illustration brings us to probably one of the most difficult areas. The courts outlaw the subdelegation of a *legislative* power; the principle is not breached if the power to be exercised by a body or person acting under a subdelegation from the designated legislation maker is *administrative* and not legislative in nature. (Contrast *Geraghty v Porter* [1917] NZLR 554 with *Esmonds Motors Pty Ltd v The Commonwealth* (1970) 120 CLR 463.)

(i) Export Control Orders No.3 of 1988 — Revisited

47. This problem is illustrated by the long chain of delegations in the Export Control Orders No.3 of 1988 that I cited in paragraph 4 above. There the whole chain may have been valid because the legislation clearly authorised the delegation down to the last link and it could be argued that that link was valid because it was not a subdelegation of legislative power but of an administrative power.

(ii) A Return to the Export Control (Fish) Orders

48. A simple illustration, but not an easy one to decide, occurred in the Export Control (Fish) Orders as amended (Amendment), Export Control Orders No. 2 of 1988 already mentioned in another context (see para. 33 above). These Orders

provided for "approvals" to be given by the Secretary, and, if these approvals were legislative in nature they would be beyond the scope of Orders made under the regulations and invalid. However, if they were administrative in nature, they would be perfectly valid.

49. In the result, the Minister undertook to amend the Orders, but I was by no means certain what view a court would have taken. Frankly, it is not always easy to decide whether there is a legislative or an administrative matter involved.

### *(3) Tentative Views on Invalidity*

50. That comment brings me to some very tentative views as to what could possibly be an appropriate approach for the Committee on invalidity.

51. If there is clear and unambiguous invalidity in delegated legislation, then the Committee should perhaps press the matter strongly, so that affected members of the public do not have to spend money in the courts protecting their rights. Of course, in 99.999% of cases Ministers quickly concede the point and correct clear cases of invalidity.

52. However, where two legitimate opposing views as to legality can be taken, I have, on occasion, advised the Committee not to press the point through to the ultimate conclusion and I respectfully believe that that is the appropriate course.

53. I blushingly discount the first clause of the Committee's comment in its *Eightieth Report* (at page 32), but agree with the rest of the sentence:

"Although the Committee itself acts on the basis of skilled legal advice, it is not a court and, in difficult cases, validity can sometimes depend on finely balanced legal arguments."

That comment was made about the possible fettering of Ministerial discretions by subordinate legislation, but, in my opinion, it is equally valid in the present instance.

## **C. Technically Valid but Inappropriate Delegations**

54. There are occasions when a delegation or subdelegation may be technically perfectly legal, but the Committee may decide, under Standing Order 23(3)(b) (old principle (b)), that it does "trespass unduly on personal rights and liberties".

### *(1) Our Long Chain of Delegations Revisited — Yet Again*

55. Our famous, or notorious, long chain of delegations in the Export Control Orders No. 3 of 1988 was such a case. The Committee conceded that it could be argued that the whole chain was valid, because there may not have been an invalid subdelegation of a legislative power but subdelegation of an administrative power.

56. Nevertheless, the Committee could still argue that it was inappropriate for a Senior Executive Service officer to delegate further the power to delegate. In the happy ending to the longest-running saga of this Report, Committee members will recall that the Minister agreed to amend the Orders to make it clear that a Senior Executive Service officer could not so delegate.

(2) *ACT Credit Ordinance 1985*

57. A similar case occurred with s. 19 of the ACT Credit Ordinance 1985. The effect of s. 19 was to give the Minister power to abrogate or suspend virtually any provision of the Ordinance protecting the rights of people seeking credit for an unlimited period by granting exemptions by notice in the *Gazette*. It was quite within power for the Ordinance so to provide. However, the Committee believed that this was inappropriate and, after long negotiations, persuaded the Minister to amend the Ordinance to allow the power to continue, but for it to be exercised by regulations, which would be subject to tabling and disallowance in the Parliament.

(3) *Sex Discrimination (Operation of Legislation) Regulations*

58. As Committee members know, the Sex Discrimination (Operation of Legislation) Regulations are still causing a bit of heart-burn as they are now before the Committee yet again. But the fact that the Commonwealth and Territories legislation in the regulations is still subject to the Committee's scrutiny is due to the Committee's vigilance at an earlier stage.

59. The *Sex Discrimination Act 1984* provided for a compliance period of two years or such longer period as may be prescribed, during which certain discriminatory provisions would not be unlawful. The Sex Discrimination (Operation of Legislation) (No. 1) Regulations were made and continued exemptions for specified Commonwealth and Territories legislation indefinitely. The Committee believed that this was an inappropriate use of delegated power and the Attorney-General agreed to substitute temporary exemptions for indefinite exemptions.

(4) *A Tentative View on Valid but Inappropriate Delegations*

60. In none of these cases would a court have been likely to rule that the use of the delegated powers was unlawful. Nevertheless, it is suggested that it is quite proper for the Committee to take up cases where the law may be against the Committee, but the *spirit and intention* of the primary legislation in granting the power to make delegated or subdelegated legislation may well favour the Committee's view of what the Parliament probably intended when it conferred the powers.

#### **D. Appropriate Levels of Delegation**

61. The final question in this area that has concerned the Committee is the level to which it is appropriate to delegate legislative and decision-making powers.

##### *(1) A Last Lingering Look at a Long Line of Delegations*

62. If, gentle reader, you thought you had heard the last of the Export Control Orders No. 3 of 1988 a few paragraphs back, you are doomed to disappointment. My use of it as a Terrible Warning is almost as extended as the subdelegations in it. But it is a very good illustration of the need for the Committee to indicate where it believes the delegation buck should stop. The Committee did so indicate in that case and, as I reminded members in paragraph 56 above, the saga ended happily for the Committee when the Minister agreed to amend the Orders to make it clear that a Senior Executive Service officer could not delegate the power to delegate.

##### *(2) Export Control (Unprocessed Wood) Regulations*

63. Perhaps because of the concern of the Committee to ensure that it adheres to its ideals of scrutiny while ensuring that it does not become involved in any matter that could possibly be seen to have a political connotation, the case under this heading that has caused the Committee the most difficulty in my time has been that dealing with the Export Control (Unprocessed Wood) Regulations (Statutory Rules 1986 No. 79). The case was complex and I see that I said this in my *Report No.209*:

“I think this is one of those rare occasions where the more I see the matter explained, the less convinced I am by the explanations. Indeed, with respect, it seemed just a slight Tar Baby job, which, as I recall it, was a case of the more contact there was, the more entanglement ensued!”.

I shall try to sum up the position without using up too much more processed wood.

64. The regulations gave the Minister, or his or her delegate, power to grant licences to export wood chips. The Minister could reconsider a delegate's decision and, if that happened, reasons had to be given for the decision. However, no reasons had to be given by the Minister if he or she took the initial decision, although it was suggested that informal reasons would be given. This problem, which involved balancing the preservation of Cabinet secrecy against the justice of giving reasons, was eventually sorted out by amending the regulations to require reasons, but following the usual method of inserting a Cabinet secrecy provision.

65. However, there were subsidiary questions that are the significant issues in the present context. The regulations appeared to give the Minister power to delegate to an official the power to conduct the Ministerial reconsideration of the delegate's own initial decision made under the delegation from the Minister. Furthermore, as the Committee had been told that the decisions were few in number, but very substantial in size, the Committee was concerned to see that the delegate who was to exercise the Minister's powers was of appropriate seniority.

66. These matters were also amicably settled. First, the regulations themselves were changed to ensure that an officer could not act like Pooh Bah and formally reconsider his or her own decision. Secondly, although the Minister was not prepared to alter the regulations in this respect, he undertook in his letter of 22 September 1986 to limit delegations to make decisions on his behalf to senior officers whose level and title he indicated.

(3) *An Illustration of Good Practice*

67. The levels to which delegation can be made is now occasionally put into the delegated legislation itself and the powers to be exercised under a delegation are spelt out in detail. For instance, the Defence Force Regulations (Amendment) (Statutory Rules 1988 No. 321) provide as follows:

"72A. For the purposes of section 58E of the Act, the Minister may by instrument delegate to a Secretary, or Senior Executive Service officer, ... the power ... to make determinations with respect to the following matters: [there follows a long and very detailed list of powers to deal with remuneration, allowances, leave and various other terms and conditions of service]."

68. This is very helpful to everyone concerned and, where it is appropriate, should be copied.

## Conclusions

69. I draw together some tentative thoughts on delegation and subdelegation and I respectfully offer them for the Committee's consideration.

70. (a) The Standing Committee for the Scrutiny of Bills has the first opportunity and, indeed, under Standing Order 24(1)(a)(iv), a responsibility, to ensure that Acts contain only appropriate delegation and subdelegation powers.

71. (b) Standing Order 23(3)(a) (the old principle (a)) requires the Standing Committee on Regulations and Ordinances to scrutinize each instrument that stands referred to it

“... to ensure ... that it is in accordance with the statute”.

72. (c) In recent years there has been an increase in the number of cases of invalidity that have come before the Committee for scrutiny. Given the profile of the invalid instruments that have been found, it seems that this is because of the move towards instruments other than the classic Statutory Rule. Whether this tendency to invalidity will diminish as experience with the use of these less formal instruments grows will be interesting to observe in the next few years.

73. (d) If the Committee finds a clear case of invalidity in any form of delegated legislation, whether involving delegation, subdelegation or any other ground of invalidity, it should pursue the matter rigorously to ensure that the invalidity is removed from the legislation. For, although a clearly invalid piece of legislation is not law, no person should have to run the risk of being put to the expense of having a court formally declare the legislation invalid.

74. (e) Of course, in practice, when a clear invalidity is discovered by the Committee, the relevant responsible Minister is very willing to correct the invalidity.

75. (f) However, when the legal arguments as to whether an instrument is valid or invalid are evenly balanced, the Committee should draw attention to the problem, but it should recognize that it is not a court of law and should probably leave the doubt to be resolved by the courts.

76. (g) Standing Order 23(3)(b) and (c) (the old principles (b) and (c)) require the Committee to scrutinize each instrument to ensure

“(b) that it does not trespass unduly on personal rights and liberties;  
[and]

(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”.

77. (h) Thus, even if a delegation or subdelegation is technically legal, but it appears to the Committee that the spirit and intention of the primary legislation have been breached, that the delegations or subdelegations trespass unduly on personal rights and liberties or that the delegations or subdelegations prevent or inhibit independent review of decisions, it is quite proper for the Committee to raise the matter with the responsible Minister.

78. (i) In my opinion, the Committee has had a great deal of success, and has exerted a considerable amount of influence on the development of the changing face of delegated legislation, in this area, simply because it has taken up such issues. Indeed, I am tempted to argue that much, if not most, of the value of the Committee's work has really commenced once the technical legality questions have been answered and the discretionary area has been entered.

79. (j) When one is considering delegations and subdelegations in the decision-making process, I suggest that it is not the number of links in the chain that is important, but the actual level where the ultimate decision is made.

80. (k) In considering the level at which primary decisions should be made, I am afraid that I cannot offer a set formula, but have reached the conclusion that there must be a subjective element in deciding the level at which it is appropriate for such decisions to be made.

81. (l) At one end of the scale, it would be absurd to suggest that all primary decisions on minor customs matters should be made by Senior Executive Service officers. Yet, at the other end of the scale, as the Committee argued successfully in relation to wood chip licences, where decisions were few in number but enormously important in financial and other terms, the primary decision must be taken at a high level. Those two are easy, but, along the scale, I suggest that subjective judgment does have a part to play. The Committee's experience is important and by testing and seeking information from a Minister sensible agreement on appropriate levels should be able to be reached.

82. (m) Of course, having established the appropriate level for primary decision-making, it is equally important to ensure that appeals and reviews of decisions can reach a level commensurate with the level of importance of the decision that is being made. Deciding the adequate level for review will also include an element of subjectivity.

83. (n) Finally, if I may respectfully say so, in this question of delegation and subdelegation, as in all matters, the good practical and pragmatic commonsense that the Committee always demonstrates will continue to afford the best protection for the rights and liberties of the community and individuals.

Emeritus Professor Douglas J. Whalan



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